



Intergovernmental Organisation  
for International Carriage  
by Rail

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Bulletin  
of International  
Carriage  
by Rail

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**4/2004**

112th Year • October - December

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**Annual subscription to the Bulletin : SFr. 48,-**  
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# 4/2004

112<sup>th</sup> year – October - December

## **Bulletin of International Carriage by Rail**

Quarterly publication of the Central Office  
for international Carriage by Rail, Berne

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### **Central Office Communications**

#### **Ratification of the 1999 Protocol**

##### **Bulgaria**

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), Bulgaria deposited its instrument of ratification of the 1999 Protocol with the Provisional Depositary<sup>1</sup> on 29 November 2004.

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). Bulgaria is the 23<sup>rd</sup> State to have ratified the 1999 Protocol.

<sup>1</sup> 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.

### **OTIF Organs**

#### **Administrative Committee**

##### **102<sup>nd</sup> session**

*Berne, 18/19 November 2004*

The Administrative Committee held its 102<sup>nd</sup> session in Berne on 18 and 19 November 2004 under the chairmanship of Mr. Michel Aymeric (France).

The Committee approved the 2005 work programme.

In the field of finances, the Committee noted in particular the general financial situation of OTIF and the current situation with regard to investments. It approved the draft 2005 budget as proposed by the Central Office. The provisional rate per kilometre was set at SFr. 6.60.

With regard to personnel matters, the Committee, among other things, mandated the future Director General to submit new proposals to the Committee on the basis of overall considerations concerning the personnel policy (see Bulletin 4/2003, p. 67).

The Administrative Committee dealt with matters in connection with preparation of the 7<sup>th</sup> General Assembly, such as the venue, date, duration and

chairmanship of the General Assembly, the report on the activities of the Administrative Committee for the current five year period, the composition of the Administrative Committee for the next period, fixing the maximum amount that the expenditure may reach in each budgetary period for the period 2006 to 2011, the possible assumption of tasks relating to the Rail Protocol (see Bulletin 2/2003, p. 34 et seq. and Bulletin 4/2003, p. 67) and the debts of the former Yugoslavia.

The 103<sup>rd</sup> session of the Administrative Committee will be held on 12 and 13 May 2005.  
(Translation)

### **RID Committee of Experts Working Group on standardized risk analysis**

*Bonn, 21/22 October 2004*

see “Dangerous Goods”

### **RID Committee of Experts**

*Meiningen, 15-18 November 2004*

see “Dangerous Goods”

### **Working group “Technical Approval”**

see “Technology”

## **Dangerous Goods**

### **UIC “Carriage of Dangerous Goods” Group of Experts**

*Malmö, 13/14 October 2004*

At this meeting, the group of experts was informed about the results of the following international meetings:

- Meeting of the UN Sub-Committee of Experts (Geneva, 5 - 14 July 2004; see Bulletin 3/2004, p. 50-51),
- RID/ADR/ADN Joint Meeting (Geneva, 13 – 17 September 2004; see Bulletin 3/2004, p. 51),

- Meeting of the working group on tank and vehicle technology (Duisburg, 24/25 June 2004; see Bulletin 3/2004, p. 48-50).

In addition, a representative of the OTIF Secretariat (Central Office) informed the group of experts about the proposals submitted so far for the 41<sup>st</sup> session of the RID Committee of Experts (Meiningen, 15 – 17 November 2004; see p. 80).

The representative of the OTIF Secretariat referred in particular to a document setting out the difficulties which will arise, when the new COTIF enters into force, in respect of transport with those States which are not Members of the European Union or the European Economic Area, which have not ratified the new COTIF and which have not informed the Secretariat that they will apply the new COTIF de facto. It was noted that no problems are expected for the meeting participants, or rather for their States, as they had either signed COTIF or they apply the RID Framework Directive 96/49, but it was suggested that UIC or CIT should send a letter referring to this problem to the Members and railways concerned in order that they can lobby their Governments if need be.

Lastly, the group of experts discussed questions of interpretation of RID.

At the joint meeting of the UIC group of experts on the transport of dangerous goods and the UIC synthesis group on dangerous goods, held on 14 October 2004, COLPOFER guidelines (COLPOFER - **C**ollaboration des services de **p**olice **f**erroviaire et de sécurité – Co-operation between the railway police and security services) on Chapter 1.10 (Security Provisions) were introduced and discussed.

UIC's financial participation in the work of the RID Committee of Experts working group on standardized risk analysis was also discussed.

As the previous UIC representative at international dangerous goods meetings, Mr. Wieger Visser, will be retiring at the end of May 2005, there has already been discussion at the last meetings of the UIC group of experts and the UIC synthesis group concerning his successor. At this joint meeting, Mr. Jean-Georges Heintz (SNCF) was unanimously elected as Mr. Visser's successor.

In conclusion, various models for future co-operation between the two UIC groups were put forward and discussed. A decision was postponed to a later meeting.

The next meeting will be held on 23 and 24 February 2005 in the Czech Republic.  
(Translation)

### **RID Committee of Experts working group on standardized risk analysis**

*Bonn, 21/22 October 2004*

8 Governments and 2 non-governmental international organisations and the European Commission took part in the ongoing work at the 2<sup>nd</sup> meeting. The considerably low attendance as compared with the 1<sup>st</sup> meeting (see Bulletin 2/2004, p. 30) was surprising, to the extent that at its last session, the RID/ADR Joint Meeting had said it was in favour of setting up a joint informal working group between the transport modes (12 for, 1 against and 11 abstentions) and as the ADR delegates had been invited to take part in this 2<sup>nd</sup> meeting. However, setting up such a group will be subject to agreement by WP.15.

It will be remembered that this working group was set up in the context of restrictions on transport imposed by the competent authorities (Chapter 1.9), and for these restrictions, proof must be provided of the need for measures which in future, should not be taken except on the basis of a risk analysis.

The working group noted that at the end of October 2004, the European Commission would invite bids for a research project which could cover the working group's proposed project. A new feature was that more than 50% of the total cost could be requested. However, the focus of the tender would be on the problem of "security". The amount of finance available would be 3.5 million Euro. Only a complete package would be awarded. The European Commission would no longer co-ordinate the research; this would be the task of the project leader. Integrating the safety management of the railways could be considered as an important component of a project proposal.

It was decided that those States which already carried out risk analysis or which had risk analysis carried out (CH, F, NL, UK) should provide papers describing the procedures for preparing risk analysis in their countries (guidelines or similar). These documents would be made available on the OTIF website. The representatives of those States which had submitted documents will be invited to an initial editorial meeting to produce guidelines. This meeting will be held at the beginning of February 2005.

The full report of this meeting is also on the OTIF website under [www.otif.org/html/e/rid\\_CExp\\_RID\\_gt\\_analyse\\_risque\\_rapport2004.php](http://www.otif.org/html/e/rid_CExp_RID_gt_analyse_risque_rapport2004.php). The next meeting of the working group will be held in Bonn on 3 and 4 May 2005.  
(Translation)

### **Working Party on the Transport of Dangerous Goods (WP.15, UN/ECE)**

*Geneva, 25-28 October 2004*

26 Member States of ADR, 14 governmental or non-governmental international organisations and the European Commission took part in the work of this 77<sup>th</sup> session chaired by Mr. Franco (Portugal).

Most of the subjects dealt with in this Working Party are not limited solely to road transport.

#### **Interpretation of ADR**

##### **Carriage in a transport chain including maritime or air carriage**

It was recalled that section 1.1.4.2 had initially been intended to facilitate multimodal transport by permitting dangerous goods to be carried in a transport chain including maritime or air carriage under packing, marking, labelling and placarding conditions applicable in accordance with the IMDG Code or the ICAO Technical Instructions when these differed from RID and ADR. The conditions of maritime or air carriage, aligned with those of the United Nations Model Regulations, were regarded as more stringent, and this exception did not affect the level of safety, which was considered to be at least equivalent.

However, existing differences between modal regulations, particularly in air transport, gave rise to problems of interpretation in practice, particularly in matters of classification and when the conditions of maritime or air carriage did not meet RID and ADR safety requirements.

Several delegations would have preferred to discuss the Secretariat's document in the context of the RID/ADR/ADN Joint Meeting. The document had, however, already been submitted to the Joint Meeting in September 2004, but owing to lack of time it had not been possible to discuss it. On the other hand, the problems raised essentially concerned the interface

between road transport and maritime or air transport in ports and airports. The Working Party therefore decided to examine the proposals concerning in particular documentation, additional marking, exempted limited quantities, exempted quantities and consumer goods (ICAO) and concerning marine pollutants. The decisions or lack of them will be brought to the attention of the RID Committee of Experts to follow up as necessary.

### **Security in the transport of dangerous goods**

The Working Party considered that the intention of the provisions of 1.10.3.3 was that it should not be possible for either the vehicle or the load to be stolen, and that both should be secured. The text of 1.10.3.3 was corrected to avoid any ambiguity. The RID Committee of Experts should also endorse this decision.

### **Enforcement of ADR**

The representative of Finland said that the problems she had raised some years previously concerning the interpretation and enforcement of ADR on the territory of the Russian Federation had still not been resolved. Special permits were still demanded for certain substances and vehicle certificates of approval were demanded for vehicles which, according to ADR, did not require them.

It was pointed out that the same problems arose on the territories of the Ukraine, Belarus and Lithuania.

The Working Party recalled that certificates or special permits of this nature were not required under ADR and that such requirements by certain States were not in keeping with their status as Contracting Parties and the ensuing commitment to implement the provisions of ADR on their territories. Such practices constituted major barriers to the development of international trade and transport. They incurred administrative formalities which were not justified from the safety point of view, caused logistical problems for carriers and considerably increased the cost of international transport since the issue of the permits or certificates in question carried a fee, which was tantamount to an arbitrary tax on the transport of dangerous goods.

The Working Party considered that it was particularly important for international transport to settle these misunderstandings which unnecessarily penalized all the carriers involved.

The representative of the Russian Federation said that major administrative reforms were in progress in his

country and that every effort would be made to resolve these problems as rapidly as possible.

### **Carriage for delivery/sale**

(See Bulletin 2/2004, p. 31-32)

A drafting group met to prepare a text according to which, when the consignee could not be identified at the start of the transport operation, as, for example, in the case of local distribution, the name and address of the carrier could be given in place of those of the consignee.

Some delegations were not completely satisfied with this proposal in view of the legal implications which they would like to review. In this case, the carrier would be regarded as the consignee and would take on the consignee's obligations for which Chapter 1.4 provided.

According to the International Road Transport Union (IRU), when a contract of carriage existed, there could be contradictions with the Convention on the Contract for the International Carriage of Goods by Road (CMR). According to the definitions of ADR, when no contract of carriage exists, the consignee is the undertaking which takes charge of the goods on arrival.

Some delegations also considered that the question should be settled as a whole. Account should be taken not only of deliveries of gas cylinders but also of petroleum products, and of supplies of fertilizers, pesticides, etc. to farmers.

Although the proposal was supported by several delegations, the majority of the Working Party wished to reflect further on these issues and it was decided to come back to them at the next session.

### **Multilateral special agreements**

It was pointed out that in the case of carriage according to multilateral or bilateral special agreements, the agreements themselves established the conditions of carriage, including the particulars to be entered in the transport document. In accordance with 1.4.2.1.1 (b), it was the consignor's responsibility to furnish the carrier with the necessary information for the transport operation. The carrier himself had to check for which countries the agreement was valid.

For the inspections, the monitoring authorities must be informed about the applicable requirements of ADR, including the special agreements signed by the competent authorities of their country. In addition, the text of the agreements and their status were available on the Secretariat's website, which permitted rapid

checking. It was therefore decided not to require that copies of special agreements be carried on board vehicles.

### **Safety in tunnels**

(See Bulletin 2/2004, p. 32)

The texts received were approved, but the representative of Switzerland entered a reservation on their adoption and the representative of the Netherlands declared that his Government had not yet determined its position.

### **Programme of work**

#### **Standardized risk analysis**

The Working Party took note of the discussion of the Joint Meeting at its September 2004 session in which the RID Committee of Experts had expressed the wish to work on standardized risk analysis together with the Working Party, in the context of the Joint Meeting.

It was recalled that the Joint Meeting's mandate was for the time being to bring into line the technical requirements common to RID, ADR and ADN. The work of the RID Committee of Experts was linked to paragraph 1.9.3 of RID, which did not exist in ADR and which dealt with transport restrictions - an issue that was political rather than technical. Several delegations considered that it was not appropriate to include risk analysis in the programme of work.

It was also noted that the work undertaken by the RID Committee of Experts appeared to depend on major financial contributions for risk analysis research, and that for the time being the resources were not available.

The Chairman said that if the RID Committee of Experts wished the work to be carried out within the Joint Meeting, OTIF should apply officially to UN/ECE, explaining the objectives, the presumed importance of the work in the context of ADR, the arrangements for work, the calendar and the results expected.

With regard to the alignment of Chapter 1.9 of ADR with that of RID, the Chairman submitted a text in an informal document in reply to the suggestion by OCTI, as he had announced at the last session of the Joint Meeting.

However, the Working Party considered that although an alignment could be considered in terms of presentation, Chapter 1.9 of RID contained a number of

fundamental differences in paragraphs 1.9.1 and 1.9.2, and an additional paragraph 1.9.5, which could not be included in ADR without a duly justified official proposal. It was therefore decided not to take action on the alignment exercise at the current session.

#### **Strategic objectives of the Inland Transport Committee**

The Working Party took note of the Committee's strategic objectives, in particular the request to identify the issues that could be added to its programme of work.

The Working Party stressed that the priority of its work had always been, and continued to be, to ensure the safety of the carriage of dangerous goods. In considering questions of safety, the Working Party had always found itself involved in a subsidiary discussion on security issues, since security concerns sometimes went along with safety concerns and sometimes opposed them. The Working Party's work also had a direct effect on transport facilitation on account of the standardization of the rules concerning the three modes for inland transport of dangerous goods, in a geographical context which already went beyond the UN/ECE region, and in keeping with the rules relating to air and sea transport.

The Working Party was also of the opinion that several of the subjects mentioned were already topical issues in its programme of work:

- (a) Development of transport links between Europe and Asia: ADR facilitated the international transport of dangerous goods and several Central Asian countries (Kazakhstan, Azerbaijan) or countries which had common borders with Asian countries (Russian Federation) were already Contracting Parties. In addition, the Asian countries of the Association of South-East Asian Nations (ASEAN) had already expressed an interest in ADR or had already included its provisions in their national legislation (e.g. Thailand);
- (b) Use of telematics and smart transport systems: this should make it possible to improve both safety (vehicle safety, detection of leaks) and security (follow-up of vehicles and containers) in the future;
- (c) European integration: since the European Union had decided to implement Annexes A and B of ADR in domestic traffic and since ADR governed international transport with neighbouring countries, work on ADR was important for

European integration and should be reinforced with a view to the harmonization of local conditions of carriage;

- (d) Transport security: provisions had already been included in Chapter 1.10 of ADR and would be updated as appropriate;
- (e) Globalization of the economy: ADR was regularly updated on the basis of the United Nations Model Regulations on the Transport of Dangerous Goods in order to bring it into line with the rules applicable to the different transport modes worldwide.

(Translation)

### **RID Committee of Experts**

41<sup>st</sup> Session

*Meiningen, 15 – 18 November 2004*

15 Member States and 3 non-governmental international organisations took part in the work of this session with Mr. H. Rein (Germany) as Chairman and Mr. W. Visser (UIC) as Vice-Chairman. This low level of attendance on the part of the States – only one more than required for the quorum – was a little disappointing in comparison with WP.15, which deals with road transport, where attendance was between 25 and 30 Member States. Should this lead us to conclude that Governments have only scant interest in rail transport, or do they perhaps consider that everything is already moving in the right direction? Nevertheless, the subjects dealt with were important, varied and current.

As the full report of this session will be available on OTIF's website under [www.otif.org/html/e/rid\\_CExp\\_RID\\_rapport2004.php](http://www.otif.org/html/e/rid_CExp_RID_rapport2004.php), along with all the documents, the following only sets out the Committee's main decisions.

#### **Tank and vehicle technology**

##### **Energy absorption devices**

As there was a lack of experience in practice with UIC leaflet 573, and even though it had confirmed that it was possible to proceed on a provisional basis according to the current status of the leaflet, the RID Committee of Experts considered that it was necessary to wait before referring to it in RID. This UIC leaflet will therefore remain on the agenda. In this context, the Committee

wished a competent representative of the European Railway Agency (ERA) to attend its sessions once the Agency was up and running.

##### **Derailment detectors**

In the absence in particular of alternative systems, the Committee of Experts took the following decision of principle:

"The RID Committee of Experts is convinced of the need for measures to prevent derailments in the transport of dangerous goods. It will get in touch with the other competent bodies dealing with the subject of derailment in order to develop the best suitable measures. In connection with this, RID should include a general description of the objective, the entry into force of which is planned for 2009, subject to the resolution of technical problems."

##### **Protective measures to prevent damage caused by the overriding of buffers**

The Committee of Experts adopted the principle of a device against the overriding of buffers. It accepted an increase in the wall thickness to 18 mm for certain very toxic gases and adopted a reference to EN standard 13094 and an additional measure concerning sandwich covers (specific energy absorption capacity of at least 22 kJ, or 6 mm thickness). With regard to protective shields, two measures relating to the arresting device and the width of the shield were adopted.

For the possible retrofitting of tank-containers for very dangerous substances, as for tank-wagons, the Committee of Experts also decided to deal with this subject in the working group on tank and vehicle technology under a special agenda item, in order not to restrict the discussion directly to certain measures.

##### **External/central solebars/self-supporting tank**

This subject will be left alone for the time being until new information is available.

##### **Telematics**

The Chairman pointed out that various solutions were already available on the market. However, the problem was that for commercial reasons, there would not be any which were restricted to dangerous goods. Thus transmission of data specific to dangerous goods could only be ensured in connection with other applications.



He proposed to continue pursuing the subject and to define the requirements from the perspective of dangerous goods in order to find a solution together with ERA. The subject would therefore remain on the agenda in order to report annually on progress.

#### **Tank-wagon handbook**

The representative of UIC pointed out that without support, he was not in a position to continue pursuing this subject. He was asked to present a rough structure of the handbook to the next meeting of the working group on tank and vehicle technology, in which specific tasks could be allocated.

#### **Safety in rail tunnels**

The only measure retained which has implications for RID was that concerning notification of the infrastructure manager by the carrier before transport takes place, in order to be able subsequently to inform the emergency services. It emerged from the discussion that

- in various States, there already existed an obligation on the part of the carrier to provide advance information to the infrastructure manager;
- in some States, the emergency services are not interested in being informed in advance of all the dangerous goods being carried;
- among other things, for reasons of confidentiality, it had to be established which data had to be transmitted (UN number, number of packages, mass?).

A proposal relating to the carrier's obligations and taking into account the wording of the TSIs (Technical Specifications for Interoperability) will be submitted to the next session.

#### **Future work of the working group on tank and vehicle technology**

The Chairman explained that the real task of the working group – to examine accidents – had virtually been concluded. However, he proposed that the working group be maintained in order to support the work of the RID Committee of Experts from a technical point of view. This standing working group could then meet subject to the tasks it was assigned. He would discuss with the Secretariat how this working group could best

be organized in order to be able to propose a new working method for the next RID Committee of Experts. The subjects which have still to be dealt with can be found in the full report.

#### **Working group on standardized risk analysis**

(See p. 77 of this Bulletin and the report of the WP.15 meeting, p. 77).

It emerged from the discussion that:

- All those delegations which had expressed a view had supported continuing the work, so the working group could hold its next meeting. As a first step, guidelines would be produced containing the main considerations on carrying out risk analysis and based on risk analysis which was already carried out in some States
- The secretariat work of the Association for Reactor and Plant Safety (GRS) was ensured for the first half of 2005 by a research project funded by the Federal Ministry of Transport, Construction and Housing (BMVBW)
- UIC had offered its assistance in completing the statistics on accidents in rail transport
- The following steps (scenarios, assessment) were more complex and could only be tackled with additional funding. The working group was therefore asked to investigate other opportunities for funding and to ensure co-operation with the EU (UIC and France have announced that they might be able to consider financial participation under certain conditions). The working group was also asked to submit draft guidelines to the next session of the RID Committee of Experts and to report on which further steps should be aimed at and how this work could be funded
- The Secretariat was mandated to inform the Joint Meeting and WP.15 of the progress of the work and the further steps planned.

#### **Other proposals**

##### **Corrigenda for the 2005 edition**

A range of documents containing corrections or adjustments was adopted. At the request of the representative of Austria, Annex 2 of the full report contains comments from the legal service of OTIF on

the question of the time at which corrigenda to RID enter into force.

### **Interpretation of RID/ADR**

(See the report of the WP.15 meeting on p. 77 of this Bulletin).

The Committee of Experts took a position on the questions concerning transport operations prior to or following carriage by air or sea (security). The Committee did not share all of WP.15's views, and these points were referred to the RID/ADR Joint Meeting.

### **Proposals for entry into force on 1 January 2007**

The Committee of Experts dealt with the following issues:

- Alignment with section 1.10.4 of ADR to avoid discriminating against the railways
- Additional specialized training for locomotive drivers
- Differentiation between restrictions on carriage and special operational provisions in Chapter 1.9
- Carriage of refrigerated liquefied gases in portable tanks
- Mutual recognition of experts for tank inspections
- Indication of a responsible person in the documentation for Class 6.2.

### **Entry into force of the new COTIF**

The Committee of Experts was informed of the difficulties which would arise when the new COTIF entered into force for traffic with those States which were not members of the European Union or the European Economic Area, had not yet ratified the new COTIF and had not declared to the Secretariat that they would apply the new Convention de facto.

In this context, the Committee also noted that the European Commission had already stated that in the Committee of Technical Experts on Appendices F and G of the new COTIF, it would exercise the right to vote for all the EU Member States provided the subject being dealt with came within the exclusive competence of the

European Union. In view of the uniform vote envisaged in the Committee of Technical Experts, the EU Member States would have a majority. The new Railway Agency would be developing technical approval provisions which would be submitted to the Committee of Technical Experts after approval within the European Commission.

The RID Committee of Experts mandated the Secretariat to notify in the form of a corrigendum the amendments necessary to RID in connection with the new COTIF after the entry into force of the new Convention. The Member States were requested to inform the Secretariat of any other adaptations that might be necessary.

The Secretariat's mandate specifically excluded the amendments to Chapter 7.7 (hand luggage and luggage). UIC was asked to prepare an initial incentive paper for developing provisions on this matter. Until then, the current text would be replaced by "(reserved)" after the new COTIF entered into force.

### **Aligning Annex 2 of SMGS with RID 2001**

The representative of Poland explained that OSZHD's work to align Annex 2 of SMGS with the structure of RID had been concluded. If no objections were lodged by the end of February, the new Annex 2 could enter into force on 1 July 2005 with a one year transitional period.  
(Translation)

## **Technology**

### **The OTIF Member States have decided to revise the concept of the COTIF 1999 Technical Approval System**

On 7/8 October 2004 an OTIF working group to prepare the implementation of the new COTIF 1999 Appendices F and G concerning the COTIF Technical Approval System met in Berne. Invitations were sent to all the OTIF Member States, the European Commission and other relevant organisations.

The representatives of the 15 Member States which participated, the European Commission, UIC and UIP unanimously adopted a proposal from the Secretariat to introduce a revised concept of the COTIF Technical Approval System. Since the system was adopted in Vilnius in 1999, a lot has changed in the surrounding

environment, making a revision indispensable. A subgroup was set up to prepare the changes necessary to COTIF Appendices F and G in order to implement this revised concept under the law. The volunteer members of the subgroup represent the OTIF Member States Germany, France, Greece, Lithuania, Switzerland, Slovakia and the United Kingdom, the European Commission, UIC and UIP.

The subgroup met in Bonn on 14/15 December 2004 at the invitation of Germany. At the meeting, the detailed changes proposed by the Secretariat were adopted in principle and legal texts are now being drafted in order that they can be adopted at the next subgroup meeting on 19/20 April 2005. Subsequently, separate discussions will be held with the EU Commission, with OTIF Member States outside the EU and with OSZhD, as the OTIF Member States present at the working group meeting in October stressed the importance of involving OSZhD. Finally, the outcome will be submitted to the working group, it is hoped before the summer holidays.

The proposed legal changes to the COTIF 1999 Appendices F and G are expected to be such that they can be formally adopted by the OTIF Revision Committee, possibly in a meeting in autumn 2005. Other decisions of principle agreed by the working group can be formally adopted by the Committee of Technical Experts once it has started its work after COTIF 1999 enters into force.

The revised concept is adapted to the present situation where the EU has implemented its interoperability and safety legislation through the Directives and TSIs (technical specifications). The revision will assure that the OTIF Member States which are also members of the EU will have before them a COTIF system which is fully compatible with the EU regulations.

However, other OTIF Member States may opt for a less ambitious level of specifications than the TSIs and this will be made possible by creating variations to the COTIF Approval System. Vehicle approvals at a higher level will be valid at lower levels, but not automatically vice versa. Within each level there will be mutual recognition of the approvals issued.

The EU level will form the COTIF basic level, which will be mandatory for the OTIF Member States which are also Member States of the EU; the other OTIF Member States will be assigned the basic level unless they make a reservation and choose a lower level. The COTIF basic level will use the adopted EU TSIs as its specifications.

## Other Activities

### Training Course

*Cairo, 22-26 November 2004*

In order to promote application of the uniform law in Arabic speaking States, OTIF fosters regular contact with the Arab Union of Railways (UACF) (see Bulletin 4/2003, p. 76 and 3/2004, p. 52). In addition, training courses are jointly organized. The last course intended for this linguistic area was held five years ago in Tunisia (see Bulletin 6/1999). Thanks to a contribution from Switzerland to cover the participants' subsistence costs, it was possible this time to hold a training course on the COTIF system of international railway law and related issues from 22 to 26 November 2004 in Cairo.

33 Participants from eight States (Morocco, Algeria, Tunisia, Egypt, Sudan, Jordan, Syria and Iraq) attended this course.

The main aim of the course was firstly to present the new COTIF, as amended by the 1999 Amendment Protocol (COTIF 1999), with its Appendices, to railway specialists from the Arabic speaking Member States of OTIF, before it enters into force, and secondly, for railway specialists from other States in the region which are not Member States of OTIF, to highlight COTIF and the advantages of a modern, flexibly designed uniform law.

The Secretariat of OTIF's own staff gave ten presentations relating to the main topic – COTIF 1999. The Secretariat also succeeded in securing speakers from the European Commission, the International Rail Transport Committee (CIT), the International Union of Railways (UIC) the International Union of Private Wagon Owners (UIP), the European Intermodal Association (EIA), the Union of European Railway Industries (UNIFE) and from two railway undertakings, SNCF International and RENFE.

The talk by the representative of the European Commission on the subject of "Rail reform in Europe:

the new regulatory framework" made it easier to understand developments in the rail sector which also underlie the new COTIF. The CIT contribution looked at implementation of the new COTIF at a practical level; it emerged from this that the focus of CIT's work in this respect was on standardizing the various contractual relationships. The subject of the quality of rail transport was addressed on several occasions.

A very interesting presentation by a representative of the host State gave all the participants an overview of the history and present state of the railway infrastructure in Egypt, the rolling stock, the impressive results of the ongoing renovation work and the investments that still have to be made. In his talk, the Secretary General of the Arab Union of Railways presented the Union's aims and activities.

Other informative presentations looked at the practical problems involved when using private wagons, intermodal transport in general, the significance of intermodal transport for the Mediterranean region and the Middle East and UIC's activities in the Middle East. Thanks to excellent presentation, the topics in the technical and economic areas were among the most absorbing in the programme ("The challenges of international traffic for railway operations", "Rolling stock maintenance in SNCF" and "Global trends in the railway manufacturing industry").

Comprehensive documentation in Arabic, containing all the presentations and additional background material, was available for all participants. This was a credit to UACF, which had also carried out the major part of the work in connection with organisational preparations.

The lively discussions throughout the entire course confirmed that the course met participants' requirements. It was thanks to the organizers from UACF and Egyptian National Railways that it was possible to hold the course in a pleasant atmosphere. In the margins of the course, useful contacts were established, which can now be developed further.

At present, there is undeniably very little international traffic in North Africa and the Middle East to which COTIF is already applied or might be applied in the near future. The international connections (linking the railway networks) would first have to be created and existing obstacles (closed borders) removed. Nevertheless, there is interest in COTIF on the part of specialists. There is the hope that the border crossings for international rail transport between Algeria and its neighbours will be reopened and that the gaps between the railway networks in North Africa will gradually be closed. UACF is committed to achieving this.

Iraq's attendance at the course leads one to hope that preparations are being made to accommodate international traffic again. The relevant expertise, as provided by this course, forms part of this.  
(Translation)

## OTIF – UNIDROIT

### Seminar

*Mexico City, 11/12 October 2004*

The Seminar entitled "The Cape Town Convention on International Interests in Mobile Equipment, its Aircraft Protocol and the future Rail Protocol: an opportunity for Governments and Industry" was organized jointly by UNIDROIT, the Mexican Government, OAS, the Centro Mexicano de Derecho Uniforme and OTIF. It was held at the Ex-Collegio de la Santa Cruz, the headquarters of the Centro Mexicano de Derecho Uniforme, and was very well attended. At the opening session, the Mexican Government was represented by the Mexican Foreign Minister, Dr. Luis Ernesto Derbez Bautista. The Seminar was chaired alternately by Dr. Maria del Refugio Gonzalez Dominguez, Titular de la Unidad de Coordinacion juridica y informacion documental, as the representative of the Ministry of Foreign Affairs, Prof. Herbert Kronke (UNIDROIT), Prof. Jorge Sanchez Cordero, Director of the Centro Mexicano de Derecho Uniforme, and Dr. Gerfried Mutz (OTIF).

After the opening session, the Secretary General of UNIDROIT, Prof. Kronke, gave an overview in the introductory section of the event of the aims and main features of the Cape Town Convention on International Interests in Mobile Equipment. Jeffrey Wool, the Secretary of the Aviation Working Group, presented the aims and main features of the Aircraft Protocol to the Convention and reported on the present, well advanced status of the work on setting up the International Register, the headquarters of which are in Ireland. In the meantime, the United States have already ratified the Aircraft Protocol.

Other presentations dealt with the principles of "asset based financing" from the point of view of lenders and borrowers, the significance of the Convention for Latin America and the Interamerican Model Regulations concerning secured transactions.

An important part of the Seminar was given over to the future Rail Protocol. The Chairman of the Rail Working Group, Mr. Howard Rosen, first gave an overview of the concept and the particular problems associated with this Protocol, such as the problem of public service and insolvency, the existence of regional systems and their assimilation into the International Register, the identification of rolling stock etc., and looked in detail at the solutions proposed by the Joint Meeting of Governmental Experts. A representative of the

manufacturers and a representative of the lenders then highlighted the practical interest in the future Rail Protocol.

The last part of the Seminar was devoted to special issues of the future Rail Protocol. In this part, the representative of OTIF dealt with various questions concerning the registration system, particularly the relationship between the Supervisory Authority and the Registrar, and the special role intended for OTIF in connection with this. The Co-Chairman of the Registry Task Force, Mr. Peter Bloch (USA) looked in particular at the integration of existing registers. The Seminar was concluded with a round table discussion.

The colloquium was held in English and Spanish. Thanks to the excellent organisation, for which sincere thanks are expressed in this Bulletin to both the Secretariat of UNIDROIT and the Centro Mexicano de Derecho Uniforme, and to the interest shown by the great number of participants, the colloquium was very successful. This Seminar has also made a contribution to ensuring the necessary political pressure for the planned Diplomatic Conference to be held soon.

(Translation)

### **Co-operation with International Organizations and Associations**

#### **United Nations Economic Commission for Europe (UN/ECE)**

#### **Working Party on Rail Transport**

58<sup>th</sup> Session

*Geneva, 27 October 2004*

For the first time, the meetings of both the "railway" working groups of UN/ECE and ECMT were held together and with the same Chairman, the ECMT meeting being split into a regular session and a workshop on the subject of "Infrastructure Charges" (see p. 86).

This amalgamation was decided upon after preparations by the Secretariats in Geneva and Paris a year ago and was welcomed by the Central Office (see Bulletin 1/2004, p. 12).

For the first time, representatives from the Caucasus and Central Asian States took part, principally in the UN/ECE Working Party, while attendance by European States was not complete; however, it cannot yet be deduced from this that there is a general decline in the willingness to take part.

The UN/ECE Working Party session, which was held first in the combined meeting, dealt with a broad range of subjects aimed clearly more in the direction of Europe/Asia. The focus was on information, with the inclusion of regular monitoring. Surveys among the Member States serve as the basis, and these are evaluated by the Secretariat and the UN/ECE Transport Division. A number of very substantial and interesting documents were thus produced. The programme also of course included the status with regard to agreements and projects which had been launched by Geneva and were overseen from there (AGC/AGCT; TER (project management in Budapest)). A new activity which was discussed in the area of facilitation of border crossing was an international conference in 2006, the subject of which would mainly be measures in the OSZhD area and at the borders with the EU.

(Translation)

#### **European Conference of Transport Ministers (ECMT)**

Group on Railways

*Geneva, 28/29 October 2004*

The regular meeting of the ECMT working group was held in Geneva following the meeting of the UN/ECE Working Party on Rail Transport. It was only a short meeting and expressed clearly the new direction of this ECMT working group: it will concentrate on focal issues dealt with primarily outside the group's regular meetings with special resources, and submitted to the group with a view to preparing the ECMT Conference of Ministers. Input must thus be provided based on the interests of the railways in competition with the interests of the other modes. Of current interest is an OECD/ECMT study on the reform of the railways in Russia, which has now been finished, and an in-depth analysis of the situation concerning infrastructure charges, which is fully underway.

A workshop was held on the latter topic and this took up the most time. Now that the first step has already resulted in a certain number of contributions concerning the situation in various States, and now that initial

processing has been undertaken by external experts commissioned for the purpose, the focus of further dealings will be a detailed questionnaire in order finally to arrive at an in-depth and as comprehensive as possible an analysis of the situation, which can be used as the basis for proposals for the attention of the Conference of Ministers. In the meantime, it may be noted that there are many opinions and solutions, which will not make it easy to submit suitable proposals for harmonization to the Conference of Ministers. Nevertheless, it is the general conviction that this must be the aim.

From OTIF's point of view, the following comments come to mind:

From OTIF's point of view, both the working groups' new working method (see p. 85) and the routes they are following must be seen as positive. They should create a good basis for monitoring the development and requirements of the railways from the standpoint of the State level in the international context. This should of course happen in the context of the roles of the EU and ECMT as well as OSZhD. The main task of the UN/ECE Working Party should therefore be to work as an information platform and the agency of periodic monitoring for the different questions of importance, while the ECMT working group should concentrate on in-depth analysis in the run up to proposals for action for the attention of the ECMT Conference of Ministers. (Translation)

## Studies

### Reform the reform of rail transport law in Europe?\*

Professor Rainer Freise

#### A. Introduction

Liberalization of the European rail sector is being carried out in stages. On 3 March 2004, the European Commission submitted the "third railway package"<sup>1</sup>. Like its predecessors, the "railway infrastructure package" of 2001 and the "second railway package" of

\* This study has also been published in "*Transportrecht*", 10/2004, p. 377 et seq.

1 A summary of the package can be found in the Commission's Communication dated 3.3.2004, COM(2004) 140 final.

2002/2004<sup>2</sup>, the new package also contains proposals for Directives on the *public order law* of the railways in Europe: on the one hand, it is a matter of liberalizing rail passenger transport<sup>3</sup> (as the previous packages of reform were restricted to the gradual liberalization of rail freight transport), and on the other, it is a matter of laying down Europe-wide uniform provisions for the certification of train crews (locomotive driver certificate)<sup>4</sup>.

What is new in the third railway package is that it also contains proposals on the more detailed development of rail *transport law*, in particular a proposal for a Regulation "on International Rail Passengers' Rights and Obligations"<sup>5</sup> and a proposal for a Regulation "on compensation in cases of non-compliance with contractual quality requirements for rail freight services"<sup>6</sup>. Formerly, European Community law had restricted itself to establishing public order law for the rail sector, thereby setting out the public order framework for the railways' corporate activities in an increasingly liberalized railway market. This public order law is generally understood to be business administration law and thus public law. The contractual relationship under private law between the railway undertaking and its customers (the passengers and the consignors of goods) remained unaffected.

Laying down an obligation to take out insurance as one of four conditions for an operating approval to be issued to railway undertakings in the Communities' Member States in accordance with Directive 95/18/EC of 19 June 1995<sup>7</sup> is also of a public order law nature: this affects the relationship between the applicant/railway undertaking on one hand and the State – represented by the approval authority – on the other; contracts under private law between the railway undertaking and its

2 On both packages, see Freise, *Transportrecht* (Transport Law) 2003, 265 (273 et seq.). The one Regulation and three Directives of the second railway package are dated 29 April 2004 and are published in the EC OJ, L 164, 30.4.2004, pp. 1-172.

3 Proposal for a Directive amending Dir. 91/440/EEC on the development of the Community's railways – COM(2004) 139 final – the aim of which is to open up national rail networks to cross-border rail passenger transport from 1 January 2010 (including cabotage in transfrontier trains).

4 Proposal for a Directive on the certification of train crews operating locomotives and trains on the Community's rail network, COM(2004) 142 final.

5 COM(2004) 143 final.

6 COM(2004) 144 final.

7 Directive "on the licensing of railway undertakings", EC OJ L 143, 27.6.1995, p. 70, as amended by Dir. 2001/13/EC of 26.2.2001, EC OJ L 75, 15.3.2001, p. 26.

customers are not affected. Nothing in this is changed by the fact that Art. 9 of Directive (Dir.) 95/18 cites, as a component of obligatory insurance, cover "in accordance with national and international law, of its liabilities in the event of accidents, in particular in respect of passengers, luggage, freight, mail and third parties". Proof of sufficient cover is not provided to "third parties" or the railway undertaking's contracting parties, but to the competent authority<sup>8</sup>. Also, injured parties cannot make a direct claim against the insurer.

So now, the Regulations proposed in the third railway package on the rights of passengers and on compensation for poor standards of quality in rail freight transport are for the first time also to provide Community law guidelines for the form of contracts between railway undertakings and their customers, and hence commercial private law provisions.

The Commission's proposals for Regulations come up against existing international rail transport law in the form of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980<sup>9</sup>, with its Appendices CIV (Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail) and CIM (Uniform Rules concerning the Contract for International Carriage of Goods by Rail). In 1999, COTIF was amended by the Vilnius Protocol<sup>10</sup> and among other things, was extended with an Appendix CUI (Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic). COTIF as amended is expected to enter into force in 2005.

The European Community is preparing its accession to COTIF<sup>11</sup>, the consequence of which is that not only are the individual Member States of the EU Contracting States of COTIF and, in accordance with Article 1 thereof, Members of the Intergovernmental Organisation for International Carriage by Rail (OTIF), but the European Community will also attain this status as a "Regional Economic Integration Organisation" (Art. 38

of COTIF). The accession can only come into effect when COTIF 1999 has entered into force.

However, the European Commission's proposals on international rail transport law tie in not so much with the existing COTIF – its provisions are not considered sufficient to protect passengers<sup>12</sup> – but quite consciously<sup>13</sup> with developments which already started in air transport some years ago<sup>14</sup>, although there, it has so far been restricted to the transport of passengers and has only recently been extended to the transport of luggage<sup>15</sup>.

Will the Commission's proposed Regulations lead to a reform of the COTIF reform, or are they even the beginning of the end of international rail transport law which has significance throughout the EU and Europe and beyond? This article will look into these questions using the example of the rules concerning liability according to the Commission's ideas on the one hand and according to COTIF/CIV on the other.

## B. How the article is arranged

The following presentation is restricted to the Commission's proposal for a Regulation on International Rail Passengers' Rights and Obligations (hereinafter: proposed Regulation or Commission proposal), because parallels or differences in the development of railway or air transport law in the EU can best be demonstrated

8 Cf. in Germany § 3 of the *Eisenbahnhaftpflichtversicherungsverordnung – EBHaftPflV* (Railway third party liability insurance regulations) of 21.12.1995, last amended by an Act of 21.6.2002 (BGBl. I 2191). Among other things, these national regulations serve to transpose Dir. 95/18. With regard to questions of obligatory insurance in respect of passengers, see also D II 1 f and E II 1 f below.

9 BGBl. 1985 II 130; BGBl. 1992 II 1182.

10 Protocol of 3.6.1999, BGBl. 2002 II 2140, 2142 – not yet in force.

11 Cf. COM(2003) 696 final, 17.11.2003.

12 Communication COM(2004) 140 final, p. 8.

13 Cf. Communication COM(2004) 140 final, p. 9; proposal for a Regulation COM(2004) 143 final, p. 3 and 7-9; also Commission Communication of 7.5.2002 "Consumer Policy Strategy 2002 – 2006", COM(2002) 208 final, p. 18; Directorate-General Energy and Transport consultation paper of 4.10.2002, p. 5.

14 Cf. Regulation (EEC) No. 295/91 of 4 February 1991 on a denied-boarding compensation system in scheduled air transport, EC OJ L 36, 8.2.1991, p. 5; also Regulation (EC) No. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (to passengers), EC OJ L 285, 17.10.1997, p. 1 (= original version).

15 Cf. Regulation (EC) No. 889/2002 of 13 May 2002 amending Regulation 2027/97 – with the extension of its title to cover "air carrier liability for the carriage of passengers and their luggage in air transport"; also with regard to passenger transport, most recently Regulation (EC) No. 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and revoking Regulation (EEC) No. 295/91, EC OJ L 46, 17.2.2004, p. 1; according to its Art. 19, Regulation 261/2004 will enter into force on 17 February 2005.

using the subject of passenger transport. For medium journey distances, both these modes are competitors, so the way each mode's transport law is formed can also have consequences for their competitive relationship to each other.

Firstly, a brief introduction to the basic content of the proposed Regulation is given and subjected to a preliminary assessment (C), followed by a comparison of the proposed Regulation's ideas on liability law with air transport law as it exists at present in Europe (D). In connection with this, the liability provisions of the proposed Regulation are contrasted with international law on the carriage of passengers by rail in the form of the 1999 version of the "Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)" (E). Attached to a critical review of the Commission proposal (F) are some proposals for provisions of Community law to complete or supplement CIV 1999 (G).

### C. Basic content of the Commission proposal on International Rail Passengers' Rights and Obligations

The fundamental aim of Commission proposal COM(2004) 143 of 3 March 2004 is to increase consumer protection in the field of cross-border rail transport, true to the Community's consumer policy strategy 2002 – 2006 and to improve the quality and effectiveness of cross-border rail passenger transport services in order to make a contribution to increasing the railways' share of the transport market as compared with other transport modes<sup>16</sup>.

#### I. Overview of the regulatory scope

The Commission proposal deals with the following subjects:

- Objective and scope of the Regulation:

To establish rights and obligations for international rail passengers travelling within the Community and to a third country if the Community has concluded a rail transport agreement with this country (e.g. Switzerland); application of the Regulation restricted to railway undertakings which have been issued with an

approval in accordance with Dir. 95/18/EC (Art. 1, para. 1 and 2<sup>17</sup>);

- Valid also for computer operated information and reservation systems for rail transport when these systems are provided or used within the Community (Art. 1, para. 3);
- Obligations for railway undertakings and tour operators to provide passengers and the public with information and obligation of "system vendors" to provide railway undertakings with access to travel information systems (Art. 3, 5, 37);
- Transport contract and availability of tickets, through tickets and reservations; obligation of railway undertakings to co-operate in providing through tickets (Art. 4, 6);
- Liability of the railway undertaking for death of and injury to passengers, luggage and delays; obligation to have insurance to cover claims for compensation (Art. 7 to 10);
- Compensation and advance payments; in the event of a delay or cancellation of a train, compensation, reimbursement of the fare or onward transport and assistance for the passenger, in addition to compensation for subsequent difficulties (Art. 11 to 17);
- Liability in rail-ferry transport and in the event of transport by another mode (Art. 18);
- Liability of successive and substitute railway undertakings (Art. 19 and 20);
- Liability of the railway undertaking for its staff and others whose services it makes use of, which also includes the staff of the infrastructure manager (Art. 21);
- Basis of claims and aggregation of claims (Art. 22);
- Limitation of actions (Art. 23);
- Right of recourse; right to claim compensation from the infrastructure manager (Art. 24);

<sup>16</sup> Cf. grounds for consideration 1 and 2 of Commission proposal COM(2004) 143 final.

<sup>17</sup> Articles not further specified are those of Commission proposal COM(2004) 143 final.



- Exclusion of waiver and stipulation of limits; permissibility of conditions which are more favourable to the passenger (Art. 25);
- Exoneration from liability (Art. 26);
- Railway undertakings', tour operators' and station managers' obligation to provide transport and assistance to persons with reduced mobility (Art. 27 to 31);
- Quality and security of the transport service including service quality standards; determining the addressee of claims relating to liability (Art. 32 to 35);
- Passenger obligations (Art. 36);
- Enforcement of the Regulation by national enforcement bodies (Art. 38 and 39);
- Obligation of the Member States to lay down rules on penalties applicable to infringements of the provisions of the Regulation: "The penalties must be effective, proportionate and dissuasive" (Art. 40).

## II. Preliminary assessment of the Commission proposal

### 1. Title, structure and content

Contrary to its title,<sup>18</sup> the proposed Regulation deals not only with international rail passengers' rights and obligations, but also railway undertakings' access to travel information systems and the relationship between railway undertakings (particularly the obligation to co-operate in providing travel information, offering through tickets, ensuring a high level of security and the processing of complaints); obligations are also given for tour operators and station managers.

Thus the Commission proposal contains not only rules on the contractual relationship between the railway undertaking and the customer, but also public order law, e.g. for ensuring safe transport operations. However, the Commission contents itself with some considerations and requirements which it keeps very general and which are basically only of the quality of standard sentences: "Railway undertakings shall take adequate measures to ensure a high level of security in railway stations and on trains. They shall prevent risks to passenger security and

effectively address these risks where and when they occur within their sphere of responsibility" (Art. 32, para. 1); railway undertakings shall co-operate "to accomplish and maintain a high level of security and to exchange information on best practices concerning the prevention of activities which are likely to deteriorate the level of security" (Art. 32, para. 2); "Railway undertakings shall define service quality standards for international services and implement a quality management system to maintain the service quality. The service quality standards shall at least cover the items listed in Annex IV" (Art. 33, para. 1). Annex IV simply contains keywords, such as "information and tickets", "punctuality of international services", "general principles to cope with disruptions of services", "cancellations of international services", "cleanliness of rolling stock and station facilities ...".

It is difficult to imagine how the Member States are supposed to comply in a constitutionally acceptable way with the obligation to lay down and implement the rules on penalties applicable to infringements of the provisions of the Regulation (Art. 40). Such rules on penalties can certainly not relate to disputes between railway undertakings and passengers on the validity of claims for compensation, reimbursement or assistance<sup>19</sup> - the civil courts are responsible for these - but must be aimed at implementing the quality and security requirements; however, these are of such a general nature that backing up a penalty would hardly be reconcilable with the principle of "nulla poena sine lege".

Furthermore, it is surprising that the Commission is including security requirements for railway undertakings in a proposed Regulation on the rights and obligations of passengers at all. The Rail Safety Directive,<sup>20</sup> which has just entered into force, aims at "reorganising and bringing together the relevant Community legislation on railway safety"<sup>21</sup>. Safety requirements in previous Directives have thus been deleted. Now however, new safety provisions are being considered in a single place where one would least expect to find them.

The proposed Regulation also causes concern in other respects<sup>22</sup>: the detailed provisions on the obligations to

<sup>18</sup> Cf. also Pohar, *ReiseRecht aktuell* (Travel Law Today) 2004, 194 under II 2.

<sup>19</sup> Cf. also Pohar, *ReiseRecht aktuell* 2004, 194 (198 before IV).

<sup>20</sup> Dir. 2004/49/EC of 29 April 2004 on safety on the Community's railways and amending Directives 95/18 and 2001/14, EC OJ L 164, 30.4.2004, p. 44.

<sup>21</sup> Consideration 54 of the Rail Safety Directive.

<sup>22</sup> Cf. also Pohar, *ReiseRecht aktuell* 2004, 194 (198).

provide information, the availability of (through) tickets and reservations, passenger assistance and complaints procedures, create extensive obligations for railway undertakings to co-operate with each other and coerce them in a way that is incompatible with the aim of the European package of reform to gear rail transport in Europe to be entrepreneurial, market-based and competitive.

The public order law aspects of the Commission proposal need not be gone into further here; the question as to whether Community law has the competence to regulate all the material covered in the proposed Regulation need not be gone into either. At this point, this will just be assumed. The question as to whether non-observance of the international Convention COTIF/CIV implemented by the EU Member States is contrary to international law will not be dealt with here either. This article concentrates on comparing the content of the transport law liability provisions of the proposed Regulation with the relevant provisions of international rail transport law and aviation law as it applies in Europe.

The rather incidental extension of the scope of the proposed Regulation to tour operators and station managers will not be brought up here either. In addition, for the purposes of this article (comparison of material liability and warranty provisions), "railway undertaking licensed according to Dir. 95/18/EC" (Art. 1.2) and "carrier" in the sense of CIV (cf. Art. 3 of CIV 1999) are equivalent; this does not mean that it is not recognized that there are differences between them and that this subject is worth looking at – as in air transport with the differentiation between "Community carrier" (Regulation 2027/97, Regulation 261/2004) and "carrier" (Montreal Convention).

## 2. Relationship to CIV

The Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) are not mentioned in any of the Articles of the Commission proposal, even though CIV 1980 is in force for all the Member States of the EU which have a railway – except Estonia – and even though it will soon enter into force in its amended version, CIV 1999 (provisionally 2005). If the proposed Regulation achieves force of law, it will exist alongside the Convention concerning International Carriage by Rail (COTIF) with its Appendix CIV. The consequences this will have are examined further below<sup>23</sup>.

<sup>23</sup> See E I below.

Only in consideration 12 does the proposed Regulation also refer, in addition to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea<sup>24</sup>, to CIV, in order to support its view that the liability of the railway undertaking is prevalent "when passenger transport is carried out by other modes, in particular by sea or inland waterway, as a part of the railway journey or because of temporary changes." In the Commission proposal itself, this view is reflected in Art. 18. However, Art. 1, para. 3 of CIV 1999 quoted by the Commission in consideration 12 only prescribes the application of international rail transport law to supplementary carriage by sea or supplementary transfrontier carriage by inland waterway if the carriage by sea or inland waterway is performed on *lines included in the CIV list*; and Art. 31 § 2 of CIV 1999 specifies that the provisions of CIV relating to liability apply if the passenger suffers the accident on the ferry *arising out of the operation of the railway*. Here, one of the numerous questions of applicability concerning the EC Regulation and COTIF/CIV becomes apparent, when both run in parallel.

The Commission does not seem to be aware of these problems. This becomes understandable when one realizes what the Commission thinks of international rail law in accordance with COTIF/CIV. Its Communication on the third railway package says in this respect<sup>25</sup>: "The convention essentially governs relations between railway undertakings (and not between passengers and railway undertakings). ... Lastly, being an international convention, the CIV does not create passengers' rights directly".

Neither of the Commission's statements apply: in the first place, CIV does govern relations between the passenger and the railway (this is already apparent from the title of CIV, which refers to the contract of carriage, but primarily from most of its provisions); CIV 1999 only deals with relations between the "carriers" themselves right at the end in Articles 61 to 64, and even then the provisions are mostly non mandatory. And like most multilateral international transport conventions under international law, CIV's entering into force in the Contracting States does create directly applicable law<sup>26</sup>.

<sup>24</sup> See Czerwenka, *ReiseRecht aktuell* 2003, 158 et seq.

<sup>25</sup> COM(2004) 140 final, p. 8 under 3.1, "Inadequate international arrangements".

<sup>26</sup> The reservation made against the 1924 Hague Rules on sea cargo law – which Germany also declared upon ratification – not to apply the Convention directly, but to incorporate its rules into national law, is an exception; on this subject, cf. Herber (editor), *Transportgesetze* (Transport Acts), 2<sup>nd</sup> edition 2000, p. XVI et seq.

Here obviously, the Commission is only attributing to international transport law conventions the effect of EC Directives, which have to be implemented in the Member States first; in fact however, these conventions have the same effect as EC Regulations (cf. Art. 249, para. 2 of the EC Treaty): they are binding and apply directly in every Contracting State.

Before looking in more detail at overlaps and possible conflicts between the Commission proposal and CIV (E I, below), it should first be clarified to what extent the proposal does justice to the Commission's policy to reform international rail passenger transport more closely in line with the model of air transport. This is because if aviation law is taken as a basis, this may be the justification if the proposed Regulation derogates from international railway law.

#### D. Comparison between the Commission proposal and air transport law in Europe

Air transport law as it applies in Europe consists essentially of secondary Community law (Reg. 2027/97 as amended by 889/2002<sup>27</sup> and Reg. 261/2004<sup>28</sup> – the latter being valid from 17 February 2005) and the Montreal Convention (MC)<sup>29</sup> on the Carriage of Passengers and their Luggage by Air.

##### I. Comparison of the fundamental concepts

According to its Art. 1, the new version of Reg. 2027/97 implements the relevant provisions of the Montreal Convention and lays down additional provisions; it also extends the scope of these provisions to air transport operations within a Member State. Reg. 2027/97 therefore has a threefold significance: firstly, it ties in with the MC, and even requires it<sup>30</sup> (whereas "transposition" of the MC in the EU States, using Community law, is not required, because these States have ratified the MC itself<sup>31</sup>). Secondly, Reg. 2027/97

lays down additional provisions to those of the MC with regard to the transport of passengers and luggage (not freight transport) and thirdly, it extends the MC and the additional provisions to domestic air transport in the Member States, in so far as the transport of passengers and luggage is concerned.

The proposed Regulation on the international carriage of passengers by rail is quite different: it does not tie in with the relevant international Convention, COTIF/CIV, but takes its place abruptly alongside, and it is not restricted to laying down additional provisions, but – as will be demonstrated – also sets out competing provisions which derogate from international railway law in a range of areas.

Thus for the creation of European rail transport law, the Commission is proposing a course of action which is fundamentally different to that for air transport law in Europe. The suppression of existing international rail law would be understandable if, with its proposed Regulation, the Commission stuck to its programme to reform railway law in line with the model of aviation law, to harmonize both sets of law to some extent on the basis of aviation law. There would no longer be any room left for existing international railway law. This raises the question of whether, with regard to its substance, the Commission proposal brings about harmonization of air transport law and rail transport law. This will be examined below by comparing the basic material liability provisions of the proposed Regulation with the equivalent liability provisions (taken into account in the new version of Reg. 2027/97) of the Montreal Convention.

27 Cf. footnotes 14 and 15 above.

28 Cf. footnote 15 above.

29 Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air, BGBl. 2004 II 458, 459; entered into force for Germany on 28 June 2004, BGBl. I 1027.

30 Because according to its Art. 2, Reg. 889/2002 amending Reg. 2027/97 applies "from the date of the entry into force of the Montreal Convention for the Community ...".

31 For Germany, see footnote 29 above; cf. also decision of the Council of the EU of 5 April 2001 on the approval of the MC by the European Community, Art. 2: "The European Community's instrument of ratification will be deposited at the same time as the instruments of ratification of all the Member States." The idea that the MC has to be "transposed" is probably due to the misunderstanding

already referred to concerning the effect of international conventions (C II 2 above, penultimate sentence). Understood correctly, Art. 1, 1<sup>st</sup> sentence of Reg. 2027/97, new version, only has declarative significance; in contrast, ratification of the MC by the EC and its Member States is constitutive, cf. Bollweg, *Zeitschrift für Luft- und Weltraumrecht – ZLW* (German Journal of Air and Space Law) 2000, 439 (450). If it were necessary to transpose the MC by means of Community law, the provisions concerning freight transport in the former would not be transposed! – in contrast, Staudinger/Schmidt-Bendun, *Versicherungsrecht* (Insurance Law) 2004, 971 (972 under III. 2 and footnote 21) are of the view that Reg. 889/2002 implements the relevant provisions of the MC.

## II. Comparison of the content of the regulations with regard to the liability of railway undertakings and air transport undertakings

### 1. Liability for personal injury

#### (a) *Grounds for liability*

The proposed Regulation prescribes liability on the part of the railway undertaking in the event of death or bodily injury, whether physical or mental, of a passenger (Art. 7.1), whereas the MC only prescribes liability in the event of death or bodily injury (Art. 17.1 of the MC); purely mental injury has deliberately not been included in the MC as a breach of the law justifying liability<sup>32</sup>. So the proposed Regulation and the MC already differ in respect of the types of damage to be compensated.

#### (b) *Exemption from liability*

In the event of personal injury up to 220,000 €, the only reason for exemption from liability that can be considered according to the proposed Regulation is (contributory) fault on the part of the passenger or his legal successor (Art. 12.2, 1<sup>st</sup> sentence, Art. 26)<sup>33</sup>; according to the MC, the comparable strict liability of the air carrier ends at only 100,000 Special Drawing Rights (SDR), which is approximately 120,000 €<sup>34</sup>.

For damage in excess of 220,000 €, the railway undertaking is liable without limit, unless it proves that it was not negligent (Art. 12, 2<sup>nd</sup> sentence). For air carriers, a similar exclusion from liability already takes effect when the damage exceeds the 120,000 € referred to. So the proposed Regulation only provides for harmonization of the liability structure, but in effect imposes considerably stricter liability on railway undertakings than on air carriers.

#### (c) *Advance payment*

In the event of personal injury, the railway undertaking has to make an advance payment within 15 days, to cover immediate economic needs, to the person entitled to damages; in the event of death, this payment is at least 21,000 € (Art. 13). According to the MC (Art. 28) in conjunction with the new version of Reg. 2027/97 (Art. 5), the obligation to make an advance payment in the event of death amounts to at least 16,000 SDR, or around 19,200 €. In addition, it is made clear in aviation law that the advance payment does not constitute acceptance of liability and may be offset against any subsequent compensation paid and may be returnable if the air carrier is not liable or if the person who received the payment is not the person entitled to compensation (Art. 5, para. 3 of Reg. 2027/97, new version). There is no equivalent restriction in the proposed Regulation on rail transport. So with regard to the obligation to make an advance payment, it is also only the principle that is taken over from aviation law, while the detail of the rules is either deficiently formulated or else is more onerous for the railways<sup>35</sup>.

#### (d) *Successive railway undertakings*

According to the proposed Regulation, successive railway undertakings (Art. 2, No. 22) are always jointly and severally liable (Art. 19), while in the event of personal injury (or delay caused to the passenger), successive air carriers are each liable only if the accident (or delay) occurred during carriage performed by the carrier concerned (Art. 36, paras. 1 and 2 of the MC). For railway undertakings, the derogation from aviation law and from the general principles of transport law creates a significant extension and strengthening of their liability, which is not understandable from an objective point of view<sup>36</sup>.

#### (e) *"Substitute" railway undertakings*

For calling in "substitute" railway undertakings (Art. 2, No. 23), the proposed Regulation only prescribes that the contracting railway undertaking remains liable in respect of the entire transport operation (Art. 20) and that the

32 Müller-Rostin, ZLW 2000, 36 (39 et seq.), Ruhwedel, *Transportrecht* 2001, 189 (193).

33 For more detail, Schmidt-Bendun, *Zeitschrift für Gemeinschaftsprivatrecht – GPR* (Journal of Community Private Law) 2003/04 (volume 4), 193 (197).

34 In August and September 2004, the value of one Special Drawing Right of the International Monetary Fund was just above/below 1.20 €. All conversions in this article are therefore based on an average rate of 1 SDR = 1.20 €.

35 Cf. also the critical review by Schmidt-Bendun, *GPR* 2003/04, 193 (195).

36 Also, critically, Schmidt-Bendun, *GPR* 2003/04, 193 (197).

aggregate amount of compensation payable by the railway undertaking and the substitute railway undertaking (and any other persons who have to make payments) does not exceed the limits provided for in the proposed Regulation (Art. 22, para. 3). The proposed Regulation does not say for what, in particular for which leg of the transport operation, the substitute railway undertaking is liable.

In contrast, and in accordance with the general principles of transport law, the MC prescribes that the contracting carrier is liable for the whole of the carriage contemplated in the contract, whereas the actual carrier is liable solely for the carriage which it performs (Art. 40 of the MC). The MC also regulates the mutual liability of acts and omissions in the relationship between the two carriers as well as the limits of mutual liability in special agreements between the contracting carrier and the customer (Art. 41 of the MC).

In this respect, the Commission proposal on rail transport is incomplete.

**(f) *Obligation of insurance***

With regard to liability for passengers, the existing obligation of insurance for railway undertakings with an operating approval valid throughout the EU in accordance with Directive 95/18 is put into concrete terms in the proposed Regulation. (Art. 7.2): the level of insurance must be adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with the proposed Regulation; the minimum insurance cover per passenger is 310,000 €. With this, the proposed Regulation ties in with developments in aviation law.

The MC stipulates that the States Parties must require their carriers to maintain adequate insurance covering their liability under the MC (Art. 50 of the MC). The new version of Regulation 2027/97 (Art. 3, para. 2) prescribes, with reference to Reg. 2407/92<sup>37</sup>, that as far as it relates to liability for passengers, a Community air carrier must be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with Reg.

37 Reg. (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers, EC OJ L 240, 24.8.1992, p. 1.

2027/97. This is put into concrete terms in Reg. 785/2004<sup>38</sup> (Art. 6, para. 1), according to which the minimum amount of insurance in respect of passengers is, in principle, 250,000 Special Drawing Rights, i.e. around 300,000 €.

Liability for loss or damage caused by delay is not subject to the obligation of insurance in either rail or air transport<sup>39</sup>.

Incorporating obligations of insurance in transport law provisions is on the increase, but is problematical<sup>40</sup>. Proof of the existence of third party insurance covering the scope laid down in the law is a prerequisite for an approval to be issued to the respective transport undertaking. The persons, damages and sums insured have to be set down in public order law provisions, and the sums insured have to be specified per occurrence of loss or injury (e.g. "accident").

Projecting the obligation of insurance onto individual contractual conditions between the transport undertaking and its customers conceals risks, e.g. the risk that injured third parties outside the contractual relationship are treated worse than the transport undertaking's contracting partners. Unfortunately, the anomaly in air transport is now threatening to affect the rail sector as well<sup>41</sup>.

**(g) *Interim findings***

In many respects, the proposed Regulation does not follow the model of aviation law, but prescribes stricter liability for railway undertakings. This applies mainly in respect of the railway undertaking's non-fault liability up to the sum of 220,000 € (instead of 120,000 € as in air transport) and in respect of the additional joint and several liability of successive railway undertakings for loss or injury caused to persons or as a result of delay. Moreover, while the

38 Reg. (EC) No. 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators, EC OJ L 138, 30.4.2004, p. 1; this Reg. will enter into force on 1.5.2005.

39 Cf. Art. 9 of Dir. 95/18 (cover of liability in the event of accidents) and Art. 6 of Reg. 785/2004 according to the meaning of consideration 14. In Germany however, the intention is to extend the obligation of insurance to cover loss or damage caused by delay in air transport as well.

40 Cf. Müller-Rostin, *Versicherungsrecht* 2004, 832 under III: Art. 50 of the MC – a "foreign body" in the Convention.

41 Cf. also E II 1 f below.

proposed Regulation is based on individual decisions of principle concerning aviation law, it does not incorporate the necessary specific provisions to implement the principles, and is therefore unclear and incomplete.

## 2. Liability for damage to luggage

### (a) *Hand luggage*

If a passenger suffers personal injury *as a result of an accident*, the railway undertaking is also liable, without proof of fault, for his hand luggage and the personal effects he had on him (Art. 8.1) up to the sum of 1,800 € per passenger (Art. 14.1). As in the case of personal injury, the only reason for exemption from liability that can be considered is fault on the part of the passenger or his legal successor (Art. 26).

If the damage to hand luggage and personal effects the passenger had on him is not accompanied by personal injury owing to an accident, the railway undertaking is only liable if fault of the railway undertaking can be proved (Art. 8.2). In this case, compensation is also limited to 1,800 € per passenger (Art. 14.1).

In air transport, the carrier is only liable in accordance with Art. 17.2, 3<sup>rd</sup> sentence of the MC for hand luggage and personal effects if fault can be proved, and then only up to a maximum of 1,000 SDR, or around 1,200 € per passenger (Art. 22.2 of the MC). In the event of gross negligence by the carrier or its employees, there is no limitation of liability, so the carrier has to compensate the entire loss or damage (Art. 22.5 of the MC). This removal of the limitation of liability, which is usual in transport law in the event of gross negligence, is missing in the proposed Regulation on rail transport.

The result of this is that the Commission provides for stricter liability, with higher sums, for hand luggage in rail transport than in air transport in the event that the railway undertaking is not at fault or is only slightly at fault; in the case of gross negligence on the part of the railway undertaking, the limitation of liability still applies, so the railway undertaking's liability is more advantageous than for an air carrier in the same situation.

### (b) *Luggage*

For luggage in the care of the railway undertaking, the proposed Regulation prescribes non-fault liability of the railway undertaking up to a maximum of 1,300 € per passenger (Art. 9, 14.2). Again, the only reason for exemption from liability is fault of the person claiming compensation (Art. 26).

An air carrier is liable for luggage in its care up to a sum of 1,000 SDR/around 1,200 € per passenger; this sum is only available once for luggage and hand luggage together and has to suffice for all concurrent damage: destruction, loss, damage or delay (Art. 17.2, 22.2 of the MC). There are several grounds for exemption from liability: quality or inherent defect of the luggage (Art. 17.2, 2<sup>nd</sup> sentence of the MC) or fault of the person claiming compensation (Art. 20 of the MC). Limitation of liability is also waived in the event of gross negligence on the part of the air carrier or its employees (Art. 22.5 of the MC); here again, the proposed Regulation on rail transport differs.

With regard to liability for luggage, the proposed Regulation and the MC have the same liability benchmark: non-fault liability. However, aviation law provides more grounds for exemption from liability and prescribes a lower maximum liability sum, which also has to suffice for damage to hand luggage that occurs concurrently (MC = 1,200 € as opposed to 1,300 + 1,800 € under the proposed Regulation). An air carrier only faces stricter liability than a railway undertaking in the event of gross negligence.

### (c) *Conclusions so far*

The proposed Regulation does not follow the model of aviation law with regard to liability for damage to luggage either, but for railway undertakings prescribes stricter liability conditions, fewer grounds for exemption from liability and higher amounts of liability. Only the air carrier's unlimited liability in the event of gross negligence is stricter than the railway undertaking's limited liability. Therefore, there is no comparability between the two systems of liability, let alone harmonization of aviation and railway law.

### 3. The passenger's rights in the event of delay

#### (a) *in rail transport*

In the proposed Regulation, the term "delay" includes *delays*, *delays leading to a missed connection* and *cancellation* of an international passenger service or the transport of luggage (Art. 10, para. 1; definitions of delay and train cancellation in Art. 2, Nos. 15 and 16).

The following approximate picture can be formed from several of the provisions of the proposed Regulation which, in part, are difficult to understand<sup>42</sup>:

The railway undertaking *is liable* for delays in the broad sense referred to, provided the delay was

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42 Cf. the wording of Art. 11 in conjunction with Art. 10 of the proposed Regulation:

"Article 11 – Consequential damages

In case a railway undertaking is liable of a delay, a delay leading to a missed connection or a cancellation, the railway undertaking shall be, irrespective to the conditions of compensation for delays laid down in Article 10, liable for damage.

Without prejudice to Article 16, for delays less than one hour there is no right to compensation for consequential damages.

Article 10 – Delay

The railway undertaking is liable for a delay, including a delay leading to a missed connection and/or the cancellation of an international service to passengers and/or the transport of luggage.

The railway undertaking shall not be liable for delay or cancellation of an international service if these were the result of exceptional weather circumstances, natural catastrophes, acts of war or terrorism."

What is meant is probably the following: a railway undertaking is liable for delays in the broad sense, unless there are specific grounds for exemption from liability. When the railway undertaking is liable for delays, because there is no ground for exemption from liability, it must then provide compensation for consequential damage, provided the delay is not less than one hour; the obligation to provide compensation payments under the conditions provided for this is not affected.

Pohar, *ReiseRecht aktuell* 2003, 194 (196) assumes from Art. 11 and 16 and from the justification for the proposal in Art. 10 that the liability under Art. 10, according to the Commission's idea, is aimed solely at "compensation payments" in the sense of Art. 17. Counter to this is that the Commission also speaks of "compensation payments" in the justification for Art.11, but this time in the sense of compensation for consequential damage. The crux is in the fact that the Commission does not differentiate between guaranteeing and liability or between compensation payments (irrespective of loss/damage) for reduced performance and compensation (depending on loss/damage) for (consequential) damage.

not caused by exceptional weather circumstances, natural catastrophes or acts of war and terrorism (Art. 10). The "justification" at the beginning of the proposed Regulation summarizes the exclusions from liability mentioned above as "exceptional circumstances"<sup>43</sup>; Art. 16.1 of the proposed Regulation uses the same term in connection with certain obligations of the railway undertaking in the event of a connection being missed or a cancellation.

#### *What does the liability cover?*

In the first place, compensation for *consequential damages*, provided the delay is not more than one hour (Art. 11). By "consequential damages", the proposed Regulation means "significant damages" arising as a result of a delay or a cancellation (Art. 2, No. 17); i.e. damages which are normally described as damages due to delay (according to the proposed Regulation however, only when they are significant).

In addition, for every delay in the broader sense referred to, the railway undertaking (or the station operator!) must provide *assistance* free of charge (Art. 17): information about the situation (normally a matter of course), meals and refreshments in reasonable relation to the waiting time, hotel accommodation in cases where an overnight stay becomes necessary, as well as additional or alternative transport services. Here, it is a question of covering passengers' additional requirements with regard to meals, accommodation and transport, and hence of compensation<sup>44</sup>.

In the event of missed connections or cancellations (except if the train was cancelled because of exceptional circumstances), the railway undertaking must offer passengers the choice between reimbursement of the cost of the ticket (together with, when relevant, a free return service) or continuation of the journey under comparable transport conditions (Art. 16). The German view is that the right to choose relates to

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43 Justification for Art. 10, COM(2004) 143 final, p. 7.

44 With regard to additional requirements as part of the compensation, cf. in German law e.g. § 6 of the *Haftpflichtgesetz* – HaftPflG (German Liability Act) or § 843 of the *Bürgerliches Gesetzbuch* – BGB (German Civil Code). Pohar also assumes "compensation" in *ReiseRecht aktuell* 2004, 194 (197 before bb); for another view, see Schmidt-Bendun, GPR 2003/04, 193 (197), cf. footnote 50 below.

rescission or subsequent completion (cf. § 634 Nos. 1 and 3 of BGB)<sup>45</sup>.

In addition, in the event of major delays in cross-border scheduled services, the railway undertaking has to make flat-rate "*minimum compensation payments*", which are 50% or 100% of the price of the ticket, depending on the type of train (high speed train or not), the length of the journey and the extent of the delay (for high speed trains at least 30 minutes, for other scheduled services at least 60 minutes) (Art. 15 in conjunction with Annex III of the proposed Regulation). The request for transport does not cease to exist if a passenger demands compensation. These minimum compensation payments equal a flat-rate reduction of the cost of the ticket (cf. § 636 No. 3, § 638 BGB).<sup>46</sup>

So for delays, the proposed Regulation prescribes several legal consequences: compensation, including redress for additional requirements occasioned by the delay (covered by the term assistance), the right to rescission or subsequent completion as well as a flat-rate reduction of the price of the ticket as a result of reduced service (compensation payments). The prerequisites, grounds for exclusion and scope of services vary according to the legal consequence, although the Commission proposal leaves some issues unclarified:

aa) Conditions of liability and service

Consequential loss or damage is only compensated if the delay is at least an hour and if the loss is considerable (Art. 11). In contrast, additional requirements occasioned by delay are compensated as a result of *any* delay by means of services to provide assistance (Art. 17), without the requirement for a minimum period of delay.

Entitlement to reimbursement of the price of the ticket or onward carriage (= rescission or subsequent completion) only exists in the event of a missed connection or cancellation of a train, not in the event of the train in which the passenger is

sitting being delayed per se (Art. 16)<sup>47</sup>. However, in such a case, it may also be pointless to continue the journey in accordance with the passenger's original travel plans, so that it is in his interest to get out of the train at the next stop and to travel back. The fact that he is not given this right according to the proposed Regulation is possibly a result of the Commission's basing itself in some respects too much on aviation law: an air passenger can only get out of a delayed aircraft if it makes a stopover, which is probably not very often the case in internal Community flights.

On the other hand, there are flat-rate compensation payments for all types of delay, provided it is at least 30 minutes or 60 minutes respectively (Art. 15).

bb) Liability criterion and grounds for exclusion

In no case are the legal consequences of the delay tied in with fault on the part of the railway undertaking. The lack of fault on the part of the railway undertaking or the presence of fault on the part of third parties (e.g. in cases of suicide) is not a reason for the respective legal consequence to be excluded.

What is in doubt is how far the reason of exclusion from liability of "exceptional weather circumstances, natural catastrophes, acts of war or terrorism" (Art. 10, para. 2) extends. Liability for consequential loss or damage is in any case excluded if one of the reasons for exclusion referred to is present<sup>48</sup>. Because Art. 11 concerning consequential damages begins with the premise: "In case a railway undertaking is liable ...". This premise is not present if there is a reason for exclusion from liability. The claim to compensation for additional requirements occasioned by delay (Art. 17, Assistance) also ceases to exist if there is a reason for

45 Cf. also Pohar, *ReiseRecht aktuell* 2004, 194 (196 at the end).

46 Likewise Pohar, *ReiseRecht aktuell* 2004, 194 (196).

47 In this respect, see also Schmidt-Bendun, GPR 2003/04, 193 (196).

48 Doubtfully, Schmidt-Bendun, GPR 2003/04, 193 (195 footnote 37). However, because of its draft status, Art. 11 should to some extent be interpreted here as retaining its meaning.



exclusion from liability. As the matter is one of liability and compensation<sup>49</sup>, grounds for exclusion from liability come into effect<sup>50</sup>. The fact that Art. 17 – like Art. 11 concerning consequential damages – does not refer to the general liability standard of Art. 10 says little, given the unfortunate formulation of Art. 11 in conjunction with Art. 10.

In contrast, the claims for flat-rate compensation payments and reimbursement of the price of tickets or subsequent completion (Art. 15, 16) are not claims for compensation<sup>51</sup>, so the grounds for exclusion from liability of Art. 10, para. 2 cannot be applied to them. In addition, in the event of a train being cancelled, Art. 16 contains its own reason for exclusion, "exceptional circumstances", the justification for which can however be called into doubt<sup>52</sup>, as passengers also have to be informed and provided with suitable onward transport in a case such as this.

The general reason for exclusion from liability of "negligence of the person claiming compensation" (Art. 26) also applies to the cases of liability for delay and therefore rules out compensation claims for consequential damages and additional requirements occasioned by a

delay. But the right of rescission and the claim to subsequent completion and a flat-rate compensation payment cease to apply for the passenger who interferes wilfully in railway operations, for instance by trying an emergency brake when there is no emergency, thereby causing a longer delay (*venire contra factum proprium*).

cc) Scope of service provision and compensation

The proposed Regulation describes in more detail the scope of the railway undertaking's obligation to provide services and compensation in the event of additional requirements occasioned by a delay, reimbursement of the ticket price or subsequent completion and in the event of flat-rate compensation payments. The passenger's entitlement to compensation for consequential damages (Art. 11) is unlimited in this respect and this is the case even though damages such as these in the form of purely pecuniary loss are those which the railway undertaking is least able to foresee and which can assume very major proportions.

It can happen for example, that a railway undertaking has itself to compensate the loss arising from a missed million dollar business deal in the event of a train delay of more than one hour which the undertaking could not prevent. The other passengers, who have to share in bearing the loss – which the railway undertaking transfers to ticket prices – are the ones who suffer and if the proposed Regulation comes into effect, they can only hope that the courts, with reference to (joint) fault on the part of the passenger entitled to compensation (because of failing, in such a sensitive case, to factor into the individual travel plans a time safety margin), limit or even exclude the railway undertaking's obligation to pay compensation, thus correcting the legislator's exaggeration.

The penalties for delays that have been described are tailored to delays suffered by *passengers*. Delays in the *transport of luggage* are only referred to once in the rule on the justification for liability (Art. 10, para. 1), and then no more. It remains open as to when a delay has occurred in

49 See footnote 44 above.

50 As here, Leffers in *Deutsche Gesellschaft für Reiserecht Jahrbuch* (Almanac of the German Association of Travel Law) 2003, 28 et seq. (under IV 2 b); another view, Schmidt-Bendun, GPR 2003/04, 193 (197), who assumes that in the outcome, the assistance should be qualified as obligations *sui generis*, which can be understood as a section of subsequent completion. However, this is contradicted by the fact that subsequent completion is dealt with in Art. 16 of the proposed Regulation and consists of rail transport services, while the assistance, hotel accommodation and alternative transport provision referred to in Art. 17 cannot be considered as subsequent completion of a delayed or cancelled train journey. For an assessment of the equivalent assistance in air transport, cf. Staudinger/Schmidt-Bendun in *Neue Juristische Wochenschrift – NJW* (New Legal Weekly) 2004, 1897 (1899 et seq.), and in *Versicherungsrecht* 2004, 971 (973).

51 For another view, Schmidt-Bendun with regard to compensation payments, GPR 2003/04, 193 (196); on air transport, cf. Staudinger/Schmidt-Bendun, *Neue Juristische Wochenschrift* 2004, 1897 (1899); flat-rate "compensation", from the perspective of German law an anomaly. In contrast, as here, Pohar, *ReiseRecht aktuell* 2004, 194 (196).

52 Cf. Schmidt-Bendun, GPR 2003/04, 193 (196).

respect of luggage (the definition of delay in Art. 2, No. 15 is silent with regard to determining the later delivery of the luggage, which depends on the passenger), and whether there is compensation for this. Art. 11 on compensating consequential damages in the event of delays is placed so much in relation to the rule on compensation payments in the event of passengers being delayed that it can hardly be called upon to supplement liability in the event of delays in the transport of luggage. According to this, the proposed Regulation does indeed advance the principle that the railway undertaking is liable for delays in the transport of luggage, but then to some extent loses this from sight.

**b) *in air transport***

For air transport, compensation benefits and other services in the event of delay are regulated in two different sets of regulations: liability and compensation claims in the MC, other services – but including compensation for additional expenses (“assistance”) occasioned by a delay – in Regulation 261/2004.

According to the MC, an air carrier must compensate loss or damage arising from a delay in the carriage by air of passengers or luggage, unless it and all its servants have taken all reasonable measures to avoid the loss or damage, or unless it was not possible for them to take such measures (Art. 19 of the MC). So the liability criterion for compensating loss or damage caused by delay is more favourable for the air carrier in air transport than under the proposed Regulation (Art. 10) for railway undertakings in cross-border rail transport, because for example the wilful intervention of third parties excludes the air carrier’s liability for delays.

The amount of an air carrier’s liability for delays is limited: for the carriage of passengers, it is a maximum of 4,150 SDR/around 5,000 € and for the carriage of luggage, it is a maximum of 1,000 SDR/1,200 € (Art. 22.1 and 2 of the MC), although the maximum amount with respect to the transport of luggage is at the same time to be drawn on for compensation for loss of or damage to the passenger’s hand luggage and luggage, so that there is possibly no longer any money left to compensate for loss or damage caused by delay.

In contrast, the proposed Regulation does not prescribe any maximum amounts of liability for liability caused by a delay in rail transport, either for the carriage of passengers or for the carriage of luggage.

According to Regulation 261/2004, from 17 February 2005, air passengers are entitled to assistance, reimbursement of the price of the flight ticket, return flights or other transport to the destination and flat-rate compensation payments if flights are cancelled or delayed, in a similar way to that prescribed in the proposed Regulation for rail transport passengers. It is not possible here to undertake a detailed comparison of the flat-rate amounts for compensation payments; it would go beyond the scope of this presentation.

**c) *Comparison of the rules in rail and air transport***

The Commission proposal on rail transport takes over whole passages from the aviation law Regulation 261/2004, but there are some important differences between the two sets of regulations.

Regulation 261/2004 stands alongside the MC: the MC regulates liability for loss or damage caused by delay in the carriage of passengers and luggage; Regulation 261/2004 provides for flat-rate compensatory payments, reimbursement or subsequent completion as well as assistance in the event of substandard passenger transport services, and does not affect more wide-ranging claims for compensation under other legal provisions (e.g. the MC); nevertheless, the compensatory payments provided for under this Regulation may be offset against claims for compensation (Art. 12 of Reg. 261/2004).

If “assistance” in accordance with Art. 9 of Regulation 261/2004 is also considered to include compensation for additional expenses incurred as a result of a delay, then with regard to this point, the Regulation may conflict with Art. 29 of the MC<sup>53</sup>.

In contrast, the Commission proposal on rail transport attempts collectively to regulate liability for loss or damage caused by delay in the carriage of passengers or luggage, as well as other services for passengers. However, this creates problems,

53 Cf. Staudinger/Schmidt-Bendun, *Versicherungsrecht* 2004, 971 (973).

because the Commission proposal is oriented primarily towards Regulation 261/2004, but does not take sufficient account of the MC with its rules concerning liability for loss or damage caused by delay: the wording of the proposed Regulation does not provide for offsetting compensatory payments against compensatory services; the railway undertaking's liability in the event of delays in the carriage of luggage is not developed.

Regulation 261/2004 provides for fewer services (e.g. in the event of a delay, only when it is at least two hours) and contains more extensive grounds for exclusion from services to be performed than the proposed Regulation on rail transport: compensation payments need not be made if a flight has been cancelled (and probably also if it has been delayed, in so far as compensation payments for this come into question at all<sup>54</sup>) as a result of "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken" (Art. 5, para. 3 of Reg. 261/2004). The 14<sup>th</sup> "whereas clause" in this Regulation refers to the MC and in particular, cites as extraordinary circumstances political instability, unfavourable meteorological conditions, security risks, unexpected flight safety shortcomings and strikes; this list is not exhaustive. The proposed Regulation does indeed also refer generally to "exceptional circumstances", but contains a very much narrower catalogue of exclusions (Art. 16, 10).

### III. Result and appraisal of the comparison with aviation law

The Commission proposal on rail passenger transport takes from the air transport regulations over several structures pertaining to liability and compensation, compensatory services, subsequent completion and assistance in the event of disruptions to services and to insuring liability. However, with regard to establishing the types of loss or damage to be compensated, the liability criteria, exclusions from liability and the scope of liability/services to be provided, the Commission proposal mostly diverges from the model of aviation law and considerably increases the railway undertaking's obligations. This applies above all to

- liability for personal injury (possibility of relief for the railway undertaking only when the damages are in excess of 220,000 €, not 120,000 € as in air transport);
- liability in successive transport operations (joint and several liability of successive railway undertakings for the entire transport operation, not related to the separate legs of a journey as in air transport);
- liability for loss of and damage to hand luggage and luggage (higher, cumulative maximum amounts as well, while in air transport, a lower flat rate applies in the event of loss of, damage to and delay of hand luggage and luggage);
- unlimited liability for loss or damage caused by delay, provided the delay is at least one hour and was not caused by exceptional weather conditions, natural catastrophes or acts of war and terrorism; in contrast, in air transport, liability for loss or damage caused to a passenger by a delay is restricted to 5,000 € and to 1,200 € in the event of luggage being delayed (provided this amount has not already been used for loss of or damage to individual pieces of luggage belonging to the passenger).

Only in the case of serious fault is the air carrier's unlimited liability, which then comes into effect, stricter than the railway undertaking's remaining limited liability in such a case in accordance with the proposed Regulation. In air transport, there is only unfringeable limitation of liability in the carriage of goods, even if there is serious fault (Art. 22 of the MC).

It is not clear why the Commission proposal seeks, as a rule, to prescribe stricter liability and more wide-ranging obligations to provide services in rail transport than in air transport. Ultimately, the introduction of unlimited air carrier liability for personal injury is the result of pressure that was exerted from outside Europe.<sup>55</sup> There are no comparable connections in European rail transport; still less is there reason in rail transport to go beyond the strict liability for personal injury that exists in air transport.

54 Cf. Staudinger/Schmidt-Bendun, *Neue Juristische Wochenschrift* 2004, 1897 (1898 et seq.); Tonner, *ReiseRecht aktuell* 2004, 59 et seq.

55 Compare IATA Intercarrier Agreement on Passenger Liability, 1995: Müller-Rostin, *Versicherungsrecht* 1997, 1445 (1446 before III); Saenger, *Neue Juristische Wochenschrift* 2000, 169 (169 et seq., 171).

## E. Comparison of the Commission proposal with international rail transport law

### I. Competing application

It has been shown that with regard to the rules on liability and compensation, the Commission proposal only reveals some structural commonalities with the aviation law that applies in Europe, but that for the rest, it diverges substantially from it. What needs to be clarified now is how the proposed Regulation relates to the international rail transport law COTIF/CIV 1999. This is not just a matter of comparing the material rules (as in the relationship with aviation law), but also of precedence in the event of overlapping applicability, as both sets of regulations relate to cross-border rail passenger transport. The question of whether the proposed Regulation infringes international law because it does not take account of COTIF/CIV will not be dealt with here.

As the proposed Regulation is silent on the subject of overlapping applicability<sup>56</sup>, several questions arise:

- Are the two sets of regulations entirely mutually exclusive – because each of them is designed to be definitive – and does one take precedence over the other, so that the other one is completely ousted?
- Or can both sets of regulations exist side by side and complement each other if one of them has a gap for which the other provides rules?
- On a particular subject covered by both sets of regulations (e.g. the question of liability for damage to luggage), can the stricter liability criterion of one be combined with the higher amounts of compensation of the other ("the best of both worlds")? This is not an absurd question if each set of regulations is semi-mandatory and only lays down minimum conditions, i.e. if they permit contractual derogations in favour of the passenger (cf. Art. 25.2 of the proposed Regulation and Art. 5, 3<sup>rd</sup> sentence of CIV<sup>57</sup>).

Here, these questions can only be raised, but not dealt with conclusively. The following is a rough and ready response to the above:

- European Community rules on passengers' rights in international rail transport take precedence over COTIF and CIV (Art. 3 § 2 of COTIF).
- In addition, CIV often contains only minimum requirements and provides Contracting States with the opportunity of establishing more wide-ranging rules in their national legislation (cf. e.g. Art. 29 of CIV concerning compensation for bodily harm and Art. 30 of CIV concerning the form and amount of damages in case of death and personal injury). This opportunity may also be used through Community law, as it is a *minus* as compared with the possibilities afforded by Art. 3 § 2 of COTIF: according to this provision, Community law may prevail over COTIF/CIV without concern, while using the various possibilities for scope in CIV permits complementary co-existence of the two sets of regulations.
- When Community law on the rights of passengers in international rail transport has been created, then once it enters into force, CIV 1999 only applies in the Member States of the Community in so far as Community law does not cover a specific subject or gives CIV precedence. According to the regulatory content of the proposed Regulation, this applies, for example, in relation to the court of jurisdiction, so that Art. 57 of CIV is applicable<sup>58</sup>. It also applies in cases where the proposed Regulation is recognizably incomplete or where it cites a "key word" but does not flesh it out, e.g. in the case of the passenger's liability (cf. Art. 36), the relationship between the contracting and substitute carrier (Art. 20) or the liability for delays in the carriage of luggage (Art. 10)<sup>59</sup>.
- The cases which remain critical are those in which it is not clear whether the silence of Community law on a particular subject means there is a gap which CIV may fill, or whether the law of the Community on a particular subject is intentionally silent and does not provide a specific rule because it considers the subject already to have been dealt with by means of other

<sup>56</sup> Only the consultation paper from Directorate-General Energy and Transport of 4.10.2002, p. 11, makes reference to the precedence of Community rules on passengers' rights over COTIF/CIV.

<sup>57</sup> Unless otherwise indicated, references are to CIV 1999.

<sup>58</sup> Cf. E II 1 e, 3 c and 5 below.

<sup>59</sup> Cf. Schmidt-Bendun, GPR 2003/04, 193 (198).

rules under Community law. This combination of cases recalls the discussion on whether the Warsaw Convention – and today the MC – has not regulated the reduction, which is not dependent upon damage, of the price of the flight in the event of a delay, because it wished to leave this subject to the respective national legislation, or whether it had not included a rule because it only wished to allow passengers to make claims for compensation but not to allow them rights of warranty (claims for a reduction)<sup>60</sup>.

- The cases where the outcome is not critical are those in which "the best of both worlds" are under consideration, for instance by combining the more advantageous benefits of the one set of regulations with the more advantageous legal consequences of the other. If the proposed Regulation comes into force, any action in respect of liability against the railway undertaking can only be brought under the conditions and limitations set out in this proposed Regulation (Art. 22). Thus the "enhancement" of such claims by means of more extensive rights from CIV lapses. And if the proposed Regulation does not come into force, Art. 52 of CIV gives rise to the same effect as Art. 22 of the proposed Regulation.

In view of the questions which have only been touched on here, it is recommended that in further discussions, the Commission proposal on rail transport should be given the same structure as the new version of Regulation 2027/97 on air transport: firstly, confirmation of the validity of COTIF/CIV and then the promulgation of supplementary provisions, covering, for instance, guarantees and liability in the event of trains being delayed and cancelled. The Commission also has this concept in mind in considering the aim of its proposed Regulation to be the creation of a Community framework that has to coalesce with CIV, which framework would provide better protection for passengers and which, above all, would enable them to have a more precise overview of their rights<sup>61</sup>.

In the following, the material liability and warranty provisions of the Commission proposal are compared with those of CIV.

## II. Comparison of the content of the regulations

### 1. Liability for personal injury

#### a) Basis of liability

According to Art. 26 § 1 of CIV, the "carrier" (definition in Art. 3 a) of CIV, as a rule identical to the railway undertaking in accordance with the proposed Regulation) is liable for loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles. Like the Montreal Convention, but unlike the proposed Regulation (Art. 7.1), CIV itself does not prescribe liability of the carrier for psychological injury, but does not affect any liability of the carrier that might exist under other provisions – and hence under Community law (Art. 26 § 4 of CIV).

The wording of CIV is more restrictive than that of the proposed Regulation, as it links liability to the occurrence of an accident "arising out of the operation of the railway". Thus accidents during the journey which bear no relation to the operation of the railway do not come under the liability provisions of CIV, but probably do come within the scope of liability of the proposed Regulation<sup>62</sup>. In the interest of equal treatment of the different transport modes and in the interest of synchronization of the legal provisions established at different levels for one and the same transport mode, it should however be assumed that the railway is not liable under the proposed Regulation either for non-operational accidents or for accidents which are not typical for the railways<sup>63</sup>.

60 Cf. Leffers, *Transportrecht* 1997, 93 et seq.; Ruhwedel, *Der Luftbeförderungsvertrag* (The Contract of Carriage by Air), 3<sup>rd</sup> edition 1988, marg. 189 et seq.; Stefula/Thoß, *Transportrecht* 2001, 248 et seq.; Tonner, *ReiseRecht aktuell* 2004, 59 (60).

61 Commission Communication of 3.3.2004, COM(2004) 140 final, p. 8 before 3.2.

62 Cf. Pohar, *ReiseRecht aktuell* 2004, 194 (197 under 2). In general, with regard to accidents in connection with the operation of the railway: Mutz, *Liability of the Railway for Death of and Injury to Passengers in International Rail Passenger Transport in accordance with the Additional Agreement to CIV*, 1977, 87 et seq.

63 Relevant with reference to the interpretation of the equivalent provisions of air transport law and to § 1 of HaftPflG: (Schmidt-Bendun, GPR 2003/04, 193 (194)).

Thus it can be noted that with regard to the basis of liability for personal injury, CIV and the proposed Regulation are not substantially different.

**b) *Relief from liability***

CIV recognizes the following grounds for relief from liability (Art. 26 § 2):

- circumstances not connected with the operation of the railway,
- fault of the passenger,
- unavoidable behaviour of a third party (whereby another railway undertaking using the same railway infrastructure is not considered as a third party).

Proof of the absence of fault on its own part does not relieve the carrier from liability.

This rule is not comparable to that contained in Art. 12.2 of the proposed Regulation: for damages not exceeding 220,000 €, the railway undertaking can only exclude its liability under the proposed Regulation if it proves fault of the injured party; above this amount, it is not liable if it proves that it was not at fault. So according to this, liability in accordance with the proposed Regulation is more strict at the lower level and less strict than CIV at the upper level, since CIV also prescribes absolute liability for loss or damage exceeding 220,000 €, and this does not lapse if the railway undertaking proves that it was not at fault.

For damages up to 220,000 €, the interaction between CIV and the proposed Regulation is clear: owing to the precedence of Community law, a Community railway undertaking can only exclude its liability in this area if it can successfully invoke fault of the injured party. In contrast, above 220,000 €, it is questionable as to whether a Community railway undertaking is relieved from liability by invoking Community law – but in contrast to CIV – just by proving that it was not at fault.

If one looks for assistance to the CIV provision concerning the *amount* of compensation, the result is the following solution: according to Art. 30 § 2 of CIV, the amount of compensation not dependent upon fault is determined in accordance

with national law, but for each passenger to be compensated, at least 175,000 SDR/around 210,000 € must be available. This requirement is also satisfied by the proposed Regulation, which, above 220,000 €, only excludes liability of the railway in the absence of fault.

In contrast, according to German law, absolute liability of the railway is only excluded at a capital sum of 600,000 € (§ 9 of the new version of HaftPflG), which poses no problem according to CIV, but probably does according to the proposed Regulation, which moves over to liability for presumed fault even from 220,000 €, and which does not permit national law to make this any more strict (Art. 22, para. 1). Thus in this case, precedence of Community law would worsen the legal position of injured passengers in Germany.

**c) *Payment in advance***

CIV does not contain an obligation for the railway to make advance payments, whereas the proposed Regulation takes over the obligation to make advance payments from aviation law, and makes it stricter for the railway by not providing the possibility of setting payments off or reclaiming them.

**d) *Successive carriers***

Like the MC, CIV also prescribes for successive transport (for its part of the transport operation, each carrier involved is the passenger's contracting partner) that only the carrier which, in accordance with the contract of carriage, performed carriage in the course of which the accident happened, is liable for damage to persons and hand luggage (Art. 26 § 5, Art. 33 § 1 of CIV). In contrast, according to the proposed Regulation, successive railway undertakings should always be jointly liable, which leads to a considerable extension and tightening of their liability. Because of the obligation to co-operate in providing through transport services (Art. 6), a railway undertaking cannot even choose whether and with whom it wishes to co-operate successively in cross-border transport and for whom it accordingly wishes to take on joint and several liability in the event of damage or loss.

If joint and several liability and the obligation to make advance payments coincide, it can happen that a railway in a chain of successive carriers,

although far away from the scene of the accident, may have to pay an entitled person in a far off country an advance of several thousand Euro (in the event of the death of a passenger more than 20,000 €) within 15 days.

**e) *Substitute carrier***

If a substitute carrier (Art. 3 b) of CIV) is used, it and the contracting carrier are jointly and severally liable to the person entitled to compensation (Art. 26 § 5, 2<sup>nd</sup> sentence of CIV). Details concerning liability and the relationship between carriers are dealt with in Art. 39 of CIV in a similar way to the MC. In contrast, the proposed Regulation is content just to say that if a substitute railway undertaking is used, the (contracting) railway undertaking continues to be liable for the whole transport operation and that the limits of liability of the proposed Regulation also apply in this case (Art. 20, 22). The proposed Regulation is silent on all other questions which arise in this context, so Art. 39 of CIV continues to apply.

**f) *Obligation of insurance***

CIV contains nothing with regard to the railways' obligation of insurance, as it just restricts itself to regulating the contractual relationship between the carrier and the passenger. In contrast, the proposed Regulation (Art. 7.2) puts into concrete terms the obligation of insurance, which is set out in Dir. 95/18 as a prerequisite for obtaining approval, in respect of liability for passengers: the level of insurance must be adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with the proposed Regulation; the minimum insurance cover per passenger is 310,000 €.

While the obligation of insurance does not conflict with CIV, the way it is formulated in the proposed Regulation does not make sense and in all probability is only on the insurance market – if at all – to cover premiums which are too high: the proposed Regulation does not lay down the minimum sum to be covered per "case of loss or damage" (such a case would be, for example, two trains colliding) – as is usual in third party accident insurance – but per "passenger". The result of this is that in order to estimate the risk and to calculate the premium, the insurer must calculate the maximum number of passengers

who might be affected by an accident. In a collision between two full international passenger trains, each carrying 400 passengers, the minimum level of insurance required would be around 250 million € for the passengers alone. As a comparison: in Germany, the amount of cover required in accordance with the *Eisenbahnhaftpflichtversicherungsverordnung* (Railway Third Party Insurance Act) for all third party damages arising from an accident (i.e. not just loss or damage suffered by passengers) is around 10 million €; this might seem low, but is based on the transport policy consideration that in the liberalized rail market, hurdles should not be set too high for new railway undertakings wishing to access the market.

But although the amount of cover to be provided per incident under the proposed Regulation is extraordinarily high, it might nevertheless be insufficient in relation to individual passengers: for the most severely affected victims of an accident, the amount of compensation in individual cases can be millions, while for passengers with slight injuries, only a few hundred Euro may be sufficient. So should the insurance cover for the worst affected passengers end at 310,000 € whatever their needs, or should the amount of cover for the worst affected victims be topped up with the help of the unused cover provided for slightly injured passengers? In this case, complicated transfer rules are required, which would seem to indicate that fixing amounts of cover per victim should be abandoned, returning instead to the tried and tested principle of having an amount of cover per incident and to make this amount available to the victims collectively.

This would mean that statements concerning the scope of the obligation of insurance would not be included in the Regulation on the rights of passengers, but that Dir. 95/18 on the licensing of railway undertakings would be put into concrete terms with regard to the obligation of insurance, particularly with regard to the minimum amount of cover per damage incident.

**g) *Conclusions so far***

In several respects, the proposed Regulation diverges from CIV to the detriment of railway undertakings and supersedes CIV as a result of the rule of precedence for Community law. The possibilities offered by CIV for taking account in

certain matters of the different legal traditions and different economic power of the various Contracting States to COTIF by referring to the national law applicable in each case are again removed by the proposed Regulation with its standard solutions for the EU States in OTIF. In some countries – for instance in Germany, this leads to a worsening of passengers' legal position. The requirement for joint and several liability of the participating railway undertakings in successive transport is particularly disadvantageous and, in the end, impairs co-operation. In formulating the obligation of insurance, the proposed Regulation takes over the unfortunate example of air transport and deals with this subject in connection with passengers' rights rather than in the context of the approval requirements for issuing a railway licence under public law.

## 2. Liability for loss of or damage to luggage

### a) *Hand luggage*

If a passenger has suffered personal damage (as the result of an accident), the carrier is also liable to him in accordance with Art. 33 and 34 of CIV for loss of or damage to hand luggage and personal effects up to a limit of 1,400 SDR/around 1,700 €. The carrier is relieved from this liability if one of the three grounds for relief from liability already referred to under 1b exists. In the event of serious fault, the carrier's liability is unlimited (Art. 48 of CIV).

In these cases, the proposed Regulation prescribes liability of the railway undertaking up to a limit of 1,800 € per passenger, but only allows fault on the part of the person entitled to compensation as grounds for relief from liability (Art. 8.1, 14.1, 26). There is no provision for going beyond the limit of liability in the event of serious fault of the railway undertaking.

Thus under the proposed Regulation, in cases where there is absence of fault, or only minor fault, the railway undertaking is subject to stricter liability than the carrier in accordance with CIV; in cases of serious fault, liability in accordance with the proposed Regulation is less strict than under CIV.

If there is no loss or damage to persons caused by an accident, the carrier is only liable for loss or damage to hand luggage and personal effects, the

supervision of which is the responsibility of the passenger, if the carrier is at fault (Art. 33 § 2 of CIV). Art. 8.2 of the proposed Regulation has a similar provision, with this tortious liability of the railway undertaking also being limited to 1,800 €, while CIV in this case prescribes unlimited obligation to assume liabilities on the part of the carrier. Liability in tort of the railway for hand luggage and personal effects, the supervision of which is the responsibility of the passenger, is therefore stricter under CIV than the equivalent liability in accordance with the proposed Regulation.

### b) *Luggage*

For luggage registered with the carrier, Art. 36 of CIV prescribes non-fault liability, which may be wholly or partly waived as a result of fault of the passenger, inherent defects in the luggage, unavoidable circumstances or as a result of particular risks in the sphere of the passenger (absence or inadequacy of packing, special nature of the luggage, articles not acceptable for carriage as luggage). In the event of serious fault of the carrier, his liability is unlimited.

The proposed Regulation also prescribes non-fault liability of the railway, although liability is only waived if the person entitled to compensation is at fault. Thus the basis of liability is broader than under CIV.

The limit of liability according to the proposed Regulation is 1,300 € per passenger (Art. 9, 14.2), irrespective of the number of pieces of luggage involved.

CIV contains very many more differentiated rules on the limit of liability (Art. 41, 42, 48 CIV): the carrier must compensate proven damage arising from loss of or damage to luggage up to the amount of

- 80 SDR/around 100 € per lost or damaged kilogramme gross mass of luggage or
- 1,200 SDR/around 1,440 € per piece of luggage.

Accordingly, if two suitcases are lost, the limit of liability will be around 2,880 €, more than twice as much as under the proposed Regulation. If there is serious fault on the part of the carrier, the



limitation of liability is waived under CIV but not under the proposed Regulation.

Without proof of damage or loss, a passenger can claim under CIV flat-rate compensation of 20 SDR/around 24 € per kilogramme gross mass or 300 SDR/around 360 € per piece of luggage.

Another difference results from the fact that for the carriage of vehicles in motorail transport, CIV contains some special liability provisions (Art. 44 to 46 of CIV) and also refers to the provisions concerning liability for luggage.

With regard to liability for luggage, CIV also prescribes joint and several liability for successive carriers (Art. 38 of CIV), so does not differ from the proposed Regulation in this respect.

For luggage, CIV and the proposed Regulation contain non-fault liability, where the proposed Regulation only allows fault of the person entitled to compensation as grounds for relief from liability, whereas CIV also allows inherent defects in the luggage or unavoidable circumstances.

The amounts of liability under CIV are much more differentiated and are more advantageous for the passenger than under the proposed Regulation. Unlimited liability for luggage in the event of serious fault of the railway only applies under CIV.

### c) *Interim findings*

CIV and the proposed Regulation are also inconsistent with regard to liability for loss or damage to hand luggage and luggage: it is true that both sets of regulations prescribe the same liability criterion, but the proposed Regulation only contains one ground for exclusion from liability, whereas CIV contains four. The amounts of liability under CIV are more differentiated and are almost always more favourable to the passenger than those in the proposed Regulation. In the event of serious fault of the railway, liability under CIV is unlimited. For loss or damage to hand luggage and personal effects not caused by an accident, CIV prescribes unlimited liability of the railway for every level of fault; in contrast, the proposed Regulation always prescribes limits of liability. Only CIV contains provisions specific to motorail transport.

## 3. Passengers' rights in the event of delay

### a) *The CIV system*

The CIV system presupposes that in the event of delay, cancellation and missed connections, the passenger is entitled to make a claim for *subsequent completion* in accordance with the general law of contracts<sup>64</sup>. In order to facilitate execution of this claim and of any other claims by the passenger, the carrier must, where necessary, certify on the ticket that the train has been cancelled or the connection missed (Art. 11).

CIV is silent on the passenger's *right of withdrawal*, and with regard to the conditions for reimbursing a ticket price or a supplement, refers to the General Conditions of Carriage (Art. 8 § 2, Art. 9 § 1 c) of CIV). These must also therefore regulate the legal consequences of withdrawal (full or partial reimbursement of the ticket price; with or without return transport to the place of departure).

CIV does not provide for *compensation* in the event of delays<sup>65</sup>.

In contrast, limited *liability* for "failure to keep to the timetable" has been introduced; this formula includes cancellation, delay and missed connections (Title IV, Chapter II with Art. 32 of CIV). In these cases, the carrier is liable for loss or damage resulting from the fact that the journey cannot be reasonably continued on the same day. *Compensation* consists of the reasonable costs of accommodation and of having to notify persons expecting the passenger (Art. 32 § 1 of CIV). The result is that the compensation payment for *additional expenses* incurred as a result of delay is limited in cases where failure to keep to the timetable leads to the passenger's no longer being able to reach his destination on the planned day of travel.

With regard to more extensive compensation, Art. 32 § 3 of CIV refers to the national law relevant in each case. This reference should relate not just to an extension of the obligation to pay

64 Cf. *Report of the Central Office* of the Intergovernmental Organisation for International Carriage by Rail on the Revision of COTIF – AG 5/6, 1.10.1999, p. 10 of the Explanatory Report on CIV concerning Art. 11.

65 Critical in this respect is the *Report of the Central Office* (footnote 64 above), p. 19 of the Explanatory Report on CIV concerning Art. 32.

compensation in the particular cases given in Art. 32 § 1, 1<sup>st</sup> sentence of CIV (the journey cannot reasonably be completed on the planned day of travel), but also to an increase in the cases where compensation is to be paid (failure to keep to the timetable, even if the passenger still reaches his destination on the day of travel). Thus CIV does not itself stand in the way of more extensive liability for delay.

The limited liability for delay in accordance with CIV is objective liability which is not dependent upon the fault of the carrier. However, the carrier can call upon the same grounds for relief from liability as apply in the case of loss or damage to persons and hand luggage resulting from an accident: unavoidable circumstances not connected with the operation of the railway, fault on the part of the passenger or unavoidable behaviour of a third party using the same infrastructure, but not as a railway undertaking (Art. 32 § 2 of CIV).

In the event of serious fault on the part of the carrier in accordance with Art. 48 of CIV, does unlimited liability for delay come into effect in the cases described in Art. 32 § 1, 1<sup>st</sup> sentence of CIV if the passenger is no longer able to complete his journey on the day of travel? The answer depends upon whether Art. 48 of CIV can also be applied to other limitations of liability than those *according to the amount* and whether Art. 32 § 1, 2<sup>nd</sup> sentence of CIV is a provision which extends liability or limits liability. The wording and history of the origin of Art. 48 of CIV would seem to argue in favour of not applying this provision to the new liability for delay under Art. 32 of CIV, which was unknown before the 1999 revision. In addition, Art. 32 § 1, 2<sup>nd</sup> sentence of CIV only defines the compensation to be paid in the cases listed in the 1<sup>st</sup> sentence, and is not therefore a provision which limits liability.

**b) *Precedence of the system in the proposed Regulation***

The rules in the proposed Regulation concerning subsequent completion and withdrawal, which have already been looked at in more detail under D II 3 a, do not conflict with CIV. The same applies to the system of compensation payments, assuming that CIV does not wish conclusively to regulate the legal consequences in the event of failure to keep to the timetable.

The stricter liability for delay under the proposed Regulation is accepted under CIV (Art. 32 § 3 of CIV); in addition, the general precedence of Community law applies (Art. 3 § 2 of COTIF). So the rules concerning delays under the proposed Regulation need not be criticized from the point of view of CIV, but with reference to the inherent weaknesses of the proposed Regulation.

**c) *Liability for delay in the carriage of luggage***

The proposed Regulation assumes liability of the railway undertaking for delays in the carriage of luggage (Art. 10), but does not go into details. In contrast, CIV contains not only the basis of liability (Art. 36 § 1 of CIV), but also lists scaled amounts of compensation depending on the extent of the delay in delivering luggage and on whether loss or damage resulting from delay is proved or not (Art. 43 of CIV). There is a specific provision concerning liability for delay in motorail transport (Art. 44 of CIV).

As the proposed Regulation prescribes liability for delay in the carriage of luggage, but does not put it into concrete terms, CIV remains definitive with regard to completing these provisions.

**4. *Persons for whom the carrier is liable***

The carrier is liable for its servants and other persons whose services it makes use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions (Art. 51 of CIV). The proposed Regulation includes this general basis of liability of transport law in its Art. 21, para. 1.

CIV also says in certain cases that other railway undertakings using the same railway infrastructure are not considered as third parties, so the carrier against whom the passenger is making a claim cannot invoke "unavoidable behaviour of a third party" as grounds for exclusion from liability (Art. 26 § 2 c) of CIV with regard to liability for loss or damage to persons and hand luggage caused by an accident, Art. 32 § 3 c) of CIV with regard to liability towards the passenger for delay). Thus every railway undertaking is also liable to its passengers for the behaviour of other railway undertakings on the same network. Since, in contrast to CIV, the proposed Regulation does not in any case recognize "unavoidable behaviour of a third party" as a reason for exclusion from liability, it can dispense with a revertive exception in relation to other railway undertakings on the same network.

CIV also declares the managers of the railway infrastructure on which the carriage is performed to be persons whose services the carrier makes use of for the performance of the carriage (Art. 51, 2<sup>nd</sup> sentence of CIV). Thus the carrier cannot invoke unavoidable behaviour of a third party if the infrastructure manager causes an accident.

In contrast, the proposed Regulation considers all the *staff* of the manager of the infrastructure as persons whose services the railway undertaking makes use of (Art. 21, para. 2), without any consideration of whether they were in any way active in performing carriage and were acting in the performance of their functions. This certainly goes too far; it would be better if the proposed Regulation were to dispense with this paragraph and just say that according to how it is conceived, the railway undertaking cannot in any case invoke the behaviour or fault of third parties (whether they be the infrastructure manager or his staff), in order to exonerate itself.

In addition, the proposed Regulation does not prejudice the rights of recourse of persons liable for damage in accordance with its provisions against other persons (Art. 24); it also gives the railway undertaking a right to claim compensation from the infrastructure manager for compensation it has paid to passengers (paragraph 2), without regard to whose behaviour caused the obligation to pay compensation. It is possible that the idea behind the proposed Regulation was that railway undertakings and infrastructure managers had ultimately to make compensation payments to passengers jointly and severally. In view of the unclear terminology of the proposed Regulation on compensation payments and compensation<sup>66</sup>, it also remains unclear whether the railway undertaking's claim for compensation against the infrastructure manager only relates to the flat-rate (irrespective of the damage) compensation payment in accordance with Art. 15 or to the unlimited compensation in accordance with Art. 11.

While Art. 24 is restricted to establishing a principle for the relationship between railway undertakings and infrastructure managers, the meaning and scope of which remains unclear, in this respect, Annex E (CUI) of COTIF contains provisions for the contract of use of infrastructure in international rail traffic, which, among other things, comprehensively regulate the mutual liability of the infrastructure manager and the carrier (Art. 8, 9 of CUI). Once COTIF 1999 enters into force, CUI will be authoritative, as it cannot be assumed that the general principle of Art. 24 of the proposed

Regulation is intended to deal conclusively with this relationship<sup>67</sup>.

## 5. Obligations and liability of the passenger

CIV prescribes that the passenger must, from the start of his journey, be in possession of a valid ticket (Art. 9 § 1 of CIV), upon receipt of which the passenger must ensure that it has been made out in accordance with his instructions (Art. 7 § 3 of CIV), that the passenger must comply with the formalities required in respect of himself and his luggage by customs or other administrative authorities (Art. 10, 14 of CIV), that he may not take with him in the train articles or animals likely to annoy or inconvenience other passenger or which may cause damage (Art. 12 of CIV), that dangerous goods complying with the Regulations concerning the International Carriage of Dangerous Goods by Rail (RID)<sup>68</sup> are only permitted for carriage as luggage (Art. 12 § 4 of CIV), that the passenger is responsible for supervising the hand luggage and animals that he takes with him (Art. 15 of CIV) and that he must indicate on each item of registered luggage in a clearly visible place, in a sufficiently durable and legible manner, his name and address and the place of destination (Art. 20).

The General Conditions of Carriage may provide that passengers without a valid ticket must, in addition to the price of the ticket, pay a surcharge and if they refuse to do so, they may be refused carriage; this also applies to passengers who present a danger for safety and the good functioning of the operations or for the safety of other passengers or who inconvenience other passengers in an intolerable manner (Art. 9 of CIV). In addition, Art. 53 of CIV prescribes liability of the passenger for any loss or damage resulting from failure to fulfil his obligations or caused by articles and animals that he has brought with him; the passenger is relieved from liability if he can prove that the loss or damage was caused by circumstances that he could not avoid.

In relation to the passenger himself, the proposed Regulation contains similar obligations and penalties (Art. 36), but there are no similar provisions with regard to fulfilling customs formalities or formalities required by other administrative authorities, nor with regard to care and supervision of luggage and animals. The proposed Regulation is silent on the *liability* of the passenger if he causes loss or damage.

66 See end of footnote 42 above.

67 Cf. also Schmidt-Bendun, GPR 2003/04, 193 (198).

68 RID = Appendix C to the COTIF Convention.

This therefore opens another area in which the proposed Regulation is supplemented by CIV, as it cannot be assumed that the intention of the proposed Regulation is to exempt the passenger from all obligations with regard to his luggage and from liability in connection with loss or damage for which he is responsible.

### III. Outcome and appraisal of the comparison between the Commission proposal and CIV

The 1999 CIV stands at the end of a long legal development with numerous more or less cautious stages of reform. It lays down minimum standards for personal loss or damage and for the consequences of delay, and it leaves it up to the Contracting States to make their own, more wide-ranging rules on liability to the benefit of passengers, in line with their legal traditions and economic circumstances.

In contrast, the Commission proposal prescribes standard solutions which, at the lower and medium level of personal loss or damage, are more favourable for passengers than the provisions of CIV. However, at the upper level of loss or damage, the Commission proposal restricts for passengers the more favourable rules of individual States.

The joint liability which the Commission proposal also prescribes for successive railway undertakings in the event of personal loss or damage will mean – in conjunction with obligations to co-operate, the obligation to make advance payments and the wide-ranging obligation of insurance – that new railway undertakings will be very hesitant in becoming involved in the international carriage of passengers by rail, even when liberalization of this carriage begins in 2010. This is particularly the case in view of the comprehensive liability for delays, the amount of which is unlimited, in accordance with the Commission proposal.

With regard to liability for loss or damage to luggage, the proposed Regulation does indeed broaden the basis of liability to the detriment of the railway, as it only provides for one reason for exclusion from liability. However, the maximum amounts of liability in the Commission proposal are almost always less favourable to passengers than those prescribed in CIV, and are applicable even in the event of serious fault of the railway.

If the proposed Regulation comes into effect, it will supersede CIV in those areas it regulates. CIV can continue to be of significance for the legal status of the substitute carrier and also for liability in motorail

transport, unless one assumes that the silence of the proposed Regulation in respect of motorail transport means that this type of transport is covered by the Commission proposal's standard solution and is definitively dealt with (Art. 22). CIV can also be called upon to complete the liability for delay in the carriage of luggage by rail, as in this respect, the proposed Regulation only contains the principle of liability. CIV also retains its significance with regard to the obligations and liability of passengers, as the proposed Regulation is incomplete in this respect.

### F. Critical appraisal of the proposed Regulation

The proposed Regulation does not achieve the aims it sets itself: it does not harmonize rail and aviation law, but prescribes for railways stricter liability for loss or damage to persons, luggage and in the event of delay.

In addition, the proposed Regulation does not meet its target of creating a framework to align with CIV, but merely puts forward existing international rail transport law and "re-regulates" the basic questions of liability in respect of loss or damage to persons and luggage – but differently to CIV. In so doing, it emerges that the proposed Regulation does in fact conceive the liability of the railway more strictly than in air transport, but at the same time falls short of the standards of CIV in various respects (e.g. particularly with regard to liability for loss or damage to luggage).

For liability in the event of a delay, for which in fact there is further need for reform in the railway sector, the proposed Regulation, with its unlimited, non-fault liability for all loss or damage caused by delay, shoots way beyond the target and on the whole gives the passenger rather a raw deal, because after the end of the period of State railways, the costs of such comprehensive liability (including processing costs) can no longer be passed on via the State budget to the tax payer, but will be transferred to ticket prices – a questionable outcome from an economic and legal policy point of view<sup>69</sup>.

Contrary to what the Commission has indicated, the proposed Regulation does not form a *framework* either, within which the Member States can maintain more wide-ranging solutions according to their legal traditions and economic opportunities. Instead, the consequence of the standard solutions contained in the proposed Regulation is more that for liability for personal loss or damage in the individual Member States, passengers'

69 Pohar, *ReiseRecht aktuell* 2004, 194 (197 under bb).

opportunities for favourable solutions are constrained. This way of proceeding is not compatible with the principles of subsidiarity and proportionality (Art. 5 of the EC Treaty).

The proposed Regulation often takes up a certain subject (substitute carrier, liability for delayed luggage, railway undertaking's claim for compensation from the infrastructure manager, obligations of passengers), but then fails to provide the necessary implementing measures for that particular subject. This then does require international rail transport law, along with its rules.

There thus arise a multitude of legal sources, which again, is not suitable for realizing the Commission's aim of providing passengers with a more precise overview of their rights than hitherto. There are already complaints about the growing multitude of sources for air transport<sup>70</sup>, although there, the effect is confined, as the new version of Reg. 2027/97 links in specifically with the Montreal Convention. In contrast, the provisions of the proposed Regulation on rail transport do not take account of CIV, which will lead to incomparably more doubts with regard to application than in air transport.

The proposed Regulation has already been described elsewhere as difficult to understand, contradictory and badly constructed from a technical point of view<sup>71</sup>. And even if the Commission's attempt to strengthen the rights of passengers in cross-border rail transport is welcome, the terminological maze – as in air transport – is regrettable<sup>72</sup>: the Commission proposal would need to be revised and clarified and the terminology should be aligned with that of COTIF; in harmonizing the provisions of railway law with those of aviation law, care should be taken to ensure that in addition to the wording, the form of the contents also corresponds, in order that the best synchronicity is achieved between railway and aviation law.

The way things stand, if the proposed Regulation comes into effect, the consequence of the comprehensive obligations concerning co-operation applicable to railways operating in international transport, the prescribed joint and several liability of successive railways throughout the whole of Europe, the unlimited liability for delays, irrespective of who or what caused them (provided it was not the passenger himself), and

the misconceived, cost increasing obligation to provide insurance per passenger (and not per incident), will be that only a few large railways (and hardly any of the new ones) will be in a position to become involved in international rail passenger transport. Thus the efforts to achieve liberalization in the European rail sector, at least as far as passenger transport is concerned, are at risk of failing; renationalization of the railways can no longer be ruled out.

## G. Own proposals

The Commission proposal for a Regulation on International Rail Passengers' Rights and Obligations is on the table. The Council of Ministers and the European Parliament are now looking at it. Initial experience with the earlier legislation in the field of aviation law and the required adaptation of the proposed Regulation to parallel activities on the further development of Community law in the rail sector indicate that it would be advisable to undertake a fundamental revision of the proposal in the course of the further procedure. In view of this, the following proposals are submitted:

1. According to its title, the proposed Regulation should concentrate on provisions concerning passenger transport law and thus the form of the contractual relationship between passengers and railway undertakings/carriers. Provisions under public law concerning the organization of railways, for instance on the railway's extracontractual obligations to provide information and to co-operate, and on the form of the obligation to insure and safety obligations, belong in other Regulations and Directives; for example, safety provisions belong in the comprehensive new Rail Safety Directive.
2. CIV was revised in 1999 under the deciding influence of 21 of the present 25 Member States of the EU. After the entry into force of COTIF/CIV 1999 and the accession of the European Community to COTIF, provisionally in 2005, the EU, with its majority vote, will be in a position in the organs of OTIF to revise CIV again in accordance with its ideas. This distinguishes CIV from the MC. There is thus no reason abruptly to push CIV aside now with competing legislation. This is particularly so if the proposed legal act is promulgated hurriedly and without being fully developed, flawed by numerous contradictions and matters which are still in doubt.

70 Staudinger/Schmidt-Bendun, *Versicherungsrecht* 2004, 971 (974 under IV).

71 Pohar, *ReiseRcht aktuell* 2004 194 (195 et seq., 198).

72 Schmidt-Bendun, GPR 2003/04, 193 (198 above left and summary).

Instead, it is appropriate to find a *modus vivendi* between the proposed Regulation and CIV which is similar to that between the new version of Regulation 2027/97 and Regulation 261/2004 on the one hand and the Montreal Convention on the other.

3. Thus the proposed Regulation should establish firstly that after ratification by the Member States with railways, and after the accession of the Community to COTIF, COTIF/CIV applies in the EU. The proposed Regulation can then provide *supplementary* rules to CIV, particularly with respect to guarantees and liability to passengers in the event of failure to keep to the timetable. In this respect, CIV is either silent (e.g. with regard to reducing the ticket price) or it is very reticent and refers primarily to national law (e.g. with regard to liability for loss or damage caused by delays). In this case, on the basis of aviation law – but avoiding its complications and terminological weaknesses – flat-rate compensation payments (without proof of loss or damage) and limited compensation for loss or damage (with proof thereof) can be provided for – adapted to the conditions of rail transport and its limited earning power.
4. Liability for loss or damage to persons and luggage, and for delayed delivery of luggage, does not need to be regulated additionally or differently from CIV in an EC Regulation: liability for loss or damage to luggage is in any case dealt with more effectively and more strictly than in the proposed Regulation up to now, and with regard to liability for loss or damage to persons, CIV, which is restricted to setting out minimum standards, surpasses the proposed Regulation. By restricting itself to minimum standards, CIV allows the Contracting States, in determining which loss or damage is to be compensated, the extent of compensation (compensation for non-pecuniary damage, yes or no) and in setting the maximum amounts of compensation, to provide wider-ranging protection for victims in accordance with the respective State's legal traditions and economic circumstances. Thus the principles of subsidiarity and proportionality are taken into account.

(Translation)

## Miscellaneous Information

### Slovakian Railways, Annual Conference for Major Customers

*Štrbské Pleso, 8 - 10 November 2004*

As usual, Slovakian Railways (ŽSR) again organized a conference this year for its major customers. The conference was held in the Grand Hotel Patria in Štrbské Pleso.

After the meeting had been opened by the Director General and Board Chairman of ŽSR, Mr. Kužma, Mr. Reinhardt (UIC, Paris) gave a report on the progress of work concerning the status of wagons, which must now take the amended legal situation into account. Dr. Mutz (OTIF) gave a presentation on COTIF 1999.

Other talks covered ŽSR's position in the freight transport market, information on the amendments to ŽSR's tariffs in 2005, the 2005 business plan and ŽSR's fleet of freight wagons. A presentation looking at the application of the Value Added Tax Act in international freight transport received particular attention.

With more than 200 participants, the event was extraordinarily well attended and very successful.  
(Translation)

### UIC-CIT-OSZhD Seminar

*Paris, 1/2 December 2004*

#### Improvement of the legal interface between the CIM and SMGS

A Seminar entitled "Improvement of the legal interface between the CIM and SMGS" was organized by UIC/OSZhD/CIT in Paris on 1/2 December 2004. The purpose of the Seminar was to try to obtain an interim update in the context of the CIT project to create a common uniform CIM/SMGS consignment note, which was one of the main results of the international conference on international transport law initiated by OTIF, held in Kiev in October 2003. The Seminar achieved these aims, because all those involved seem willing to make a constructive contribution to make the CIT project successful. The project should be concluded in spring 2006.

From OTIF's point of view, the following points were of importance:

- (1) With regard to the subject of the Seminar, it was established that the aim should not in fact be to optimize the "interface" between the two systems of transport law, CIM and SMGS. For international freight transport, there is no sense in having two systems. However, as the fact of their existence cannot be changed in the short term, the first step to be achieved quickly must be to create the "best interface".
- (2) OSZhD and Russia are becoming more flexible, but insist on their special circumstances with very long lines and the comparatively high proportion of goods traffic they carry. SMGS has proved itself in these circumstances. Thus there can only be a slow process of convergence, which will only progress to the extent that it receives political support.
- (3) The EU showed little interest in a multilateral legal basis. To the extent that it wishes to ensure that its Community law becomes embedded in neighbouring regions, it prefers "tailor-made improvements", on a primarily bilateral basis. This is why the EU's accession to COTIF is important, on the assumption that for the EU's international rail traffic at least, COTIF will become the multilateral instrument for cross-border requirements. It is essential to place this view in the foreground if proposals (Russia) materialize along the lines that the EU could in fact participate directly in OSZhD.
- (4) For loaders and forwarders, the whole discussion surrounding CIM/SMGS is in any case too far removed from everyday reality. Their concern is directed towards the multifarious obstacles to the performance of transport, the source of which is very often unnecessary bureaucracy. On the other hand, as is well known, forwarders have an ambivalent attitude towards reconsignment, as this is lucrative on the basis of two transport law systems.
- (5) Thus arises the question of the significance of transport law, i.e. of COTIF and hence OTIF: to what extent are they significant in practice? Are the real problems and requirements recognized at their level? The problems surrounding customs must in any case be taken into account. From this point of view, there is certainly a consensus in respect of the usefulness of a common uniform consignment note, provided it is recognized for through transport as a customs forwarding document and is reciprocally applicable, if need be with a section on liability. The language problem also seems to be particularly substantial.
- (6) The question of opening out COTIF on the basis of COTIF 1999, particularly with CIM 1999 and its Article 1 § 2 in mind, is meeting with great interest. The conditions for applying CIM in the OSZhD area on the Eurasian axes must be investigated as a matter of urgency, including the question as to whether the States concerned in the OSZhD area are ready to provide the necessary political support for appropriate solutions.
- (7) Other questions are linked to this:
  - Is it necessary to differentiate between "real" international law for international carriage by rail and law of a more "regional" (EU) nature?
  - To what extent should organisations other than OTIF, OSZhD, UN/ECE (e.g. ESCAP) be included?
- (8) Despite everything, there must be good chances of introducing CIM 1999 as a set of regulations applicable "somewhere" to international carriage by rail in intermodal goods transport, in the sense of a uniform basis – supported and developed by a "single legislator", which could presumably also be defined as a "network" of international organisations.
- (9) The main challenge for OTIF in the future, with the inclusion of the EU, could in any case be seen here. How can such a "single legislator" for international rail transport be established? How can it be developed progressively together with OSZhD, UN/ECE? If necessary, a communicable strategy in this respect should be developed quickly.

(Translation)

### Book Reviews

**Andresen, Bernd/Valder, Hubert:** *Speditionen-, Fracht- und Lagerrecht* (The Law on Forwarding, Freight and Storage), transport law handbook with commentaries, loose-leaf volume, Verlag Erich Schmidt, 864 pages, ISBN 3 503 05904 0.

As a result of the reform of transport law in Germany in 1998, it was necessary that the handbook on the law governing forwarding, freight and storage founded by Dr. Erich Krien should be restructured. The collection of the rule of law and the general terms of business covers primarily the basic principles of transport law, including the determining insurance conditions. The commentary section has been extended. Owing to their collaboration in the commission of experts for the reform of transport law in Germany and their practical activities as lawyers, the authors are particularly qualified.

This loose-leaf volume, which was first published in 2000, is supplemented by ongoing inserts as necessary. This edition includes up to supplement 1/04.

The commentary on §§ 407 to 475 of the German Commercial Code takes into account case law which has been produced in the mean time, legal essays from specialist journals and festschriften, and new commentaries, thus providing a reliable account of current opinion. Despite the difficulty of the subject matter, the legal situation is presented simply and clearly and is thus accessible to everybody.

The handbook is aimed at all practitioners and lawyers dealing with transport law as an aid to their work, whether it be in undertakings, insurance companies, courts or associations. As this is a loose-leaf work, it is guaranteed up to date; references make legal comparisons easier, particularly comparisons with the provisions concerning international transport. The comprehensive commentary on the German "General Conditions of Forwarding" provides a quick answer to all questions relating to the day to day practice of a forwarding or storage company. No library on transport law in the German speaking area should be without this volume.

(Translation)

**European Railway Legislation Handbook/Handbuch der Europäischen Eisenbahn-Gesetzgebung/Manuel de Droit Ferroviaire Européen**, published by the Community of European Railways and Infrastructure Companies – CER), ISBN 3-7771-0314-4, Eurailpress, Tetzlaff-Hestra GmbH & Co. KG, Hamburg, € 64.

As may be assumed from the trilingual title, this publication from CER<sup>1</sup> is a trilingual legal work of

1 40 Rail transport and infrastructure undertakings from the EU Member States, from those States preparing for accession to the EU (Bulgaria, Romania and Croatia) and from Norway, Serbia and Montenegro and Switzerland have amalgamated within CER, see [www.cer.be](http://www.cer.be)

reference. It is arranged into an introduction and three Parts. In the introduction and in Parts I and III, the various language versions – English, German and French – follow on directly from each other.

The comprehensive Part II contains the texts themselves, but only in English, owing to space restrictions. The 16 EU legal texts included in the collection (Directives, Regulations, a Decision) are reproduced from the Official Journal of the European Union; four legal texts also appear in consolidated versions, as issued by the European institutions. The fact that the collection of texts is limited to one language does not detract from the value of the Handbook, as the European Community's legal texts can be consulted on the European Union's website in all languages<sup>2</sup>.

In addition, four texts published by CER in agreement with other organisations in this sector have been included in the Handbook.

The assertion made by the authors of the foreword, J. Ludewig and D. Brinckman-Salzedo, that the legal framework for railway activities in the Europe of the 21<sup>st</sup> century will largely be defined by European law, must – subject to the rules of COTIF, which apply to a broader community of States – be endorsed. The book meets the need arising from this: it provides the user with a good overview of the law established in the rail sector within the EC.

The introduction sets out concisely the legislative procedure and the role of the various organs of the EC. This is followed by summary commentaries entitled "Progression towards a European rail market", containing a brief description of the base position, particularly the negative development of rail transport in comparison with road transport and the problems connected with this. In the remainder, the individual stages and specific fields regulated by EC legislation are examined.

In Chapters 1 to 4, the commentaries relate to the early reforms (Directives 91/440, 95/18 and 95/19), the First Railway Package (Directives 2001/12, 2001/13 and 2001/14), the Interoperability Directives (Directives 96/48 and 2001/16) and the Second Railway Package (Directives 2004/49, 2004/50 and 2004/51, Regulation 881/2004). Originally, the Commission's recommendation to accede to COTIF formed part of this package. This issue was later removed from the package and became the subject of a separate decision.

2 [www.europa.eu.int](http://www.europa.eu.int) or directly under [www.europa.eu.int/eur-lex/en/index.html](http://www.europa.eu.int/eur-lex/en/index.html)



Chapters 5 to 7 relate to the trans-European transport network, additional legal provisions which complete the legal framework (public services, public procurement rules, rail transport statistics) and to environmental legislation which is of relevance to the transport sector (environmental noise, diesel emissions, environmental liability).

Following the explanations concerning the EC's rule-making, brief mention is made in Chapter 8 under the heading "Sector Agreements" of, on the one hand, two charters which are the result of an initiative by the railway associations (CER/UIC/CIT), the Freight Quality Charter and the Charter on Rail Passenger Services<sup>3</sup>, and on the other hand, two agreements concluded between CER and the European Transport Workers' Federation (ETF) on basic social conditions (locomotive drivers' licences and working conditions in cross-border services).

A useful addition to the explanations (Part I) and to the collection of texts (Part II) is provided by Part III – "Index of European Rail Legislation". Under this heading, there is firstly a list of legal texts each chronologically arranged according to their subject matter, i.e. the area they regulate and secondly, a list of court cases.

The Handbook can be recommended as a standard work to anybody involved in the rail sector who is looking for some orientation in European railway legislation. (Translation)

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

*Bulletin des transports et de la logistique*, Paris, n° 3056/2004, p. 729/730 – Ferroviaire : un grand vent de liberté. Adieu monolithisme ... ; Légère et court vêtu ... (M. Tilche)

*CIT Info*, Berne, N° 5/2004, Le nouveau modèle de la lettre de voiture CIM / Das neue Muster des CIM-Frachtbriefes / The new design of the CIM Consignment Note (H. Trolliet)

*Idem*, n° 6/2004, La proposition de règlement sur les droits des voyageurs de la Commission européenne. La vue sous l'angle du droit du transport international ferroviaire / Der Vorschlag der EU-Kommission für eine

Verordnung über die Fahrgastrechte aus der Sicht des internationalen Eisenbahnbeförderungsrechtes / The European Commission's proposal on passengers' rights. Its relationship with the law of international carriage by rail (R. Freise)<sup>1</sup>; Wagenrecht: Sécurité juridique dans le droit des wagons. Nouveaux modèles de coopération dans la gestion internationale des wagons. La transposition du nouveau droit des wagons progresse / Wagenrecht : Rechtssicherheit im Wagenrecht. Neue Kooperationsmodelle im internationalen Wagenmanagement. Die Umsetzung des neuen Wagenrechts schreitet voran / Wagon law: Legal certainty for wagon law. New ways of managing the international wagon fleet. The implementation of the new wagon law progresses

*Gefährliche Ladung*, Hamburg, Nr. 11/2004, S. 39-42 – Fokus auf Tanks (J. Conrad)

*Internationales Verkehrswesen*, Hamburg, Nr. 10/2004, S. 461-463 – Neue Vorschriften zum Transport von Gefahrgut auf Straße und Schiene. Geänderte ADR und RID gelten ab Januar 2005 (N. Müller)

*Idem*, Nr. 12/2004, S. 552/553 – Vor einer Renaissance des Schienengüterverkehrs? Erfahrungen und Überlegungen zum Demonstrationszug „Asien-Europa-Express“ (H. Nowak); S. 559 – Vorhersehbarkeit der nationalen Vorschriften muss gewährleistet sein. Zulassung von Fahrzeugen in Europa (Ch. Müller); S. 560 – Interoperabilität nicht um jeden Preis (K. Zapp); S. 564 – Aktuelle Trends in der Speditionsversicherung (P. Kollatz)

*Transportrecht*, Hamburg, Nr. 10/2004, S. 377-393 – Reform der Reform des Eisenbahntransportrechts in Europa? (R. Freise)

*Uniform Law Review / Revue de droit uniforme*, Rome, n° 2004-3, p. 547-556 – The Cape Town Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment : a Belgian Perspective (G. Mauri, B. Van Itterbeek); p. 557-572 – Rights of Financiers in Aircraft : a Finnish Perspective on the 2001 Cape Town Instruments (H. Wassgren)

3 More precise information in: CIT Info 5/2004 "Is the passenger charter a legal commitment?" and "Implementation of the extended liability for delay".

1 Résumé de l'étude publiée dans la revue „Transportrecht“ et dans ce Bulletin / Kurzfassung der in der Zeitschrift „Transportrecht“ und in dieser Zeitschrift veröffentlichten Abhandlung / Summary of the study published in the periodical „Transportrecht“ and in this Bulletin