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3/2004 112th Year ● July - September

Summary

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112th year – July - September

Bulletin of International Carriage by Rail

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Central Office Communications

Ratification of the 1999 Protocol

Finland and Denmark

In application of Article 20 § 1 of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and of Article 3 § 2 of the Protocol of 3 June 1999 for the Modification of COTIF (1999 Protocol), Finland and Denmark deposited their instruments of ratification of the 1999 Protocol with the Provisional Depositary[1] on 4 August 2004 and 29 September 2004 respectively.

The 1999 Protocol and thus the new version of COTIF will come into force only after they have been ratified, accepted or approved by more than two-thirds of the Member States of OTIF, i.e. at least 27 States (Article 20 § 2 COTIF 1980). Denmark is the 22nd State to have ratified the 1999 Protocol.

[1] According to Article 2 § 1 of the 1999 Protocol, OTIF performs the functions of the Depositary Government provided for in Articles 22 to 26 of COTIF 1980 from 3 June 1999 to the entry into force of this Protocol.

Application of the CIM Uniform Rules by the Ukraine

With effect from 1 January 2004, the Ukraine acceded to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (see Bulletin 4/2003, p. 65). A total length of 216 km of transfrontier lines between the Ukraine and Poland, Slovakia, Hungary and Romania has been entered into the CIM List of Lines and are hence subject to the CIM Uniform Rules (see List of CIM Lines, www.otif.org).

The Secretariat of OTIF received a communication from the State Administration of Railway Transport of the Ukraine dated 26 December 2003 concerning the issuing of transport documents and the payment of goods transport costs on the lines Halmeu/Djakovo-Batjevo-Chop/Čierna nad Tisou (Chop/Záhony), Batjevo-Mukachevo, Medyka/Mostiska II - Mostiska I, Dorohusk/Yagodin-Kovel in accordance with Article 9 § 2 (f) of COTIF. The Secretariat brought the communication to the attention of the Member States in its circular dated 23 January 2004.

Subsequently, the railways of the Ukraine, Poland, Slovakia, Hungary and Romania have agreed, in accordance with Article 65 § 2 of CIM and with the authorisation of their Governments, specific rules concerning the payment of costs as a temporary derogation from Article 15 of CIM. These rules and the new reforwarding stations appear in the supplement to

the "General summary of special rules for international goods traffic" applicable from 1 August 2004 (published by the International Rail Transport Committee, CIT, see www.cit-rail.org).

OTIF Organs

Administrative Committee

Extraordinary session

Berne, 1 July 2004

At the extraordinary session held in Berne on 1 July 2004 under the chairmanship of Mr. Michel Aymeric (France), the Administrative Committee nominated Mr. Stefan Schimming (Germany) as Director General of the Central Office for the period 2005-2009. Mr. Schimming will take up his duties on 1 January 2005.

RID Committee of Experts working group on tank and vehicle technology

Duisburg-Wedau, 24/25 June 2004

see “Dangerous Goods”

Dangerous Goods

RID Committee of Experts working group on tank and vehicle technology

5th session

Duisburg-Wedau, 24/25 June 2004

(In this context, see also previous Bulletins)

The following States took part in the discussions: Austria, Belgium, Czech Republic, France, Germany, Lithuania, Netherlands, Poland, Romania, Spain, Switzerland and the United Kingdom. The International Union of Railways (UIC) and the International Union of Private Wagons (UIP) were also represented.

Status with regard to the standardization of energy absorption elements

The representative of UIC informed the meeting that a working group comprised of manufacturers of crash buffers and wagons, UIP and UIC had been meeting since January 2004 and had drafted proposals to amend UIC leaflet 573. The approval procedure in UIC's Technical Commission would provisionally be concluded in July 2004. The working group on tank and vehicle technology would be informed of amendments after the procedure had been concluded.

The representative of UIP pointed out that general safety requirements often brought with them major problems with regard to the details. For instance, the crash buffers were not supposed to be activated at impact speeds of up to 12 km/h. However, this requirement became problematical if the wagons were coupled closely and the impact occurred on a track curve. In future, it should be ensured that detailed discussion of the associated problems takes place before provisions are drafted.

The working group supported the inclusion of a reference to UIC leaflet 573 in RID. UIC was requested to send the new UIC leaflet to OTIF in order that it could be examined at the 41st session of the RID Committee of Experts in November 2004. If the UIC leaflet were adopted, a reference to it could already be included in the 2005 edition of RID by means of a corrigendum.

Use of derailment detectors in Switzerland

The lengthy discussion on this subject can be summarized as follows:

- There was a consensus that derailment detectors can reduce the effects of an accident.
- Up to now, three systems were known about (mechanical-pneumatic, signal transmission via a pressure impulse process, signal transmission via train bus).
- Unresolved points were whether the derailment detector should function automatically or by involvement on the part of the locomotive driver and how the motional stability of the train performed when a derailment detector was activated.
- Germany would incorporate the outcome of discussions thus far in the context of UIC and the

– TSIs into a document for the RID Committee of Experts.

Protective measures to prevent damage caused by the overriding of buffers

Two options were discussed:

– One from Switzerland which recommended increasing the thickness of the tank ends from 12 mm to 18 mm for certain very toxic gases (e.g. chlorine), contrary to the decision of the 40th session of the RID Committee of Experts;

– One from France proposing arresting devices as active protection against the overriding of buffers.

As there was no majority in favour of one or other of the proposals, it was agreed to submit both proposals to the RID Committee of Experts.

Sandwich covers for tank ends

The representative of the Netherlands introduced his document, which referred to another protective aim of the sandwich cover in addition to mechanical protection against penetration and thermal protection against exposure to fire. If gases were carried in a refrigerated state, the quantity that escaped in the event of a tank being penetrated could be reduced considerably.

As this protective aim also concerned road transport, the representative of the Netherlands was asked to submit a document on this matter to the Joint Meeting's working group on tanks.

External/central solebars/self-supporting tanks

After a discussion on the advantages and disadvantages of the different types of construction, it was agreed that the performance in accidents should be investigated in a research project, with particular reference to the filling and discharge devices.

Checklist

As the new staff training provisions would enter into force on 1 January 2005, this subject would no longer be pursued.

Air brake check

It was agreed not to continue with the examination of this matter until new technical possibilities became available, particularly with regard to checking from the locomotive the passage through the main brake pipe by means of chronometric measurement of the pressure reduction.

Guard distance between the tank end and buffer beams

As the 300 mm guard distance was already covered in a UIC leaflet, this matter was deemed to have been concluded.

Safety in rail tunnels

The deputy Chairman of the multidisciplinary working group on safety in rail tunnels reminded the meeting that there were three significant documents for safety in rail tunnels:

– Document TRANS/AC.9/9, which contained both recommendations and standards set down by the railways, ministries and inspection authorities;

– The Interoperability Directive on safety in rail tunnels, which was to be mandatory in all the EU Member States;

– UIC leaflet 779-9, which contains recommend-dations from the railways, although these do not replace the existing national provisions.

In his view, the same safety concept can be discerned in all three documents:

– With regard to infrastructure, the question arises as to whether single track tunnels should be built from the outset. In tunnels, drainage must be provided to avoid dangerous substances leaking into watercourses or sewage systems;

– It is planned to use derailment detectors for rolling stock;

– With regard to operations measures, the question arises as to whether there should be a prohibition on meeting dangerous goods trains in tunnels. Before carriage, the infrastructure operator should be given information on the dangerous goods train. On the other hand, it was not considered useful to give advance notification of dangerous goods to the competent authorities and fire brigades. This should be a matter for individual States.

With regard to the use of derailment detectors, he explained that a distinction should be made between goods trains and passenger trains. While it was considered possible for goods trains to come to a halt in tunnels, for passenger trains, it must be ensured that emergency braking could be overridden.

The RID Committee of Experts would be informed that the measures concerning the dangerous goods area could be accepted. With regard to using derailment detectors, the result of the ongoing discussion should be awaited.

Telematics

Following an exchange of information focussing in particular on the progress of the Telematics Research Project and on the use of telematics for security purposes, it was agreed that this subject would be taken up again when telematics applications and technical solutions for providing information to the locomotive driver were available in practice.

Tank wagon handbook

The representative of UIC explained that he had received numerous documents, so the work could be started. The chemicals industry had expressed great interest in a handbook.

Any other business

The Netherlands presented approaches for solutions to avoid frequently occurring drip leaks. As these faults were particularly noted in the rail sector, he proposed that the subject should first be dealt with in the working group on tank and vehicle technology and should then be taken to the Joint Meeting's working group on tanks.

The representative of UIP explained that mistakes on the part of the carrier's or filler's staff should not lead to additional technical measures.

The representative of UIC recalled the provisions in RID for filling tank wagons for gases, which had lead to an improvement in safety. For this reason, he also considered provisions for filling and discharging tank wagons to be useful. He referred to a document he had submitted to the Joint Meeting which dealt with the same problems.

It was agreed to await discussion of this document at the Joint Meeting.

Next session

The next session will be held in spring 2005.
(Translation)

Sub-Committee of Experts on the Transport of Dangerous Goods (UN/ECE)

25th Session

Geneva, 5-14 July 2004

Experts and observers from 26 countries and 29 governmental or non-governmental international organisations took part in the work of this 3rd session of the 2003-2004 biennium.

75 official documents and more than a hundred informal (INF.) documents were on the agenda. The Sub-Committee showed discipline by dealing only with those informal documents which related to official documents or which were prepared by working groups. Informal documents dealing with new issues not on the agenda of the work programme for this biennium were deferred to the next biennium.

The following items were included on the agenda:

- Explosives, self-reactive substances and organic peroxides (entrusted to a working group)
- Transport of gases (entrusted to a working group)
- Packagings, including IBCs and large packagings
- Dangerous goods packed in limited quantities
- Listing, classification and packing of new substances
- Miscellaneous
- Various proposals for amending the UN Model Regulations
- Standardization of emergency procedures
- Harmonization with the IAEA Regulations for the Safe Transport of Radioactive Material
- Procedure for incident reporting
- Guiding principles for the Model Regulations

- Harmonization with the Globally Harmonized System of Classification and Labelling of Chemicals (GHS)

- Programme of work for the 2005-2006 biennium.

The Sub-Committee thus made good progress in preparing the 14th revision of the Model Regulations which will be incorporated into RID/ADR as from 1 January 2007. The full report of this session can be consulted in French, English and Russian on the UN/ECE Transport Division's website under http://unece.org/trans/danger/danger.htm.
(Translation)

RID/ADR/ADN Joint Meeting

Geneva, 13-17 September 2004

25 Governments and 13 governmental or non-governmental international organisations and the European Commission took part in the work of this meeting chaired by Mr. C. Pfauvadel (France).

40 Official documents (only one of which could not be dealt with) and 33 informal (INF.) documents were on the meeting agenda.

The following items were included on the agenda:

- Questions pending

- Harmonization with the UN Model Regulations

- New proposals for amendments to RID/ADR/ADN

- Standards (entrusted to a working group)

- Transport in tanks (entrusted to a working group)

- Miscellaneous.

The following were among the important decisions:

- Reports on incidents and accidents must also be provided by loaders, fillers and consignees if they occur during loading, filling or unloading operations

- An addition was made to the obligations upon fillers to the effect that they must ensure conformity with the provisions relating to carriage in bulk (Chapter 7.3)

- A working group was set up to establish a stable structure for Chapter 6.2 (infectious substances) to minimise the work involved in transposing amendments from the Model Regulations, improve user-friendliness and the conciseness of the texts

- References to new standards were added

- New provisions for transport in tanks were added

- Transforming the RID Committee of Experts working group on standardized risk analysis into a Joint Meeting working group was accepted on condition that WP.15 is also agreeable.

The complete report of this meeting is available in German on OTIF's website (www.otif.org) and in French, English and Russian on the UN/ECE Transport Division's website under http://unece.org/trans/danger/danger.htm.
(Translation)

Other Activities

OTIF – UNIDROIT

Rail Registry Task Force (RRTF)

Brussels, 21 - 23 September 2004

The RRTF met under the joint chairmanship of Mr. Peter Block (USA) and Mr. Henrik Kjellin (Sweden).

First of all, the representative of the OTIF Secretariat reported on the progress of efforts to find a State to host the planned Diplomatic Conference. These efforts must be further increased, although at the third Joint Meeting of Governmental Experts, this task was taken on by the Secretariat of UNIDROIT and Germany. However, the Secretariat of OTIF will of course also continue to try to obtain suitable candidates.

As at least 12 months or more will be needed to prepare the Diplomatic Conference, it will not be possible to

maintain the date of May 2005, and even a Diplomatic Conference at the end of 2005 could be in doubt.

Subsequently, the RRTF dealt with problems in connection with Article V of the draft Protocol to the Convention on International Interests in Mobile Equipment concerning Matters Specific to Railway Rolling Stock, particularly the identification of railway rolling stock. In this respect, it was pointed out that provision would also have to be made in Article XXV (new XXVII) for the declaration in accordance with § 2 and the declaration in accordance with § 3.

Rolling stock does not necessarily have a "nationality". The current wording of Article V does not therefore adequately regulate which rolling stock is to be subject to the general system of identification and in which cases of a declaration in accordance with §§ 2 or 3 which national or regional system is to apply. The RRTF prepared the draft Article V § 3bis, although the precise wording of it will still have to be agreed with the Drafting Group. Accordingly, another meeting of the RRTF in February 2005 is being considered.

There was extensive discussion on the question of the absence of penalties for breach of duty in accordance with Article V § 6. The RRTF came to the conclusion that penalties are not in fact absolutely necessary, but that it must be ensured that breach of these duties must not have any consequences for the validity or priority of a registration in accordance with Article VII.

In the context of discussions on Article XI (new XIII), the RRTF, bearing in mind the work on the Aircraft Register, was of the view that the International Register did not in fact have legal personality, but belonged to the Supervisory Authority, as the latter is entitled to proprietary rights over the Register and the data it contains respectively. Operation of the Register would be carried out in the name of and on behalf of the Supervisory Authority and in this respect, would also therefore be covered by the Authority's immunities and privileges. However, efforts must continue in order to establish an appropriate text to aid clarification of this interpretation of the law.

In connection with the problems of insuring the liability of the Registrar, the question arose as to the possibility of limiting liability to a specific, insurable maximum amount. At the moment, it would not be possible to accommodate unlimited liability in the international insurance market and would in any case, i.e. also if the possibility of insuring existed, increase costs for the Register to an unjustifiably high level. The RRTF did prepare a suitable draft text to limit liability in Article XV (new XVII) §§ 6 and 7, but it must be expected that a provision such as that in the version of the draft could meet with objections under constitutional law in some States.

Lastly, the RRTF discussed the rules of procedure of the Supervisory Authority and made some amendments to simplify the draft which had been prepared by the sub working group (OTIF, Canada, Switzerland). In contrast, the draft "Registry Regulations", which were also produced by this sub working group, were not discussed in detail. The draft had been prepared on the basis of and according to the first draft of the Registry Regulations for the Aircraft Register. However, in the meantime, these are being revised, so the sub working group's draft will also first have to be revised on the basis of the new rules for the Aircraft Register before the RRTF examines it in depth.
(Translation)

Co-operation with International Organizations and Associations

Arab Union of Railways (UACF)

25 Year Jubilee of the UACF

Aleppo, 2/3 September 2004

The UACF was founded in 1979 in Amman (Jordan) and is one of the oldest collaborative organisations in the entire area covered by the Arab States. Today, its members include rail companies or equivalent rail sector organisations and some governmental or semi-governmental undertakings responsible for sub-areas which lean towards UACF, from eleven Arab States. UACF is not an intergovernmental organisation, although in line with the structures in the Arab States, it is well anchored politically. UACF has its headquarters in Aleppo, Syria's second largest city. From its inception, UACF enjoyed definitive support from Syria and Syrian Railways, whence the personnel were recruited who, to a large extent, still play a part in the Organisation's Secretariat today.

UACF was set up to support its Members and to co-ordinate their efforts in the service of the railways in the Arab region. Even at a very early stage, a lexicon was established in order to provide uniform terminology in Arabic corresponding to the UIC's system of

terminology. Each year, UACF publishes a statistical overview of rail transport in its sphere of activity. Its services include uniform rules in the field of technology/operations as well as accountancy. UACF sees the organisation of congresses and seminars as a fundamental task, as a rule in collaboration with other international organisations, in order to provide platforms at regular intervals for the exchange of information and further training. UACF initiates and takes part in studies on the development of the railway system in the Arab region. An extensive study is attempting to demonstrate which main axes would have to be stimulated in order better to connect the Arab States to each other – equally by rail. Lastly, UACF publishes a bulletin which appears two or three times a year.

Today, UACF may be described as a well established, benchmark instrument of co-operation between the railways in the region of the Arab States. It fosters close relations with UIC, whose support in conjunction with a very perceptible renaissance of the railways and for the sake of regional development of the rail sector in the Arab region, is becoming more and more significant.

It is of course essential to have a well-cultivated relationship between OTIF/its Secretariat and UACF and its Secretariat. The Arab States are potentially part of the COTIF area; many are members of OTIF. It has been possible recently to strengthen contacts, not just so that in particular, the new aspects of COTIF 1999 made necessary by the reform of the railways can also be introduced, in collaboration with UACF, but also to disseminate targeted information and to improve the conditions for a decision on accession in States which are not yet members of OTIF. In connection with this, reference is made to the Central Office's commitment in the framework of the Middle East Railways Group (DGMO) (see Bulletin 1/2004, p. 13).

The Director General of the Central Office attended UACF's 25th Jubilee as an official guest. The occasion, which took place at the headquarters of Syrian Railways, included not only a ceremonial section, but also an international symposium, linked with a specialist exhibition in which a wide variety of firms took part, most of them from Europe. The successful event underlined the importance and vitality of UACF.
(Translation)

International Union of Private Railway Wagons (UIP)

UIP Congress 2004

Wiesbaden, 30 September/1 October 2004

The UIP Congress takes place every three years. This time, it was held in Wiesbaden, the capital of the German Federal State of Hesse. UIP is an important partner for OTIF; it represents a long existing private-sector, market-oriented pillar in rail freight transport (around 50% of goods are carried by private wagons belonging to the Union's member companies, with special wagons forming the main contingent). UIP and the private wagon owners respectively are a noted factor in the process of liberalisation within the European rail system and are hence also of significance for the European Commission.

UIP's 2004 Congress offered a broad panoply of topics and included all the main issues related to the future of rail freight transport, so that once again, a complete overview was generated of the problems surrounding rail freight transport, the opportunities it has and the risks it runs, as well as the principal demands on the various partners with regard to a stronger role for the railways. Ultimately, a stronger role for the railways is the aim of all the efforts under the seal of liberalisation and opening of the market – including in the rail sector – required by the EU and its Community legislation.

In all this, the private wagon owners have their own very specific perspective of interests representing what, for them, are the core problems:

- The role of private wagon owners was, and is in principle, limited primarily to the financing and provision of wagons for freight transport, particularly special wagons suitable for accommodating specific transport requirements. It should be possible to approve such wagons and to make use of them in accordance with rules which are recognised as generally as possible.

- Since the question is one of investments which can only be justified if the corresponding capital goods are used sufficiently, reliable conditions for this to happen should to some extent be in place. These conditions must be created principally by the railways which, in the liberalised system however, are also on the lookout for their own business when deploying wagons. The tendency is thus for them to become

competitors in relation to the private wagon owners, who have so far been able to rely on fairly advantageous, generally recognised usage rules.

It can be stated without doubt that up to now, fairly efficient symbiosis has prevailed between the railways and private wagon owners. The reform of the railways and liberalisation have damaged this symbiotic relationship:

– Approval of private wagons managed through the railways, often operating in a very customised and not very formalistic manner, has become a sovereign task applicable to all vehicles. Therefore, within the EU, it is the object of the new Community railway law, which at first and for the time being, will probably have a substantial, aggravating effect and presumably lead to price increases;

– the hitherto existing contract of use based on RIV and UIC leaflet 433 must give way to freedom of contract, which however leads immediately to a discussion as to how far this freedom of contract may go in order not to be counterproductive by favouring the powerful in the market.

At the Congress in Wiesbaden, it was in any case highly interesting to note how the fronts have changed. The private wagon owners, who up to now have represented the private-sector approach, are calling for more, or at least supplemental statutory regulations. As the former monopolists, the railways fervently represent market freedom and hence freedom of contract to the greatest extent possible.

COTIF 1999 is also involved and should be able to make a useful contribution. At the Congress in Wiesbaden, the representative of OTIF was required, in particular, to present the situation with regard to the new "COTIF Rules for Approval", now that compared with the concept decided in the context of the Vilnius Protocol, fundamentally new circumstances have to be taken into consideration. Wagon law itself was not at the forefront this time.

The Central Office was happy to use the occasion to introduce the concept, which was revised during discussions with the European Commission and examination of EU Community law, of the COTIF approval system in view of the working group meeting arranged shortly after the Congress to prepare the start of the Committee of Technical Experts in accordance with COTIF 1999 and to test reaction.

The test may not have gone badly. Various reactions endorse this conclusion. It also turned out consequently that with the new concept and the manner in which it was presented, it was possible to achieve a positive result of this working group meeting.

The question arises as to how contacts with UIP should continue to be fostered. UIP will be active in putting into concrete terms the COTIF approval system in line with the new concept. Here, the Central Office will take on the leading role. With regard to UIP's other interests, the ball is more in their court. In particular, it remains to be seen to what extent a "new RIV", as announced by UIC/the railways, will be accepted and how the discussion on supplementing CUV will pick up. But this new RIV will not of course be able to contain any legal provisions which are mandatory for non contracting parties.
(Translation)

Studies

Contractual basis for the use of infrastructure

Dr. Th. Leimgruber, lawyer[1]

Preliminary remarks

The use of infrastructure is a young branch of the law. The deadline for transposing the relevant European Union (EU) directives into national law was March 2003 and the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to COTIF[2]) will only enter into force in 2005. There is therefore a lack of theoretical promulgation of the subject as well as a lack of practical experience.

The International Rail Transport Committee (CIT) and the International Union of Railways (UIC) Legal Group have for some time been giving attention to the development of General Conditions of Business for the use of infrastructure (GCB-I). A short while ago, RailNetEurope (RNE) was founded, a new association whose purpose is to bring together infrastructure managers (IM) under one roof and to offer transfrontier use of infrastructure from one source via so-called one-stop-shops. Understandably, the Organisation also intends to implement uniform conditions for use. In the middle of 2004 therefore, CIT, UIC and RNE agreed to co-ordinate their work and, as far as possible, to develop a common contractual basis.

Legal relations

Before putting the contractual relationship between the infrastructure manager and the carrier into concrete terms, the individual players in transfrontier rail transport have to be correctly placed. The following legal relations need to be distinguished:

1. Customer - carrier
2. Carrier - carrier
3. Main carrier – subsidiary carrier
4. Carrier/subsidiary carrier – infrastructure manager
5. Carrier – wagon keeper
6. Carrier – auxiliary.

With regard to the terminology:

The EU Directives use the term "railway undertaking" (RU), the CUI uses the term "carrier". The different names are not congruent which, as will be shown, is of some legal relevance.

COTIF uses the term "substitute carrier", a neologism taken from aviation law. However, in German and French, the name "Unterbeförderer" ("sous-traitant") (English: "subsidiary carrier") is more common and meaningful.

Visually, the network of relationships between the customer – carrier – subsidiary carrier – infrastructure manager – wagon keeper – auxiliary can be demonstrated as in diagram 1.

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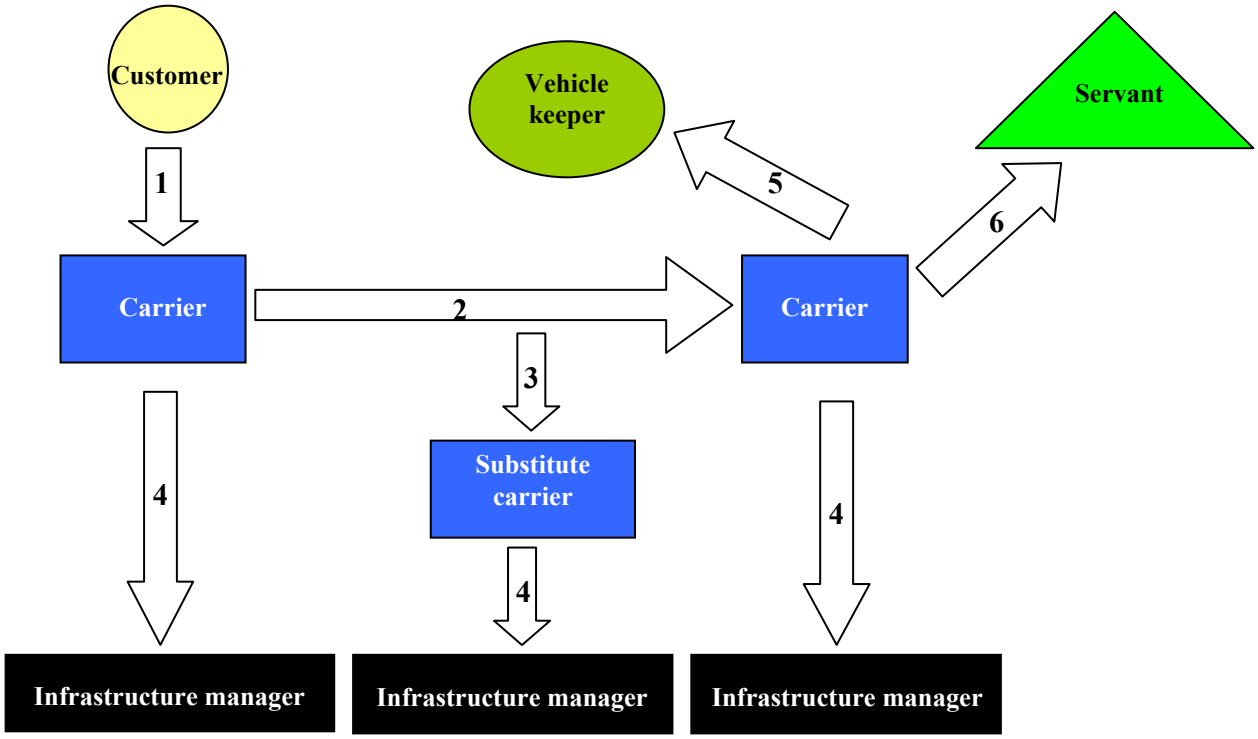
[1] The author is the Secretary General of the International Rail Transport Committee (CIT) and the opinions expressed in this essay are his own.

[2] Editor's note: when citing COTIF or the provisions of its Appendices, the author is referring to the 3 June 1999 Protocol version of COTIF.

Figure 1: Legal relationships



Legal basis

The legal sources in connection with the use of infrastructure are:

- Directive 91/440 "on the development of the Community's railways"[3] as supplemented and amended by Directive 2001/12 "amending Council Directive 91/440/EEC on the development of the Community's railways"[4];
- Directive 2001/14 "on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification"[5];
- The "Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic" CUI (Appendix E to COTIF).

Taking these as a basis, the following four possible application scenarios emerge:

1. National transport in a non EU country: only national law applies;
2. National transport in an EU country: only (nationally transposed) EU law applies;
3. International transport in a non EU, but OTIF country : only OTIF law applies;
4. International transport in an EU and OTIF country: both (nationally transposed) EU law and OTIF law apply.

An urgent recommendation in this respect:

As far as possible, the Contracting Parties should apply COTIF law and contractual law based thereon to domestic transport as well. Having a different form of contract of use depending on whether it is for national or international transport makes no sense and sooner or later, would lead to legal chaos and uncertainty. However, it must be borne in mind that in so doing, *mandatory* national law cannot of course be circumvented.

[3] Official Journal of the European Communities, L 237, 24.8.1991, p. 25

[4] Official Journal of the European Communities, L 75, 15.3.2001, p.1

[5] Official Journal of the European Communities, L 75, 15.3.2001, p. 29

Legal instruments

A closer analysis of this legal basis reveals a somewhat confusing picture. No fewer than five different legal instruments can be distinguished:

A. Framework agreement

B. Agreement

C. Contract of use

D. Conditions of use of the rail network

E. Allocation.

Concerning the distinction between "framework agreement" (A) and "agreement" (B):

According to its legal definition[6], the "framework agreement" within the meaning of Directive 2001/14 contains the infrastructure capacity to be allocated over a period longer than one working timetable period; the "agreement" within the meaning of Directive 91/440[7] contains the administrative, technical and financial conditions for traffic control and safety issues. If one assumes that the "agreement" forms part of the "framework agreement", the latter forms a legally binding basis applicable over a period longer than one working timetable period for regulating the respective legal relationships in individual cases.

Concerning the distinction between "agreement" (B) and "contract of use" (C):

According to its legal definition, the "agreement" within the meaning of Directive 91/440 governs the administrative, technical and financial conditions for traffic control and safety issues. The "contract of use" in accordance with CUI[8] governs the administrative, technical and financial conditions for the use of infrastructure for performing CIV or CIM transport operations. The subject of the contract is therefore firstly traffic control and safety issues, and secondly the performance of CIV and CIM transport operations. However, the identical wording "administrative, technical and financial conditions" leads one to assume that the same thing is meant in the EU Directive and in CUI.

Concerning the distinction between "agreement" (B)/"contract of use" (C) on the one hand and "conditions of use of the rail network" (D) on the other:

The "agreement"/"contract of use" is a *regulation* of the administrative, technical and financial conditions of access to the network, the "conditions of use of the rail network" are a *statement*[9] of rules, deadlines, procedures etc. Thus in the latter, it is not a question of a legal transaction, but of the documentation of data. This is also clearly expressed in the French and English descriptions (document de référence, network statement). In contrast, the expression in German ("Schienennetz-Nutzungsbedingungen") seems unfortunate and more misleading than helpful.

Concerning the distinction between "framework agreement" (A)/"agreement" (B)/"contract of use" (C) on the one hand and "allocation" (E) on the other:

The allocation of railway infrastructure capacity in accordance with Directive 2001/14 is a unilateral legal act which in integrated rail transport is performed by the allocation body and in separated transport by the infrastructure manager. The contract of use regulated in CUI is a bilateral legal transaction and in both integrated and separated transport it can only be concluded only by the infrastructure manager.

Another reference to the following problem:

In both integrated and separated transport, the "agreement" in accordance with Directive 91/440 and the "contract of use" in accordance with CUI respectively can only be concluded by the infrastructure manager, not, for instance, by the allocation body as well. It is debatable as to how it works for the framework agreement in accordance with Directive 2001/14. In addition to the infrastructure manager, the legal definition in Article 2 (f) also cites the allocation body as a contracting party, whereas the text itself does not (Art. 13 (2), para. 2) – and ultimately only the text prevails.

6 Art. 2 (f)

7 Art. 10 (5)

8 Art. 5 § 2

9 Art. 2 (j) of Directive 2001/14

Figure 2 gives an overview of the legal basis for the use of infrastructure.

Figure 2: Legal tools

	A	B	C	D
	Framework agreement	**Agreement**	**Contract of use**	**Network stateme**
Object	Fixing the infrastructure capacity to be allocated over a period longer than one working timetable period	Administrative, technical and financial regulation of traffic control and safety issues	Regulation of the administrative, technical and financial conditions for the use of infrastructure for performing CIV or CIM transport operations	Statement of the rules, c procedures and criteria c fees and capacity alloca information on the infra conditions of access
Participants	IM – RU IM – applicant (if permitted under national law) If RU and IM legally independent: AB instead of IM (?)[10]	IM – RU	IM - RU	IM
Form	No form	No form	In writing (regulation)	In writing[11] (regulation)
Legal source	Dir. 2001/14 • Art. 2 (f) • Art. 13 (2) para. 2 • Art. 17 (1)	Dir. 91/440 • Art. 10 (5)	CUI	Dir. 2001/14 • Art 2 (j) • Art. 3
Legal nature	Optional	Mandatory	Mandatory	Mandatory
Sphere of application	EU	EU	OTIF (incl. EU)	EU

10 Legal contradiction between Art. 2 (f) and Art. 13 (2), para. 2 of Dir. 2001/14

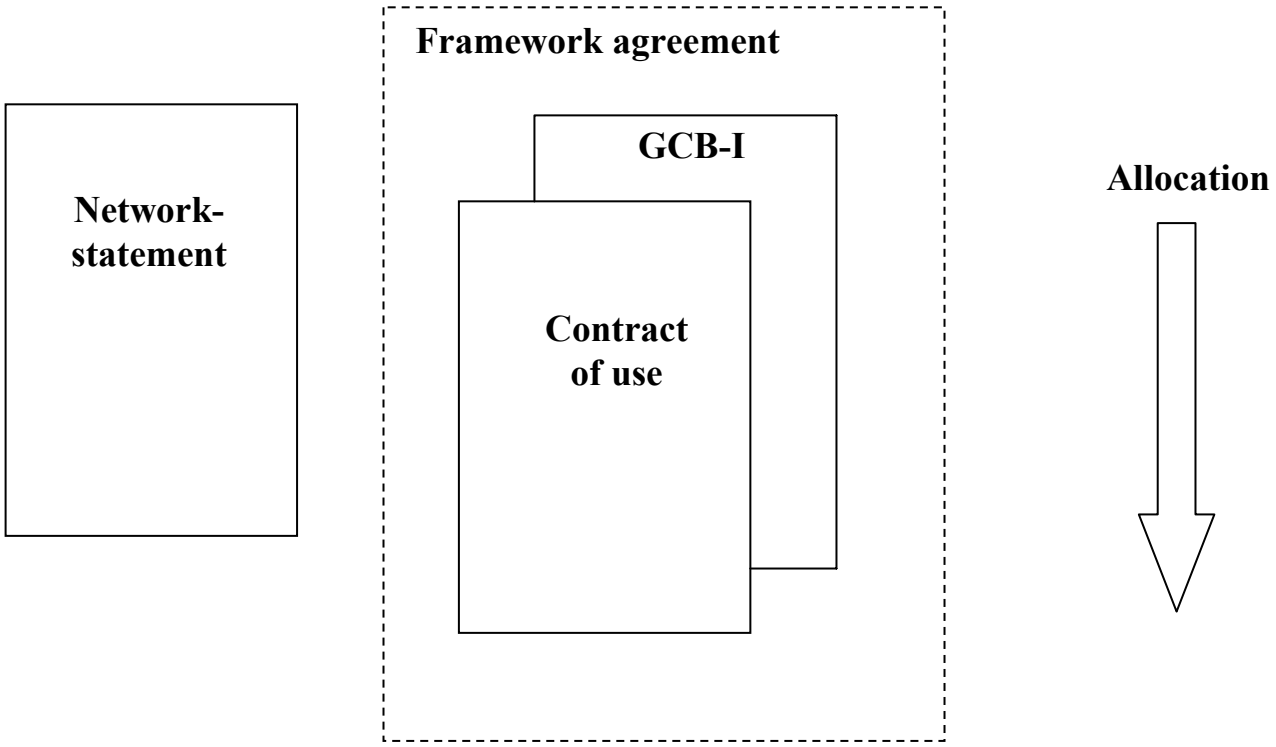
11 Because it has to be published (Art. 3 (1) Dir. 2001/14)

12 The term "entgelterhebende Stelle" in the German text of Art. 14(2) is not correct; French and English text are correct (organisme de répartition/all

Contract architecture

Based on this analysis of the legal sources, the contract architecture presented in figure 3 results for the use of infrastructure.

Figure 3: Contract architecture



The "Network Statement" is an information document. Sequentially and logically it comes before the framework agreement and may – but does not have to – contain the General Conditions of Business on the use of infrastructure in the sense of an offer. However, the General Conditions of Business become valid only when and to the extent that they are taken over into the contract of use.

The "framework agreement" covers a number of individual "contracts of use" and in addition to the actual use of infrastructure, deals with other contractual matters.

The individual "contract of use" forms part of the "framework agreement".

The "General Conditions of Business on the use of infrastructure" form an integral component of the "contract of use".

"Allocation" is a unilateral legal act designating an individualised railway infrastructure capacity. It presupposes a contract of use, but is not to be equated with it.

Contracting parties

As already shown, on the infrastructure side, only the infrastructure manager and not the allocation body can be a party to the contract of use, and this is irrespective of whether the rail transport in question is integrated or separated. This is a result firstly of the wording of Article 10 (5) of Directive 91/440 and Article 3 (b) of CUI and secondly of the legal principle of the legal impossibility of having contracts at the expense of third parties.

On the rail transport undertaking's side, only a carrier may be a contracting party to the contract of use, not the traction provider. Article 3 (c) of CUI defines the carrier as the person who carries out rail transport under CIV and CIM. This is not the case in respect of the traction

provider: the traction provider does not accept any goods from the consignor (into his custody) for delivery to the consignee, but (only) moves wagons and trains from A to B.

However, this assessment contradicts EU law. Article 10 (5) of Directive 91/440 describes as a contracting party to the "agreement" the "railway undertaking" which, for its part, is defined as a public or private undertaking whose main business is to provide rail transport services, "with a requirement that the undertaking should ensure traction; this also includes undertakings which only provide traction;"[13] There is therefore a problem of congruency between EU law and COTIF law, the probable solution to which is that COTIF should dispense with its narrow definition of the contracting parties.

There is no doubt that the "applicant"[14] – i.e. for instance the loader, forwarder or a combined transport undertaking – may *not* be a partner in a contract of use. This is unmistakably ruled out by the clear wording both of Article 10 (5) of Directive 91/440 and of Article 3 (c) of CUI.

General Conditions of Business

The need for General Conditions of Business for the use of infrastructure as well[15] seems not to be contested. Appropriate standardisation of this legal relationship is especially pressing, as it involves a highly complex legal matter with major financial consequences.

Of course, General Conditions of Business only become valid if and in so far as they are taken over by the contracting parties. However, such terms may be taken on tacitly and implicitly, as the CUI contract of use itself does not require anything in writing as a prerequisite for validity (Art. 5 § 3 of CUI).

In standardising the use of infrastructure, the well-known General Conditions of Business principles are to be observed, e.g. the precedence of mandatory (national or international) law, the precedence of individual agreements, the avoidance of major derogations from the directly or correspondingly applicable legal regime and the opportunity of reasonable notice.

CIT has prepared initial drafts of common Conditions of Business for the use of infrastructure and has discussed them with the European Commission. The outcome to be noted is that the Commission also has a positive position with regard to international standardisation; in fact, the Commission explicitly welcomes it for reasons of efficiency and legal certainty. However, the Commission took this opportunity to hint that in relation to the infrastructure managers, rail transport undertakings – particularly the newcomers – are to be considered as the weaker contracting party and that they are entitled to be suitably protected, where necessary.

Contractual freedom

It goes without saying that General Conditions of Business can only be developed in the context of the contractual freedom granted under the law. CUI essentially defines this as follows:

According to Article 4 of CUI, the parties may limit their liability for loss or damage to property (but not to persons) by fixing a maximum amount of compensation (but not as a basic principle).

According to Article 7 § 6 of CUI, in the event of payment being in arrears or clear breach of obligation, the contract may, as a derogation, be rescinded. Also in accordance with Article 7 § 6 of CUI, liability of the party to the contract who is the cause of its rescission may be limited or waived.

According to Article 8 § 4 of CUI, the contracting parties may agree whether and to what extent the infrastructure manager is liable for delays or disruptions to operations.

According to Article 20 of CUI, specific conditions for asserting rights to compensation from the other party may be agreed (so-called agreements to settle). According to Article 24 of CUI, the courts may also be designated by agreement.

Liability

The CUI rules on liability and their contractual specification are of major practical significance.

Article 51 of CIV and Article 40 of CIM which, in the event of loss or damage, define the infrastructure manager as a servant of the rail transport undertaking, form the starting point. This means that: externally, for the customer, the rail transport undertaking is always liable, even when the cause was recognisably the fault of the infrastructure manager. Whether and to what

13 Art. 3 Dir. 91/440

14 cf. Art. 2 (b) Dir. 2001/14

15 See also CIT's General Conditions of Business for the CIV and CIM contract of carriage and for cooperation between carriers (joint carriage, substitute carriage, traction, hiring of locomotives with locomotive drivers etc.) which can be consulted at www.cit-rail.org

extent the infrastructure manager is liable remains an internal question and is dealt with using the recourse procedure.

This statutory fiction does allow maximum protection for the consumer, but it places the individual rail transport undertaking in a precarious legal position, which needs to be fundamentally analysed and safeguarded carefully in a contract.

In accordance with Article 8 et seq. of CUI, the infrastructure manager and rail transport undertaking are jointly liable for all loss or damage to persons and property causally and without limit, although as mentioned above, the amount of compensation for loss or damage to property may be limited. In addition, the infrastructure manager is liable – also causally and not limited, for pecuniary loss to the rail transport undertaking resulting from damages payable by the latter under CIV and CIM (Art. 8 § 1 (c) of CUI).

On the other hand, as already shown, the contracting parties may make agreements as to whether and to what extent the infrastructure manager is liable for loss or damage caused to the carrier by delay or disruption to operations (Art. 8 § 4 of CUI). The (actual or only apparent?) contradiction between Article 8 § 1 (c) and § 4 of CUI can be resolved with the following interpretation:

- Statutory liability of the infrastructure manager in respect of the rail transport undertaking for damage or loss caused by delays is, on the basis of Article 4 in conjunction with Article 8 § 4 of CUI, to be considered as *non mandatory* and can thus be waived contractually. Only when no other rule is arranged is the infrastructure manager liable in respect of the rail transport undertaking in passenger transport for accommodation and notification (Art. 32 of CIV) and in goods transport for (proven) loss or damage not exceeding four times the carriage charge (Art. 33 of CIM).

- For obligations taken on in the form of a contract, e.g. liability for delays in accordance with the CER/UIC/CIT Charter on Rail Passenger Services or in accordance with CIT's General Conditions of Business, the infrastructure manager has no statutory liability in respect of the rail transport undertaking. CUI would equally scarcely cover liability claims arising from the Regulations of the 3rd Rail Package of 3 March 2004 on international rail passengers' rights and obligations[16] and on compensation in cases of non-compliance with contractual quality requirements for rail freight services.[17] [18]

The possibility of recourse for pecuniary loss is of particular significance as there is a perceptible increase in political pressure to assume corresponding liability claims.

In the case of infrastructure liability too, the familiar reasons for relief from liability of *force majeure*, one's own fault and third party fault take effect. A frequent bone of contention in this respect might be the question as to what extent damage or loss resulting from vandalism to stabled rolling stock can be qualified as third party fault. The decision will depend on which custody and security obligations concern the infrastructure manager. This is why it is worth recommending that this matter should also be dealt with in the General Conditions of Business for the use of infrastructure.

Lastly, reference should be made to a problem which is easily overlooked, but which is of major – and actuarial – significance. According to Article 26 § 2 (c) of CIV, the rail transport undertaking is also liable for death of, or personal injury to, its passengers if the accident was caused by another rail transport undertaking circulating on the infrastructure. In contrast, the infrastructure manager, who bears overall responsibility for the safe operation of his infrastructure, remains "well outside" in respect of this group of circumstances. The reference to the liable rail transport undertaking's right to recourse against the rail transport undertaking at fault in accordance with *national* law[19] is not reassuring to the extent that a major accident can rapidly overstretch the financial power and insurance cover of a smaller undertaking. This problem must also be discussed and dealt with clearly in connection with the GCB-I.

Concluding remarks

Preparing contractual bases for the use of railway infrastructure is a demanding task which requires the expert cooperation of lawyers, economists, operations and insurance specialists. The task of harmonising such

16 COM (2004) 143 final

17 COM (2004) 144 final

18 But for their part, Art. 24 (2) (passenger transport) and Art. 18 (2) (freight transport) of the EU Regulations permit recourse. However, this is not specified more precisely and remains unclear with regard both to the conditions for it and with regard to its scope.

19 Even the question of the law to be applied might create some cause for conflict!

contractual bases at international level would appear to be even more demanding. A great deal of skill and readiness to compromise will be necessary when it comes to achieving a common denominator for the different interests between the rail undertakings and infrastructure managers and to agreeing contractual bases which guarantee fairness, legal quality and acceptability at the same time.
(Translation)

Case Law

Bundesgerichtshof (Germany)

Ruling of 17 February 2004[1]

If, in a railway accident, a locomotive belonging to a rail transport undertaking is damaged by running over a boulder lying on the track, the railway infrastructure undertaking responsible for operating that section of the line is strictly liable for the damage in respect of the rail transport undertaking on the basis of absolute liability under § 1, para. 1 of the *Haftpflichtgesetz* – HPflG (German Liability Act). Operational risk of the rail vehicle must be taken into account in the context of the consideration to be made in accordance with § 13, para. 1, 2nd sentence of the old version of HPflG (which corresponds to § 13, para. 2 of the new version of HPflG).

Cf. § 1, para. 1, § 13 of HPflG.

The plaintiff, a rail transport undertaking, claims from the defendant, a rail infrastructure undertaking, compensation for a railway accident. The parties are in dispute as to whether the HPflG applies.

The defendant operates, *inter alia*, the railway line between Sigmaringen and Tübingen. It is responsible for construction, maintenance, the operational control system and the safety system. The defendant carries out standard checks on the line, in the course of which areas of the rock face along the track which are fixed with cable and securing devices are checked.

The plaintiff regularly travels along the line with its railway vehicles against payment of track access fees. It operates regional passenger transport for which it bears economic profit responsibility.

In March 2000, a locomotive belonging to the plaintiff collided with a large boulder which had broken away from the rock face during the night and rolled onto the track. The locomotive suffered considerable damage as a result of the collision.

In this legal dispute, the plaintiff therefore restricted the claim for compensation to the maximum amount of liability applicable at the time of the accident in accordance with HPflG (i.e. 51,129.19 €) and withdrew its further claim. The Landgericht (≈ regional court) dismissed the action. The Court of Appeal allowed it under amendment of the regional court's ruling. With the appeal allowed by the Court of Appeal, the defendant is seeking restitution of the regional court's dismissal ruling.

Grounds for the ruling:

I. In the disputed ruling (published in: *Versicherungsrecht* (Insurance Law) 2003, 648 et seq.), the Court of Appeal affirms the defendant's liability in accordance with § 1, para. 1 of HPflG. It considers that a rail transport undertaking may also be a claimant within the meaning of § 1, para. 1 of HPflG. Various sources of risk would result from the division of responsibilities between rail transport undertakings and rail infrastructure undertakings. Both undertakings were responsible for different parts of railway operations and had exclusive power of disposal over them. Therefore, both were operational undertakings within the meaning of HPflG. In view of § 13, para. 1, 2nd sentence of the old version of HPflG (now § 13, para. 2 of the new version of HPflG), both of these operational undertakings were thus liable in accordance with § 1, para. 1 of HPflG if damage was caused to the other operational undertaking as a result of operations attributable to it. This cannot be opposed by asserting that the rail operations undertakings consciously exposed themselves to the risk arising from the infrastructure. This also applied to passengers, although they were undoubtedly entitled to make a claim under § 1, para. 1 of HPflG. Even if several vehicles or aircraft, or several trains belonging to different rail transport undertakings are involved in an accident, nobody disputes mutual liability. The accident was not a result of *force majeure* (§ 1, para. 2, 1st sentence of the old version of HPflG). With uncontested overall damages of

[1] VI ZR 69/03; first instance: Oberlandesgericht, Stuttgart, ruling of 12 February 2003 – 4th civil division.

84,258.06 €, a proportion of joint liability of one third was imputed to the plaintiff, which proportion the parties did not contest either. The amount remaining after this exceeded the amount of the claim being sought.

II. These submissions bear up against the appeal charges. The Court of Appeal rightly affirmed the defendant's absolute liability for the conesquences of the rail accident.

1. According to § 1, para. 1 of HPflG, the operational undertaking is obliged to compensate the claimant for his loss or damage arising from the fact that during the operation of a railway or a suspended railway, somebody is killed, physiccally injured or harmed or material damage occurs. These fundamental conditions of liability apply in accordance with the law in force from 1 August 2002 and in accordance with the law in force before then, i.e. the law in force at the time the accident occurred (Art. 229 § 8, para. 1, No. 5 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law of the German Civil Code)).

There is no dispute that in the accident, material belonging to the plaintiff, i.e. its locomotive, was damaged. The damage also occurred during the operation of a railway. In the sense of § 1, para. 1 of HPflG, an operating accident has occurred if there is a direct external local and time connection between the accident and a specific operating procedure or a specific operating arrangement of the railway or if the accident was caused by a risk specific to the operation of the railway (*Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ (Journal of Federal Court Rulings) 1, 17, 19; court decisions of 18 December 1956 – VI ZR 166/56 – in *Versicherungsrecht* 1957, 112; 5 March 1963 – VI ZR 15/62 – *Versicherungsrecht* 1963, 583, 584; 10 March 1987 – VI ZR 123/86 – *Versicherungsrecht* 1987, 781). Both sets of circumstances exist. The accident occurred during regular operation of the plaintiff's locomotive on the defendant's line. In addition, risks typical in rail operations materialised. The collision was (at least also) due to the rail vehicle's long stopping distance and the absence of any possibility of swerving.

Accordingly, the liability of the rail infrastructure operator being claimed against only depends upon whether it is to be considered as an operating undertaking and whether a rail transport undertaking, such as the plaintiff, may be an injured party within the meaning of § 1, para. 1 of HPflG. For this case, the Court of Appeal affirmed both as being applicable.

2. Contrary to the opinion expressed in the appeal, the defendant is an operating undertaking within the meaning of § 1, para. 1 of HPflG. This is not opposable by the fact that by providing the infrastructure, the defendant only has power of disposal over part of the railway operations, but not over all operations, consisting of transport operations and infrastructure.

a) The operating undertaking in accordance with § 1, para. 1 of HPflG (as already previously in accordance with § 1 of the *Reichshaftpflichtgesetz* (State Liability Act) and § 1 of the *Sachschadenhaftpflichtgesetz* (Property Damage Liability Act) in accordance with consistent practice, is that which operates a railway for own account and which is entitled to dispose of the operation thereof (court decisions BGHZ 9, 311, 312; 23 April 1985 – VI ZR 154/83 – *Versicherungsrecht* 1985, 764, 765; Bundesgerichtshof ruling of 8 March 1951 – III ZR 34/50 – *Verkehrsrechtliche Sammlung* (Transport Law Collection) 3, 217, 218; ruling of 14 February 1963 – II ZR 19/61 – *Versicherungsrecht* 1963, 745, 747; (*Sammlung der Entscheidungen des Reichsgerichts in Zivilsachen* – RGZ) (Journal of State Court Rulings) 66, 376, 378; 146, 340, 341). In principle, this means having disposal of railway operations as a whole, i.e. of the means of transport and the infrastructure (cf. court ruling BGHZ 9, 311, 313; Bundesgerichtshof ruling of 8 March 1951 – III ZR 34/50 – op. cit.; RGZ 146, 340, 341 et seq.; Oberlandesgericht Düsseldorf, *Verkehrsrechtliche Sammlung* 9, 432, 434). However, the operating undertaking may also be that which simply has control over part of the operation when the operating criterion is fulfilled on own account. The deciding factor is that he is in a position, through the opportunities for, and obligation to intervene with respect to this part of the operation, to avoid or reduce the risks thus arising (court ruling BGHZ 9, 311, 313 et seq.; Bundesgerichtshof ruling of 8 March 1951 – III ZR 34/50 – op. cit.; RGZ 66, 376, 378 et seq.; 146, 340, 341; Oberlandesgericht Düsseldorf, *Verkehrsrechtliche Sammlung* 9, 432, 433). In previous case law, the operating undertaking which has been considered as such accordingly

has on various occasions been that which carried out carriage by rail, irrespective of who had the right of disposal of the infrastructure on the relevant track section (cf. for instance the court ruling of 23 April 1985 – VI ZR 154/83 – *Versicherungsrecht* 1985, 764, 765; Bundesgerichtshof rulings of 8 March 1951 – III ZR 34/50 – op. cit.; 14 February 1963 – II ZR 19/61 – *Versicherungsrecht* 1963, 745, 747; Oberlandesgericht Bremen, *Versicherungsrecht* 1953, 308; Reichsgericht, *Leipziger Zeitschrift für Deutsches Recht* (Leipzig Journal of German Law) 1915 column 52). However, in other cases, it was not the undertaking which performed carriage, but the operator of the railway premises who was held liable (cf. for instance RGZ 124, 204, 206 et seq.; RGZ 146, 340, 342; Reichsgericht *Eisenbahnrechtliche Entscheidungen und Abhandlungen*, published by Eger – EE (Rail Law Rulings and Studies) 10, 11, 12 et seq.; EE 15, 129 et seq.).

b) Even before the statutory separation of operations and infrastructure, the operating undertaking could in individual cases thus be considered as that which simply had the right of disposal of one of the two rail operations components. Henceforth, it is to be assumed that as a rule, rail transport undertakings and rail infrastructure undertakings are both operating undertakings which, in the event of loss or damage, are jointly liable to an (external) injured party.

aa) As a result of the statutory separation of operations and infrastructure under the *Allgemeines Eisenbahngesetz* – AEG (German General Railways Act) of 27 December 1993, both of these elements became permanently independent. Both rail infrastructure undertakings and rail transport undertakings are now regularly to be considered as operating undertakings within the meaning of § 1, para. 1 of HPflG. Separation was not intended to relieve rail infrastructure undertakings from liability; there was absolutely no wish to accept any disadvantages for injured parties (cf. *Bundesrat-Drucksache* – BR-Drucks. (Federal Parliament Printed Matter) 754/95, p. 8; BR-Drucks. 250/98, p. 4 and 8 et seq. and *Drucksachen des Deutschen Bundestages* – BT-Drucks. (Federal Diet Printed Matter) 13/10867, pp. 5 and 6).

bb) A dualistic railway definition was included in the General Railways Act of 27 December 1993 (*Bundesgesetzblatt* – BGBl. (Federal Law Journal)) I 2378, 2396; *Allgemeines Eisenbahngesetz*). According to § 1, para. 1, 1st sentence of AEG, the Act applies to railways. According to § 2, para. 1 of AEG, railways are public facilities or undertakings organised under private law which provide rail transport services (rail transport undertakings) or which manage a rail infrastructure (rail infrastructure undertakings). Both each operate a part of the railway independently (§ 3 of AEG).

cc) The defendant performs an independent subtask of railway operations in the henceforth divided rail sector. The infrastructure undertaking builds, maintains and markets for its own account the network within his power of disposal to interested rail transport undertakings, by providing them with railway tracks for a fee, exerting influence on the timetables and conducting network operations. The infrastructure undertaking provides the transport undertaking not just with the tracks for spatial use, it also ensures the provision of services in connection with the maintenance and use of the track, for instance the operation of points, signals, switch cabinets, operational notification and safety systems and electricity supply. The infrastructure undertaking must also ensure track safety, which, according to the conclusions established in the instances of fact, also includes protecting the tracks from falling rocks. In order to fulfil its tasks, the infrastructure undertaking must also select and supervise personnel (with regard to the tasks defined under the law, see § 2, para. 3, § 4, para. 1 of AEG; with regard to the defendant's safety responsibilities, see Hoppe/Schmidt/ Busch/ Schieferdecker, *Sicherheitsverantwortung im Eisenbahnwesen* (Responsibility for Safety in the Rail Sector), §§ 15 and 51; Tavakoli, *Privatisierung und Haftung der Eisenbahn* (Railway Privatisation and Liability), p. 60 et seq.; Filthaut, *Versicherungsrecht* 2001, 1348, 1351; with regard to the separation of accountancy, § 9, para. 1 of AEG). In performing the tasks it is assigned under the law, the

defendant therefore has a considerable influence on the safety of rail transport.

c) Managing the infrastructure on the one hand and performing transport operations with the vehicle fleet on the other are equivalent rail system requirements. Traffic operations do not have priority. Contrary to the conclusion of the appeal, the infrastructure manager cannot – as in road transport – simply be considered as the "load bearer for the construction of tracks". He is the operator of an independent part of the rail system. Not only does he provide the track system as such, but he also makes available other essential prerequisites for railway operations, such as the power supply. Moreover, by operating signals, points, switch cabinets and operational notification and safety systems using his own staff, he also has an active influence on railway operations and hence the risks arising therefrom. Smooth railway operations can only be achieved by the interaction of all the components comprising the overall system. The considerable risks which, as a rule, characterise railway operations, emanate both from the infrastructure components as well as from transport operations.

Accordingly, the quite predominant view in the literature also is that the rail infrastructure undertaking is an operating undertaking in the sense of § 1, para. 1 of HPflG (cf. Filthaut, HPflG, 6th edition, § 1 marginals 51 et seq., 55, 59; the same in *Versicherungsrecht* 2001, 1348, 1351; Freise, *Transportrecht* (Transport Law) 2000, 49, 50; Geigel/Kunschert, *Der Haftpflichtprozeß* (The Liability Process), 24th edition, Chap. 22 marginal 14; Tavakoli, *Privatisierung und Haftung der Eisenbahn* (Railway Privatisation and Liability), 155 et seq., 177 et seq., 212 et seq.; Tschersich, *Versicherungsrecht* 2003, 962, 964; Wussow/Rüge, *Unfallhaftpflichtrecht* (Accident Liability Law), 15th edition, Chap. 15 marginal 21; other opinion Hoppe/Schmidt/Busch/Schieferdecke, *Sicherheitsverantwortung im Eisenbahnwesen* (Responsibility for Safety in the Rail Sector), § 29. In any case, if damage is caused to an uninvolved third party, this leads, as a rule, to joint liability as joint and several debtors (Filthaut, HPflG, op. cit., § 1 marginal 56; Freise, op. cit.; Geigel/Kunschert, op. cit.; with regard to the conclusion, see also Tavakoli, op. cit., p. 177 et seq.; RGZ 61, 56 et seq. has already affirmed the joint and several liability of several railway undertakings liable in accordance with § 1 of the *Rechnungshofgesetz* - RHG (Auditing Court Act).

d) As evidence for classifying the rail infrastructure undertaking as an operating undertaking in the sense of the Liability Act, the *Verordnung über die Haftpflichtversicherung der Eisenbahnen* (Railway Liability Insurance Regulations) can also be drawn on, contrary to the appeal opinion. In its original version of 21 December 1995 (BGBl. I, 2101), it required public railways, public rail transport undertakings and public rail infrastructure undertakings to take out insurance to cover claims arising under the Liability Act. The legal material says that as the causes of loss or damage could only lie within the ambit of the rail infrastructure undertaking or the rail transport undertaking, it is ensured that the injured party would not suffer any disadvantage as a result of the separation of traffic and operations (BR-Drucks. 754/95, p. 7, 8). The new version resulting from the *Gesetz zur Änderung versicherungsrechtlicher Vorschriften im Eisenbahnbereich* (Act on amending the provisions of insurance law in the rail sector) of 25 August 1998 (BGBl. I, 2431) has in fact extended the scope of the requirement to insure beyond the coverage of claims under the Liability Act to include all cases for claims that might arise. However, in so doing, there was no wish to remove the rail infrastructure undertaking's obligation to insure itself against claims arising under the Liability Act (cf. Filthaut, *Neue Zeitschrift für Verkehrsrecht* (New Journal of Transport Law) 1999, 71, 72; Freise, *Transportrecht* 2000, 49, 50 et seq.; Tavakoli, op. cit., p. 170 et seq., 174). It was more the case that the rationale behind the law expressly assumed that rail infrastructure undertakings are also affected by absolute liability under the Liability Act (cf. BR-Drucks. 250/98, p. 4 and 8 et seq. and *Bundestag-Drucksachen* – BT-Drucks. (Federal Diet Printed Matter) 13/10867, pp. 5 and 6).

3. As a rail transport undertaking, the plaintiff is also the injured party in the sense of § 1, para. 1 of HPflG.

a) The view held in the literature is that a rail transport undertaking cannot claim against a rail infrastructure undertaking under § 1, para. 1 of HPflG. Infrastructure and transport operations did not justify independent liability. To be more precise, each are only part of railway operations, which alone are subject in their entirety to the

stricter liability in accordance with § 1 of HPflG. Rail transport undertakings and rail infrastructure undertakings are joint undertakings and as such, are joint and severally liable to the injured party, regardless of who caused the accident in the individual case. The duty to pay compensation between the joint undertakings is outside the extent of protection of absolute liability, because the rail transport undertaking itself (helped to) cause(d) the danger which led the legislator to introduce the stricter liability in accordance with § 1 HPflG (cf. Filthaut, HPflG, op. cit., marginal 147, 56, 28 et seq., the same author in *Versicherungsrecht* 2001, 1348, 1352 et seq. and *Versicherungsrecht* 2003, 1512, 1513).

b) The court providing the ruling might not be able to follow this. In any case, if the causes of the accident originate from operation of the railway and are to be classified within an operating undertaking's area of risk, it is then justified to award the other rail operating undertaking a claim under absolute liability.

aa) Recognition of an intrinsic joint and several liability collective for the protection of the injured third party does not require disaffirmation of the operating undertakings' joint liability in the case where a claim is realised by one of the undertakings participating in the collective (similarly: Freise, *Transportrecht* 2003, 265, 272 re. col. Fn. 39; Tavakoli, op. cit., p. 245, 246 et seq.; Tschersich, *Versicherungsrecht* 2003, 962, 964 et seq.; further, for a division of the liability collective externally in the individual case: Freise, op. cit.; Wussow/Rüge, op. cit., Chap. 15 marginal 21; critically, in this respect, Tavakoli, op. cit., p. 178 et seq.).

bb) It has already been argued that accident-causing operational hazards typical to the railways can result not only from transport operations themselves but also from the infrastructure. In a rail accident such as occurred in this case, various operational hazards attributable to the participating undertakings can therefore play a part. As, in accordance with § 2, para. 1 of AEG, both the rail infrastructure undertaking and the rail transport undertaking as such are already "railways", under the liability laws, each of the undertakings can be assigned its own group of hazards arising from the operation of a railway, which, if the hazard occurred, would justify a claim under absolute liability. This is confirmed by § 13, para. 1, 2nd sentence of the old version of HPflG (equivalent to § 13, para. 2 of the new version of HPflG). According to this, if the loss or damage has been caused to one of the undertakings liable to pay compensation, the duty to pay compensation which concerns another of them depends upon the circumstances, particularly upon the extent to which the loss or damage was predominantly caused by one or other of them.

The assumption that the infrastructure undertaking is liable for the "operation of a railway" because it can be assigned a group of hazards relevant in this respect is not countered by the fact that purely providing the infrastructure as such does not constitute operation of the railway and is not therefore an independent source of risk relevant to absolute liability (cf. for instance Reichsgericht, EE 17, 244; Filthaut, HPflG, op. cit., marginal 76 et seq., with further evidence). Procedures which are not directly connected with driving a train may also form part of the operation of the railway (cf. for instance RGZ 46, 23 et seq. – switching a set of points -), if there is sufficient connection with the operation of a railway (cf. Filthaut, HPflG, op. cit., § 1 marginal 121 et seq., with further evidence). This is how it is in cases such as the case in point, where a hazard which is typical for railways occurred from out of the group of risks assigned to the infrastructure undertaking during a rail transport operation.

cc) Such liability of the participating railway undertakings between themselves also fulfils the purpose of the absolute liability set out in § 1, para. 1 of HPflG.

(1) The appeal argument that an injured party within the meaning of § 1 of HPflG can only be a non-participating third party which could not avoid the particular risk of the hazard connected with rail operations (cf. Filthaut, *Versicherungsrecht* 2001, 1348, 1352) is unconvincing. The court of appeal

rightly points out that this is contrary to the fact that passengers who expose themselves "voluntarily" to hazards of the railway are undoubtedly entitled to make a claim under absolute liability (cf. also Tavakoli, op. cit., p. 241 et seq.; Tschersich, op. cit.). Similarly, in other absolute liability offences, the claimant may be the person who has consciously exposed himself to the source of risk. Under road transport law too, one vehicle holder can request compensation under absolute liability from the holder of another vehicle involved in an accident. The same applies to § 33 of the *Luftverkehrsgesetz* - LuftVG (Aviation Act) in the event of several aircraft colliding in mid-air, i.e. between participants in air transport (court ruling of 23 October 1990 – VI ZR 329/89 – *Versicherungsrecht* 1991, 341; Geigel/ Schönwerth, op. cit., Chap. 29 marginal 21 to § 33 of LuftVG; Tschersich, *Versicherungsrecht* 2003, 962, 965; Tavakoli, op. cit., p. 242; cf. also with regard to liability of the keeper of an animal the court ruling of 12 January 1982 – VI ZR 188/80 – *Versicherungsrecht* 1982, 366, 367 with further evidence.; 9 June 1992 – VI ZR 49/91 – *Versicherungsrecht* 1992, 1145, 1146 et seq. and from 22 December 1992 – VI ZR 53/92 – *Versicherungsrecht* 1993, 369). The liability of rail transport undertakings between themselves, for instance if two trains collide, should be affirmed (cf. Filthaut, *Versicherungsrecht* 2003, 1512, 1513).

(2) Neither is it possible to agree with the view that a rail transport undertaking ceases to be covered by the area of protection offered by § 1 of HPflG because it contributed to creating the danger which arises at the time of a rail accident, together with the rail infrastructure undertaking (cf. Filthaut, HPflG, op. cit., marginal 146; the same author in *Versicherungsrecht* 2001, 1348, 1352 and in *Versicherungsrecht* 2003, 1512, 1513).

(2.1) Absolute liability for dangerous installations as prescribed by, *inter alia*, § 1 of HPflG, is based on the idea that the person who, to further his own aims, lawfully creates dangers which others participating in transport cannot reasonably avoid is also responsible, in the absence of any evidence of fault, for loss or damage arising as a result of the dangerous operation – even if due care and attention is taken – unless exceptional circumstances partly defined by the law (e.g. *force majeure*) can be proven (cf. for instance the court decisions in BGHZ 105, 65, 66; 115, 84, 86; 117, 337, 340 et seq., all relating to § 7 of the *Straßenverkehrsgesetz* – StVG (Road Transport Act); Bundesgerichtshof ruling of 10 May 1976 – III ZR 150/73 – op. cit., both with further evidence; on § 1 of RHG already RGZ 1, 247, 251; cf. also court ruling of 13 November 1973 – VI ZR 152/72 – *Versicherungsrecht* 1974, 356, 357 on § 833 of the *Bürgerliches Gesetzbuch* – BGB (German Civil Code); cf. also the official justification for the *Gesetz zur Änderung schadenersatzrechtlicher Vorschriften* (Act on amending the legal provisions concerning compensation) of 16 August 1977, BGBl. I, 1577, in BT-Drucks. 8/108, p. 6). A person who creates the danger in his own interest must be responsible in respect of third parties who suffer loss or damage as a result. Absolute liability is virtually the price to be paid so that the person causing the danger may expose traffic to it (cf. court ruling BGHZ 115, 84, 86).

If several "railways" create different specific hazards which transpire when an accident occurs, the purpose of this absolute liability is not contrary to a mutual obligation to assume liabilities on the part of the participating undertakings. Each

undertaking is solely responsible for the risks incumbent upon it in its risk area. If a risk resulting from its area comes to pass, the undertaking responsible exercises its responsibility in respect of the other undertaking which has suffered the loss or damage as if the latter were an external third party not participating in the operation of the railway. The risk of loss or damage occurring particularly concerns the undertakings involved, because of the frequency of contact between them. As a result of the separation of their areas of competence, they do not routinely have the legal and actual possibility of influencing the source of the risk, so that in circumstances such as those in this case, they find themselves in a similar position to that of an uninvolved third party.

(2.2) It is not possible successfully to counter the fact that the claimant submitting a claim on the basis of absolute liability cannot be the one that contributed to the risk. This principle is certainly applicable, and it has already been taken into account in the case law on several occasions (cf. Bundesgerichtshof ruling of 10 May 1976 – III ZR 150/73 – *Neue Juristische Wochenzeitschrift* – NJW (New Legal Weekly Journal) 1976, 1686, 1687 on § 22 of the *Wasserhaushaltsgesetz* – WHG (Water Supply Act); Oberlandesgericht Cologne, *Versicherungsrecht* 2000, 861 on § 833 of the German Civil Code; for evidence from the literature, see Filthaut, HPflG, op. cit., § 1 marginal 147). It has also had an impact on § 8 No. 2 of the Road Transport Act as the result of a general legal idea (cf. court ruling of 23 October 1990 – VI ZR 329/89 – *Versicherungsrecht* 1991, 341 et. seq.; also: Geigel/Kunschert, op. cit., Chap. 25 marginal 284; Hentschel, Road Transport Law, 37th edition, § 17 of the Road Transport Act, marginal 3; Wussow/Baur, op. cit., Chap. 17 marginal 95; Römer, *Zeitschrift für Schadensrecht* – ZfS (Journal for the Law on Damages) 2002, 313, 327 with further evidence).

However, the principle referred to does not apply in this case. Here, each different operating undertaking is attributed, by the separation of the areas of operation, its own area of risk for which each is also responsible in relation to the operating undertakings among themselves. If loss or damage is caused to an external third party, reference can certainly be made routinely to the jointly created danger, and joint and several liability of several operating undertakings involved can thus be confirmed in respect of a third party. For liability of the operating undertakings between themselves, the risks resulting from railway operations which transpire in the event of an accident retain their own importance. In so far as liability of the operating undertakings between themselves is concerned, the undertaking which has suffered damage has not, in cases such as this one, jointly created the risk together with the undertaking which has caused the damage which occurred in the accident. The damage only resulted from the fact that the claimant's locomotive hit a boulder on the defendant's railway line. Bearing in mind the separation of the areas of responsibility and risk, the blocked route can only be attributed to the defendant's area of risk. In contrast, operation itself of the train, the operating risk of which the plaintiff has calculated as one third of the damages, comes within the plaintiff's area of risk.

4. The Court of Appeal correctly refused exemption from liability on the grounds of *force majeure*. According to case law established by the Supreme Court, *force majeure* within the meaning of § 1, para. 2, 1st sentence of HPflG is an event which is "external to operations, arising externally as a result of natural forces or caused

by the action of third parties, which is unforeseeable according to human knowledge and experience, which cannot be avoided by acceptable economic means, even with the care that could reasonably be expected and which the operating undertaking does not have to accept because of its frequency" (court rulings of 15 November 1966 – VI ZR 280/64 – *Versicherungsrecht* 1967, 138, 139; 15 March 1988 – VI ZR 115/87 – 1988, 910; BGHZ 7, 338, 339; RGZ 171, 104, 105 et seq. with further evidence and Reichsgericht *Juristische Wochenzeitschrift* (Legal Weekly Journal) 1918, 176). The Court of Appeal noted from the appeal, without objection, that it is neither extraordinary nor inevitable that rocks should become detached from rock faces as a result of the weather and the penetration of tree roots, and thus fall onto the line.

5. The Court of Appeal's arguments concerning the plaintiff's share of joint liability of one third and concerning the amount of the claim and the amount which is the subject of the ruling are accepted by the appeal and are uncontested.

III. The decision concerning costs is based on § 97, para. 1 of the *Zivilprozessordnung* – ZPO (Code of Civil Procedure).

(Original text under www.bundesgerichtshof.de; published in: *Transportrecht*, Hamburg, volume 6/2004, pp. 256 – 259).
(Translation)

Oberlandesgericht Nuremberg

Ruling of 23 December 2003[1]

The infrastructure manager in accordance with § 2 of the *Allgemeines Eisenbahngesetz* – AEG (German General Railways Act) is not an operating undertaking in the sense of § 1 of the *Haftpflichtgesetz* – HPflG (German Liability Act).[2]

Grounds for the ruling (in accordance with § 540 of the *Zivilprozessordnung* – ZPO (Code of Civil Procedure)):

The plaintiff is a rail transport undertaking operating locomotives on the Cham/Kothmaißling railway line, which is provided by the defendant as a so-called infrastructure manager. On this line on 30 June 2001 at about 23.11, a locomotive belonging to the plaintiff collided with a tree lying on the track. The tree had been dislodged as a result of a gust of wind during a storm and had come to rest on the track. The plaintiff's locomotive suffered material damage of around 10,000 €. The plaintiff is claiming around 7,000 € from the defendant under § 1 of HPflG. In the first instance, the Landgericht (≈ regional court) took the legal standpoint that both the plaintiff and the defendant are operating undertakings within the meaning of § 1 of HPflG. However, contrary to the Oberlandesgericht Stuttgart (ruling of 12 February 2003, ref. No.: 4 U 180/02, *Versicherungsrecht* (Insurance Law) 2003, 648 et seq.), the Landgericht Regensburg was nevertheless of the view that liability in accordance with § 1 of HPflG did not exist, because this duty of liability was only valid in respect of third parties, and not between two operating undertakings.

The plaintiff lodged an appeal against this decision, as in its view, § 1 of HPflG also applied in respect of the two parties. The plaintiff made an application as follows: the ruling of the Landgericht Regensburg of 16 July 2003, court ref. No. 6 O 804/03 is amended in accordance with the plaintiff's appeal. The defendant is ordered to pay the plaintiff 7051.87 € with 6% interest to run from 22 January 2003.

The defendant applies for the appeal to be refused.

I. Firstly, the following clarification is called for:

1. Application of § 1 of HPflG cannot be excluded with reference to § 1, para. 2 of HPflG, i.e. in an essentially unproblematic manner, because in this case, the damage did not occur as a result of *force majeure*. In the case law (for verification, see Filthaut, HPflG, 6th edition, notes on § 1, 158 et seq.), "*force majeure*" is understood to cover only very exceptional occurrences, even in respect of natural phenomena. This does not include a storm, even if accompanied by gusts of wind. Railway lines are generally in the open air and also run through wooded areas. They are exposed to wind and weather. Events such as a storm are intrinsic to the operation of a railway. In this

[1] 3 U 2666/03; first instance: Landgericht Regensburg, ruling of 16 July 2003 – 6 O 804/03

[2] Contrary to Oberlandesgericht Stuttgart ruling of 12 February 2003, 4 U 180/02 in *Versicherungsrecht* (Insurance Law) 2003, p. 648 et seq.

specific case, the scale of the occurrence was not beyond the norm, nor was it wholly unusual.

2. In addition, the parties rightly agree that liability on the part of the defendant owing to breach of the obligation to ensure safety in transport is not under consideration. The tree's lying on the track cannot be qualified as *force majeure*, but the defendant can certainly not be accused of fault in this regard as the tree was only lying on the track for half an hour.

II. Liability on the part of the defendant for the damage that occurred in the matter in dispute here, in accordance with § 1 of HPflG, i.e. by virtue purely of absolute liability, must be repudiated, because the defendant cannot be qualified as an operating undertaking in the sense of § 1 of HPflG.

The Senate (divisional court) is aware that this view is contrary to the opinion that prevails at present in the literature (for evidence on the status of opinion, see Tschersich, *Versicherungsrecht* 2003, 962 et seq. and Filthaus, *Versicherungsrecht* 2003, 1512 et seq.). The divisional court's differing opinion is based on the following considerations.

1. Even before the HPflG, there was the *Reichshaftpflichtgesetz* (State Liability Act) dating from 1871, with its absolute liability, which was even somewhat more strict. The background to this strict liability, i.e. liability without fault, was the view that rail transport constitutes something which is fundamentally dangerous. Large, and also difficult-to-brake masses are moved at considerable speeds. On top of this, these movements are rail-bound. In the legislator's view, this huge potential for danger already justified absolute liability over 130 years ago, and still does so in the opinion of modern legislators.

When these Acts were created, railway operations were not separated into two parts as they are now, i.e. the so-called "dualistic railways concept". In consequence also of European coalescence and of the EC's objectives – namely that the rail networks across Europe should be opened to competition – segmentation of formerly uniform rail operations occurred (first the Reichsbahn, then the Bundesbahn and then "Bahn Ltd."): the so-called rail transport undertaking and rail infrastructure undertaking came into being (see § 1 and § 2 of the 1993 *Allgemeines Eisenbahngesetz*, *Bundesgesetzblatt* – BGBl. (Federal Law Journal) I, 2396 et seq.). This segmentation has also resulted in the fact that today, on the part of the plaintiff, rail operations company X as the actual rail transport undertaking, and on the part of the defendant, X Ltd. as the rail infrastructure undertaking are in dispute.

Therefore, an Act has to be applied under which this separation was entirely foreign. This results in the difficulty of having to work with an Act which contains a definition of an operating undertaking dating from times past, which no longer exists in this form. The divisional court is therefore of the opinion that the concept of an undertaking in the sense of § 1 of HPflG is not identical to that used in the sense of § 3, para. 1, No. 2 of AEG, i.e. that of the concept of a rail infrastructure undertaking. The starting point for this strict liability, as already mentioned above, was the particularly dangerous nature associated with actual train operations. This rules out the subsumption of the infrastructure undertaking into the concept of undertaking within the meaning of § 1 of HPflG.

2. Here, the divisional court must of course deal with the other party's argument that the fact of being bound to the rails is also part of the hazard potential which led to the justification of absolute liability: since the infrastructure undertaking can in fact have a considerable influence on the safety of operations attendant on the safety of his railway lines, the de facto possibility of controlling the infrastructure also leads the infrastructure undertaking to being qualified as an operating undertaking. This is evidently how the Oberlandesgericht Stuttgart (op. cit.) argues with reference to the dissertation by Tavakoli it quotes. However, this can be countered as follows:

Without actual operations, there is no hazard potential. The hazard potential arises from the condition of the rails. However, with the general obligation to ensure safety in transport, it is then sufficient to argue that it is not necessary to have recourse to absolute liability.

In line with this interpretation of the concept of an undertaking, an external third party is also sufficiently protected: there is still an entity against which he can lodge a claim on the basis of § 1 of HPflG, i.e. the rail transport undertaking

itself. If there is a breach of the obligation to ensure safety in transport in relation to the infrastructure, he can also lodge claims against the infrastructure undertaking.

It is also worth noting that according to an absolutely safeguarded case law, no absolute liability is attached to the provision of the infrastructure as such. Nobody would consider, for example, that when a cyclist or pedestrian falls over – however this might happen - in the "infrastructure area", there should be recourse to HPflG. In such cases, all that is assessed is whether there has been a breach of the obligation to ensure safety in transport (recently, in this respect, cf. e.g. Oberlandesgericht Cologne, ruling of 10 December 1992 – ref. No. 19 U 81/93, Rechtsprechung der Oberlandesgerichte 1994, 34).

3. A comparison with the rules governing liability in road transport should also be drawn on when interpreting the concept of an operating undertaking in the sense of § 1 of HPflG: in road transport, absolute liability is linked solely to the actual operation of motorised vehicles. Here too, the obligation to pay compensation incumbent upon the "infrastructure undertaking", i.e. usually the body responsible for construction, only takes effect if, as a result of culpable negligence of the obligation to ensure safety in transport, the hazard potential arising from actual traffic on the road is further increased by the condition of the infrastructure.

   In the divisional court's opinion, there is now reason to apply the evaluation which was made in an Act in which the transport route and traffic operations themselves had always been separate (e.g. the *Straßenverkehrsgesetz* (Road Transport Act)) to the interpretation of HPflG, with a fundamentally altered and therefore comparable structure.

4. The reference by the plaintiff's counsel to the "Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic - CUI, Appendix E to the Convention" (BGBl. II of 2 September 2002, p. 2264) does not result in a different conclusion:

   It can be inferred from the totality of the Uniform Rules, which now exist as Appendix E to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Modification Protocol of 3 June 1999, that here, Europe-wide types of contract for all the combinations of circumstances possible in international rail transport should be set up. Consequently, as has happened in Appendix E (CUI), the contractual relationship between the so-called manager, i.e. the person providing the railway infrastructure in the form of railway lines, and the carrier, who carries goods and persons on these railway lines (see Art. 3 of CUI) should be regulated. It is entirely correct that Article 8 § 1 of CUI prescribes evidently wide-ranging liability irrespective of fault, including for damage of the type caused in this case. However, in contrast to HPflG, this is carried out in the context of contractual relationships, not on the basis of an obligation laid down in the law. However, because of the fundamental difference, it is not permissible to assimilate by analogy absolute liability irrespective of fault within contractual relationships with statutory absolute liability. In connection with this, it is also significant that the plaintiff's counsel herself refers in item 4 of her written submission of 12 December 2003 to an "agreed" and therefore contractual "right of use".

   In addition, the parties are also free to establish extended liability in the framework of their freedom of contract, precisely for cases such as this, although this option has obviously not been taken up. However, it is not apparent that there is an obvious loophole in the regulations which would call for interpretation by analogy.

5. The amended § 1 of the new version of the *Verordnung über die Haftpflichtversicherung von Eisenbahnen* (Regulations on Railway Liability Insurance) of 25 August 1998 (BGBl. I, 2431), entitled *Versicherungspflicht* (Obligation to Insure), as quoted by the plaintiff's counsel, supports the divisional court's view. In contrast to the current version of the Regulations, the original version submitted by the plaintiff's counsel (see Regulations of 21 December 1995, BGBl. I, 2101), contained an obligation to take out insurance only in respect of claims under HPflG. As stated by Filthaut in his explanatory note on the new version of the Regulations (see *Neue Zeitschrift für Verkehrsrecht* (New Journal of Transport Law) 1999, 71 et seq.), this version of the Regulations was silent in relation to the infrastructure undertaking. So these Regulations only become meaningful if they can be related to liability existing outside the HPflG, so the new

version is another argument in favour of the view set out here.

6. Also, the reference to the alleged "vacuity" of § 13 of HPflG, which is repeatedly mentioned in the discussion, does not seem convincing. (Refer in this respect, to the examples provided by Filthaut in *Versicherungsrecht* 2003, 1512 right-hand column).

Overall, the appeal is therefore unfounded. It must be rejected with the consequences attendant upon costs arising from § 97 of ZPO.

The decision concerning provisional enforceability is based on § 708, No. 10 of ZPO.

In view of the differing legal opinion of the divisional court on the ruling of the Oberlandesgericht Stuttgart and in view of the fact that the questions of liability dealt with in this case will no doubt arise frequently in future, the appeal upon re-examination is to be allowed.

(Taken from: *Transportrecht*, Hamburg, volume 6/2004, pp. 259 – 261).
(Translation)

Book Reviews

Bidinger, Helmuth, *Personenbeförderungsrecht* (Law on the Carriage of Passengers), commentary on the Carriage of Passengers Act and other relevant provisions, continued by **Rita Bidinger**, with assistance from **Ralph Müller-Bidinger**, ISBN 3503008195, supplements 2/03 as at December 2003 and 1/04 as at April 2004, Erich Schmidt Verlag, Berlin-Bielefeld-Munich.

The book produced in 1961, the 2nd loose-leaf 1971 edition of which is continuously adapted to developments in the law, contains 3,850 pages in two folders. As previously, the commentary on the current version of the German Carriage of Passengers Act forms a major part of the work.

There is extensive analysis of case law, including numerous unpublished rulings. A comprehensive list of contents makes it possible to find the respective details quickly. A clear layout and the successive introduction of margin numbers ensure that the work is very user-friendly.

Supplements 2/03 and 1/04 take account of numerous changes in the branches of law dealing with road transport, technical inspections, professional training and the awarding of public contracts.

The explanations on the subject of "compensation payments" (§ 45a of the Carriage of Passengers Act) had to be adapted following the legislator's decision, in connection with the 2004 budget, to have a phased reduction of compensation payments for services of public utility interest. The user will find the adapted explanations in supplement 1/04.

Supplement 2/03 contains the texts of the bilateral administration agreements on international passenger transport, which Germany has concluded with Kazakhstan, Kyrgyzstan, Slovakia and Uzbekistan.

The commentary on passenger transport law, the development of which has been followed under this heading for many years, still fulfils its objective of "ensuring practice-oriented and sound commentary on the law on the carriage of passengers".
(Translation)

Frohnmayer, Albrecht / Mückenhausen, Peter (editors), *EG-Verkehrsrecht* (EC Transport Law), Verlag C.H. Beck, Munich, 2000, 4th supplement, December 2003

The base volume was published in loose-leaf format in 2000 (see review in Bulletin 1/2000). It includes commentaries on the European Community's legal statutes applicable to all or to individual transport modes concerning different aspects of transport policy (internal market, social policy, environmental protection, safety/security, infrastructure, EC external relations). The legal texts themselves have not been printed.

Following the 3rd supplement dated May 2002 (see Bulletin 3/2003, p. 61 et seq.), the almost 200 page long 4th supplement contains additional legal statutes from the civil aviation and maritime shipping sectors, as well as legal statutes concerning motor vehicles. Thus for example, Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports and Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security have been newly included.

Some of the existing contributions have had to be replaced or completely revised as a result of new legislation, including that concerning Regulation (EEC)

No. 1017/68 applying rules of competition to transport by rail, road and inland waterway.

Important decisions by the European institutions, among other things, were taken into account in updating the various parts of the commentary. This concerns particularly the decisions relating to the application of competition law to the rail sector. There is an in-depth analysis of the decisions, which are also explained and examined critically.

The recently adopted so-called second rail package, with rules on extending rail undertakings' access to the networks of other Member States, interoperability of rail systems, rail safety and the setting up of a European Railway Agency will undoubtedly present an opportunity for the commentary to be comprehensively adapted once again. It is planned to do this in the next supplement.

No specialist library should be without this excellent commentary on the EC's most important secondary laws affecting transport. It is aimed at State institutions dealing with the application of these laws and at transport industry undertakings and lawyers.
(Translation)

Kunz, Wolfgang (editor), *Eisenbahnrecht* (Railway Law). Systematic collection with explanations of the German, European and international requirements, loose-leaf work with supplements, Nomos Publishing, Baden-Baden, ISBN 3-7890-3536-X, 16th supplement, status as at July 2004.

The base volume appeared in 1994 (see Bulletin 1/1995). The ongoing provision of supplements means that in addition to the necessary updating, the texts and commentaries are made more complete step by step (see Bulletin 2/2004, p. 43). In addition to the publisher, who provides commentaries on numerous provisions himself, 20 other authors have also worked in partnership.

The collection includes three volumes, two of which are reserved for German law and the law applicable in the Federal Lander. The third volume covers the categories of "European law", "international law", "recommendations/requirements/tariffs" and "other law".

The very extensive 16th supplement (560 pages) principally updates the part on "German law" and in particular the section on "budget law/competition law/public procurement law", by means of both legal texts and new explanations.

Furthermore, the part on "European law" has been brought up to date by including additional or adapted normative texts (Commission directives, regulations, recommendations).

The part on "recommendations/requirements/tariffs" now contains the new version of Deutsche Bahn AG's conditions of carriage for passenger transport (as at 1.4.2004), including the conditions concerning various special or additional offers (specific groups of people, RailCard, season tickets, luggage); new additions are the conditions of carriage for passengers in metropolitan trains and the conditions for selling tickets via the internet.

In the space of ten years, "Railway Law" has developed into a comprehensive compendium of regulations concerning the many legal relationships in the rail sector and it has proved to be a practical aid to the work of railway specialists.
(Translation)

Publications on transport law and associated branches of law, and on technical developments in the rail sector

CIT Info, Berne, N° 3/2004, Analyse du règlement de l'UE sur la qualité en trafic ferroviaire des marchandises sous l'angle du droit du transport / Die EU-Verordnung über Qualität im Schienengüterverkehr aus dem Blickwinkel des Beförderungsrechts / A legal view of the EU regulation on quality requirements for freight traffic by rail (M. Killmeyer)

DVZ - Deutsche Verkehrszeitung, Hamburg, Nr. 109/2004, S. 13 – Toleranz für schwarzen Strich. Von skurril bis sinnvoll – in Münster boten RID und ADR reichlich Diskussionsstoff (C. Grimm)

Idem, Nr. 114/2004, Beilage, S. 13 – Die Rechtswahl ist entscheidend (S. Voss)

Journal pour le transport international, Bâle, n° 35-35/2004, p. 32 – Nouvelles normes RID (Wilf Seifert); p. 33 – Tout nouveau tout beau. Banque de données sur les matières dangereuses (Heins/Hof)

IMO News, The Magazine of the International Maritime Organization, London, issue 1/2004, p. 5 – Maritime claims liability limits increase after 1996 Protocol enters into force

Transidit, Recueil de jurisprudence et d'information en droit des transports (Publication trimestrielle de l'Institut du Droit International des Transports – IDIT), Rouen, N° 40/2004, p. 20/21 – Entrée en vigueur dans l'Union européenne de la Convention de Montréal de 1999

Transportrecht, Hamburg, Nr. 6/2004, S. 268-271 – Buchbesprechungen Filthaut, Werner: Haftpflichtgesetz, Verlag C.H. Beck, München, 6. Auflage, und Tavakoli, Anusch Alexander: Privatisierung und Haftung der Eisenbahn, Nomos Verlagsgesellschaft, Baden-Baden, 2001 (R. Freise)

Transportrecht, Hamburg, Nr. 7-8/2004, S. 273-308 – UNCITRAL's Attempt towards Global Unification of Transport Law. The CMI Draft Convention on the Carriage of Goods by Sea and its Impact on Multimodal Transport (R. Herber, G.J. van der Ziel, H. Honka, R. Asariotis, J. Schelin, B. Czerwenka, F. Berlingieri)

Idem, Nr. 9/2004, S. 333-340 – Rechtsprobleme im Zusammenhang mit der Verpackung in der CMR und im deutschen Handelsgesetzbuch (M. Zapp); S. 340-343 – Zur Frage der Hemmung der Verjährung im Transportrecht (K.H. Drews)

Zeitschrift für Verkehrsrecht, Wien, Nr. 9/2004, S. 276-284 – Die Eisenbahnsicherheit und ihre Vorschriften im Schienenverkehrsmarkt (W. Catharin)