



Intergovernmental Organisation
for International Carriage
by Rail

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Central Office Communications

Accession to COTIF

Estonia

On 19 January 2005, the Government of the Republic of Estonia made an application for accession to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980. The Secretariat of OTIF, which performs the functions of the Depositary Government in accordance with Article 2 § 1 of the Protocol of 3 June 1999 (1999 Protocol) for the Modification of COTIF, notified the Governments of the Member States of OTIF of the application for accession in a circular dated 28 January 2005.

The Note on the situation of Estonia's rail transport undertakings from the standpoint of international traffic, which was attached to the application for accession in accordance with Article 23 § 2 of COTIF 1980, explains that Estonia will make the line of pan-European Corridor 1 Tallinn-Tapa-Tartu-Valga (272.9 km) subject to COTIF.

The application will be deemed to be accepted six months after this communication, i.e. on 28 July 2005, unless five Member States of OTIF lodge objections.

As the application for accession was made after the opening of the 1999 Protocol for signature and before its entry into force, it is considered as an accession to COTIF 1980 as well as to the 1999 Protocol version of the Convention (Art. 3 § 4 of the 1999 Protocol).

Ratification of the 1999 Protocol

Norway

In application of Article 20 § 1 of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and Article 3 § 2 of the Protocol of 3 June 1999 for the Modification of COTIF (1999 Protocol), Norway deposited its instrument of ratification of the 1999 Protocol on 27 January 2005¹.

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, i.e. at least 27 States (Article 20 § 2 COTIF 1980). Norway is the 24th State to have ratified the 1999 Protocol.

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

Mr Wieger Johannes Visser Conseiller honoraire of OTIF

In recognition of his exceptional commitment towards the improvement of safety in the carriage of dangerous goods by rail and for his indefatigable work for the Intergovernmental Organisation for International Carriage by Rail (OTIF), the Director General of OTIF appointed Mr Wieger Johannes Visser as Conseiller honoraire of OTIF at a ceremony on 10 March 2005.

Mr Wieger J. Visser has for more than thirty years represented the Netherlands and later the International Union of Railways (UIC) at the RID/ADR/ADN Joint Meeting and the RID Committee of Experts.

He was chairman of the Joint Meeting from 1984 to 1995 and deputy chairman of the RID Committee of Experts from 1999 to 2004, and thus made a defining contribution to the further development of the law on the carriage of dangerous goods during this period. As chairman of the working group on the restructuring of RID, he played a decisive role in successfully redesigning RID.

In addition, Mr. Visser has supported OTIF over many years in the UN Sub-Committee of Experts on the Transport of Dangerous Goods and has represented OTIF in the Sub-Committee's working groups dealing with tanks and packagings. He also represented OTIF in the European Commission's Dangerous Goods Committee. This was possible because Mr. Visser is not a typical representative of a particular association for whom the interests of the association are the principal concern; rather, he is an advocate of safety in the carriage of dangerous goods.

He has taken part in OTIF's training courses as a capable speaker. He has always been available to the Secretariat's dangerous goods officers with his expert knowledge of chemistry and tank technology.

Not only has Mr. Visser thus rendered outstanding service in successfully making crucial progress on this subject, but he has also done so for our Organisation and for its reputation in the field of transport.



Photo: Joehen Conrad

Director General of the Secretariat of OTIF,
Stefan Schimming (l.) and Wieger Johannes Visser (r.)

OTIF Organs

Central Office

New Head of the Central Office

At its extraordinary session held on 1 July 2004, the Administrative Committee of the Intergovernmental Organisation for International Carriage by Rail (OTIF) nominated Mr. Stefan Schimming (Germany) to the post of Director General of the Central Office for the period 2005 to 2009.

Following higher education in law and history focussing on international law and European law, in April 1982, Mr Schimming joined the Federal Ministry of Transport where he worked in various divisions (maritime transport, international affairs). From 1992 to 1997, he was Head of the Transport Division at the Permanent Representation of Germany at the UN and international organisations in Geneva. Back in the capital, he was

appointed Head of the Secretary of State's office at the Federal Ministry of Transport. Before taking up his duties at OTIF, Mr Schimming was Head of the Directorate for Transport, Construction and Housing at the German Permanent Representation at the European Union in Brussels.

From the time the 1999 Protocol enters into force, Mr Schimming will perform the functions of Secretary General up to the end of the period for which he has been appointed.

Mr Schimming takes over from Mr Hans Rudolf Isliker (Switzerland), whose term of office (2000-2004) ended on 31 December 2004.

Dangerous Goods

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

26th Session

Geneva, 29 November – 7 December 2004

Experts and observers from 26 countries and 30 governmental and non-governmental international organisations took part in this last session (4th) of the 2003-2004 biennium dealing with the finalisation of the 14th revision of the UN Model Regulations (see Bulletins 3/2003, p. 52-54, 1/2004, p. 3-7 and 3/2004, p. 50-51).

The main amendments comprised by this 14th revision, which will be integrated into the modal regulations (maritime, air, road, rail and inland waterways) on 1 January 2007, concern principally the following points:

- the inescapable amendments to the provisions of Class 7 (radioactive material);
- the inevitable amendments to packing instruction P 200 for gas cylinders;
- alignment of the UN Model Regulations with the land transport regulations to exempt limited quantities and radioactive material in excepted packages from the security provisions. This was a very controversial decision, given that it was taken on the basis of a verbal request for clarification;
- revision of the provisions concerning loading.

Important decisions were taken or reconsidered with regard to substances hazardous to the environment and more specifically marine or aquatic pollutants. With the agreement of IMO, it was decided to use the generic term, "aquatic pollutant". It was also decided not to identify these pollutants in the transport document if they were in classes 1 to 8, as they were considered, a priori, as pollutants to the environment and therefore their identification as pollutants to the aquatic environment by the GHS (Globally Harmonized System of Classification and Labelling) marking was not necessary. Only pollutants of Class 9 in quantities of more than 5 kg/5 litres in single packagings or in inner packagings of combination packagings should bear this marking. This decision, which was also controversial, may well be called into question in the next biennium. A list of aquatic pollutants still has to be drawn up.

The question of whether it would be advisable again to include the vibration test issue in the work programme of the next biennium received no majority in favour (equal number of votes for and against). This issue will not therefore be included.

Lastly, the subjects of substances packed in limited quantities and compatibility tests were deferred to the next biennium.

World convention on the transport of dangerous goods

We have reproduced in extenso the part of the report of this session dealing with this interesting discussion:

"The representative of CEFIC said that the organizations which had been the joint authors of the document submitted to the last session supported the proposal by Italy for a world convention since multimodal transport was in constant development and the existing

differences between international regulations applicable to the different transport modes and domestic regulations caused considerable difficulties internationally.

The representative of ICAO introduced the views of the ICAO Legal Bureau, and said that if a convention of that nature were envisaged, its terms would have to be determined in such a way that ICAO could continue to exercise its responsibility in defining the safety standards applicable to air transport.

Several experts supported the principle of a convention. They said that the international transport of dangerous goods was currently governed by a number of legal instruments applicable to the five transport modes (by sea, air, road, rail and inland waterway), obliging them to prepare translations for five different voluminous legal texts, each containing the essential elements of the United Nations Model Regulations but nevertheless forcing them to take account, mode by mode, of differences that were sometimes minimal. They also considered that the lack of simultaneous implementation of the United Nations Model Regulations worldwide through national and international modal regulations led to major legal difficulties for international multimodal transport and intergovernmental cooperation.

The expert from China said that his Government applied the United Nations Recommendations for international transport mainly in maritime and air transport but that there was no legal framework for international transport by other transport modes and that, consequently, it supported the idea of a global international convention.

Other experts considered that the existing system of recommendations was satisfactory because it enabled each country or region to adapt its regulations for land transport in a flexible form while ensuring a harmonized global framework for transcontinental transport through the IMDG Code and the ICAO Instructions.

A member of the secretariat said that the outstanding problem to be resolved in the context of trade globalization was not that of unimodal transport, which was effectively governed satisfactorily on the basis of the United Nations Recommendations in the case of maritime and air transport and at national and regional levels in the case of land transport, but rather that of multimodal transport since at the start or close of international maritime or air transport operations, the land regulations were rarely aligned in time and substance with the maritime and air regulations.

In reply to the questions raised, he said that (1) an international convention normally comprised an agreement proper and annexes with specific procedures for amendment; (2) the amendment procedures of the annexes were more flexible than those of the agreement proper and were included in the agreement if the negotiators so wished; (3) a convention applicable to international transport in no way affected the right of States to regulate national transport on their territories as they pleased; (4) an international convention could include provisions whereby the contracting parties could regulate land transport regionally under different conditions; (5) an international convention would not necessarily call in question the role of IMO or ICAO, in that it could either refer to the IMDG Code and the ICAO Technical Instructions for maritime and air transport, or provide that the conditions for the maritime and air modes should be dictated by IMO and ICAO.

He also recalled Economic and Social Council resolution 1975 (LIX) which requested the Committee of Experts to study, in consultation with other bodies concerned, particularly the United Nations Conference on Trade and Development (UNCTAD), IMO, ICAO, IATA and the regional commissions, the possibility of a joint approach to the drafting of an international convention on the transport of dangerous goods by all modes of transport which would take into account the general scope of a future convention on international intermodal transport. This request had never received a genuine follow-up, on the pretext that, at the time, modal regulations were too different from each other, something which was no longer the case at the present time.

The Sub-Committee finally decided that the issue should be discussed in greater depth during the forthcoming biennium. It requested the secretariat to prepare documents for the possible drafting of a convention of this nature and to consult the pertinent bodies of the United Nations system in this regard, in particular, IMO, ICAO, IAEA and the regional commissions. At the same time, the Sub-Committee should study alternatives to a convention in order to improve internationally the assurance of the simultaneous harmonization of legislation applicable to the international transport of dangerous goods in all countries by all modes of transport.

He also stressed that at the Euro-Asian level, the UNECE and the Economic and Social Commission for Asia and Pacific (ESCAP) are working on corridor development projects in order to develop Euro-Asian land transport. Once the infrastructure projects had been determined, it would be logical to harmonize conditions

of carriage in order to facilitate transport operations. If there were no global legal framework for international transport, it would probably be necessary to use existing regional unimodal legal frameworks such as ADR for road transport."

Programme of work for 2005-2006

- Transport of gases (harmonization and standardization);
- Listing, classification and harmonization with the GHS (including list of aquatic pollutants);
- Packagings (including packaging performance and review of Chapter 6.3);
- Limited quantities;
- Cooperation with IAEA;
- Improvement of hazard communication;
- Guiding principles for the Model Regulations;
- Other options to facilitate global harmonization and implementation of the Model Regulations, including a world convention for the international transport of dangerous goods;
- Miscellaneous amendments to the Model Regulations, as necessary.

The full report is available on the UN/ECE website: www.unece.org/trans/danger/danger.htm.
(Translation)

UIC "Carriage of Dangerous Goods" Group of Experts

Teplice (Czech Republic), 23/24 February 2005

At this meeting, the Group of Experts received information concerning the following international meetings:

- 41st session of the RID Committee of Experts (Meiningen, 15-18 November 2004; see Bulletin 4/2004, pp. 80-82),
- Meeting of the UN Sub-Committee of Experts (Geneva, 29.11-7.12.2004; see p. 3).

The Group of Experts then examined those proposals submitted to the RID/ADR/ADN Joint Meeting (Berne, 7-11.3.2005) that were of relevance to UIC and on which it took a position.

At the joint meeting with the UIC synthesis group (political and strategic issues), the two groups received information concerning the new organisation of UIC, whose "Freight" Committee will in future be called the "Freight Forum". In future, UIC's work should no longer be dealt with in working groups that meet regularly, but in principle in the form of projects, and the overall structures should be slimmed down...

With this in mind, future collaboration between the two groups, particularly for the purpose of better defining their respective competencies and to avoid duplication, was especially relevant. Although the "Quality" section, which currently accommodates the two groups, will be maintained for the time being, there is cause to believe that a merger of the two groups might be unavoidable. Despite this Sword of Damocles, this merger was rejected by 11 networks, with 8 in favour. As a result, the Rules of Procedure of the two groups will have to be better defined. In his new role as communicator, UIC's new representative in international meetings (Mr Heintz, SNCF) will ensure that work on the same subject is no longer dealt with in both groups.

The next meeting of the Group of Experts will be held in Poland on 9 and 10 November 2005.
(Translation)

RID/ADR/ADN Joint Meeting

Geneva, 7-11 March 2005

Experts from 26 Governments, including that of the United States, from the European Commission and from 13 governmental or non-governmental international organisations took part in the work of this meeting chaired by Mr. C. Pfauvadel (France). (The complete report of this meeting will be available on the UN/ECE Transport Division's website in French, English and Russian and on the OTIF website in German).

Interpretation of RID/ADR/ADN

Transitional measure for danger labels

In the context of modifying the Class 7 danger labels (radioactive materials), the transitional measure adopted had lead to different interpretations by the RID Committee of Experts and WP.15 (ADR). While the RID Committee of Experts' view had been that this transitional measure also included the danger labels that have been modified in conjunction with restructuring (indication of the Class in the lower corner), WP.15's

view had been that by adapting the transitional measure, labels not displaying the Class number in the lower corner could no longer be used.

The Joint Meeting confirmed WP.15's interpretation, but considered it necessary to specify the labels concerned in the transitional measure, particularly the fact that it also applies to placards for consignments other than packages and small containers. In addition, the measure was subject to a time limit, the date of expiry having been chosen with regard to the date set by the UN Committee of Experts for replacing the current Class 5.2 label (organic peroxides) with a new model from 2007. The provision to authorise the former labels "until stocks are exhausted" was thus abandoned.

With regard to the problem of stocks of dangerous goods labelled according to the former requirements, particularly explosives and military ammunition, which are already subject to provisions for packaging, it was noted that it would be advisable to prepare a proposal for transitional measures relating to their marking and labelling.

Obligations of the packer with regard to overpacks

As the definition of the overpack only concerned the consignor and as no obligation was attributed to the packer with regard to overpacks, the Joint Meeting considered it necessary to resolve this problem within a working group (Gothenburg, 16-17 June 2005). This working group would have to examine particularly the need to include a definition for the "overpacker", which should cover both the person who packs and loads packages into the overpack as well as the person who only loads into the overpack. It should also be considered whether to amend the definition of the "overpack", which did not cover all possibilities and was not clear with regard to the marking to be applied. Any modification of the definition should be submitted to the UN Sub-Committee of Experts in order that there should be no distancing from the other transport modes.

Harmonisation with the UN Recommendations

Aquatic pollutants

In a document prepared by the UN/ECE Secretariat, it was proposed to include in RID/ADR/ADN the provisions of the United Nations Model Regulations concerning aquatic pollutants adopted by the UN Committee of Experts in 2002 and 2004, essentially in the context of harmonisation with the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) (see also p. 3).

There was no majority in favour of this proposal given that limiting the provisions concerning aquatic pollutants only to substances that are assigned to UN No. 3077 or 3082 would not be acceptable to the International Maritime Organization (IMO). Harmonisation with the IMDG Code would be more important, in order not to perpetuate the current discrepancy between European land transport and maritime transport.

In view of the uncertainty with regard to the decisions that would be taken by IMO for the IMDG Code and by the European Union to adapt framework directives 67/548/EEC and 1999/45/EC to the GHS, and with regard to any new discussions that might take place in the UN Sub-Committee of Experts, some delegations wished to defer the decisions on the changes required until the next series of amendments (2009).

It was agreed to return to the Secretariat's document again in September 2005. The representative of the United Kingdom would inform the Joint Meeting of the decisions IMO take with regard to the IMDG Code.

New amendment proposals

Temporary derogations (special agreements)

In this context, the Joint Meeting approved the removal of the temporary limitation "for the purpose of adapting the requirements to technological and industrial developments", which is also included in the EU framework directives, in order not to prevent the signature of multilateral special agreements that do not satisfy this condition.

The representative of the European Commission said that, in the context of the reform of the framework directives, the Commission could envisage amending the directives accordingly if the Member States agreed. This would then bring European law into line.

Special provisions

The duplication of certain entries of Table A to take account of different orange-coloured marking and labelling requirements for the same substance had a favourable reception from the Joint Meeting, for reasons of user-friendliness, as did the deletion of the special provisions relating to them.

Chapter 6.2 (Construction and testing of gas pressure receptacles)

The Joint Meeting noted the report of the working group tasked with establishing a stable structure for this Chapter (see Bulletin 3/2004, p. 51) and approved the principle of continuing the work on the basis of the new proposed structure. It would have to be kept in mind that not all gas receptacles are constructed in accordance with standards, but may be constructed in accordance with a code recognised by the competent authority, provided they meet the requirements of RID/ADR. The working group would also be able to examine the question of the mutual recognition of approval certificates, particularly with a view to the future inclusion in RID and ADR of provisions from the "TPED" European Directive, which would mean this Directive could be revoked, as it partly duplicates the RID and ADR Directives, which are also being revised.

Carriage of dangerous wastes

The Joint Meeting noted the representative of Austria's intention to propose to the Member States of COTIF and to the Contracting Parties of ADR a multilateral agreement to allow simplified conditions for the carriage of dangerous wastes, the text of which he had prepared after lengthy discussions in his country with the authorities concerned and with waste management professionals.

This document gave rise to numerous comments attesting to the difficulties in connection with finalising rational conditions for the carriage of wastes while ensuring the level of safety. Some delegations would have preferred a working group to be set up, tasked with carrying out an overall review of the provisions of RID/ADR relating to wastes, particularly for classification. Others pointed out that RID/ADR already prescribed specific conditions on a case by case basis, for example for hospital wastes, aerosols, lithium batteries, accumulators etc. and that there was thus no need to apply a multilateral agreement to the cases that were already regulated. Lastly, a multilateral agreement had the disadvantage of letting waste management professionals finalise practices and invest in material on the basis of provisions which ran the risk of subsequently being revoked.

Finally, the representative of Austria invited all delegations to send him their detailed comments on this draft agreement, which would enable him to take a decision on how to follow the matter up. The representative of Germany said he intended setting up a working group to discuss these questions.

Carriage in tanks

The Joint Meeting examined the report of the ad hoc working group which met in parallel with the meeting. The Joint Meeting broadly followed the working group's recommendations, as follows:

- for tank-containers not yet bearing the tank code, the proper shipping name of the substances to be carried should be shown on the tank-container itself or on a panel;
- a new definition for the capacity of a shell or a shell compartment should be incorporated;
- a transitional period of 10 to 16 years should be prescribed for the requirements with regard to increasing the calculation pressure from 1.5 bar to 4 bar for some highly flammable liquids (packing group I);
- when a more high-performance tank is used in accordance with the tank hierarchy, it should be indicated in the explanations on Table A that the special provisions applicable to the normal tank apply;
- the content of special provision TE 15 (tanks fitted with vacuum valves and considered as hermetically closed) should be transferred into the text of the regulations themselves.

Miscellaneous

Safety adviser

The Joint Meeting took note of the record of the Forum on the provisions concerning the safety adviser and their implementation in the Member States (see Bulletin 4/2003, p. 69/70). It considered the conclusions it contained and decided as follows:

- organisation of the examination: the principle was acknowledged of the need for independence when the same body was responsible both for teaching and examining;
- examination arrangements: the Joint Meeting acknowledged that the competent authority must take all appropriate steps to ensure that the examination was impartial, consistent and held successfully, but there was no consensus on the questions of the anonymity of the papers and the use of a laptop computer, which should be discussed in greater depth in a working group;

- databank: the Joint Meeting approved the principle of collecting lists of questions and case studies for all the transport modes, which should be transmitted by the competent authorities on a voluntary basis and which would appear on the UN/ECE's website;
- examination standards: it was agreed to set up an "educational" working group to carry out a comparison to harmonise the examination standard, and the working group received a mandate (Madrid, 6 and 7 June 2005).

Next meeting

The next meeting, which will be held in Geneva from 13 to 23 September 2005, will be the last before the 2007 amendments enter into force and will be given over mainly to harmonisation with the 14th revised edition of the UN Model Regulations. An ad hoc working group would meet at the end of May in order to prepare the work.

(Translation)

Other Activities

OTIF – UNIDROIT

Rail Registry Task Force (RRTF)

Rome, 21-25 February 2005

The RRTF held its meeting at the headquarters of UNIDROIT. As planned, the first day was given over to a workshop on the subject of the registries in accordance with the Cape Town Convention, with the main focus being discussion of experiences with the Aircraft Registry. The Aircraft Registry is already in an initial trial phase. Based on a resolution of the Diplomatic Conference in Cape Town, ICAO, which was appointed as such, is acting as the Supervisory Authority (SA). The company Aviareto in Ireland was chosen to be the registrar. This is a joint venture between the Irish Government and a subsidiary company of SITA.

The Aircraft Register is designed for authorised, registered users, but also encounters individual, occasional users for registrations. In contrast, just consulting the Registry is in principle open to everyone. Thus there are different classes of users with different user profiles.

Based on the RRTF's discussions in Brussels in September 2004, the Secretariat of OTIF had prepared a working paper and put it forward for discussion. The RRTF was of the view that without special provisions in the Rail Protocol, the registrar did not enjoy any privileges and immunities, unless one counted the rules on jurisdiction concerned by Article 44 of the Cape Town Convention. The RRTF also considered that it was not appropriate to lay down privileges and immunities in the Rail Protocol, as this could meet with political resistance at the Diplomatic Conference. If necessary, privileges and immunities, particularly exemption from tax, can be agreed in a headquarters agreement between the registrar and the host State. Nevertheless, the question of fiscal privileges may be of considerable significance for the costs of registrations and hence for the functioning of the Registry.

The RRTF discussed at length matters relating to insurance (item 4 of the mandate of the 3rd Joint Meeting of Governmental Experts) and agreed with the view that for reasons of constitutional law, many States would have to reject the registrar's liability being limited through the Rail Protocol. For this reason, the text proposed by the RRTF at its meeting in Brussels (see Bulletin 3/2004, p. 52) was not maintained. In cooperation with the Drafting Group, the RRTF prepared a proposal for Article XVII (4), according to which the amount of insurance or of the financial security in accordance with Article 28 (4) is to be set by the SA. In so doing, the SA would have to take into account facts such as the availability and costs of the insurance as well as developments in the insurance markets. In contrast, liability would continue to be unlimited, albeit restricted to direct loss or damage. The risk of a gap in cover between the insurance cover and possible liability would have to be assumed by the registrar, who would have to assess this risk. The view of most of the experts represented was that this risk can be assessed as rather low. It was also pointed out that the insurance industry is in the process of developing new insurance products that might cover risks in connection with keeping electronic registries.

With regard to the legal consequences of a breach of the obligations in accordance with Article V (6) of the Rail Protocol, it was simply made clear that such a breach did not affect the validity of the registration. A corresponding text proposal was drafted together with the Drafting Group.

Regarding the SA's costs, it was held that the State representatives in the SA have of course to pay their own costs and that the registry fees therefore have only

to cover the costs of the Secretariat. A corresponding text proposal was drafted and approved by the Drafting Group. The costs depend to a large extent on whether the SA uses only one or several working languages.

The Co-Chairman, Mr. Block, submitted a document on the fee structure of the Rail Registry. In the discussion, figures of \$500,000 to \$1,000,000 were named for the development phase of the Registry and 1 to 2 million ongoing operational costs per year. The costs incurred for the ongoing operation of the Registry depend largely on the necessary functioning of a help desk and the question of languages. With regard to the role of the SA in setting, and above all in adjusting or increasing fees, a proposed text was drafted together with the Drafting Group.

The CER presented a position paper on the investment requirements for railway rolling stock in the new EU Member States. This puts the financial investment required at around 10 billion Euros. Hence there is increasing interest from the railways in the Rail Protocol. The possibility of being able to register existing interests in rolling stock could increase the financial sector's readiness to participate in investments.

The RRTF is also aware that a period of at least twelve months is required between the official invitation to a Diplomatic Conference to adopt the Rail Protocol and the time it is held, so the earliest such a Diplomatic Conference could take place would be spring 2006.
(Translation)

Co-operation with International Organizations and Associations

United Nations Economic Commission for Europe (UN/ECE)

Inland Transport Committee (ITC)

67th Session

Geneva, 15 - 17 February 2005

OTIF was represented on 16 February 2005 at the 67th session of the Inland Transport Committee held in Geneva from 15 to 17 February 2005.

With regard to rail transport, the Inland Transport Committee supported the preparatory activities carried

out so far by the UN/ECE Secretariat, OSZhD, the countries concerned and international organizations (including OTIF) with a view to organizing an international conference on border crossing in railway transport and the plan of action concerning preparations for this conference (see on this subject Bulletin 1/2004, p. 10). The Committee also invited the Working Party on Customs Questions affecting Transport (WP.30) to start drafting as soon as possible a new Annex to the 1982 International Convention on the Harmonization of Frontier Controls of Goods. This Annex would deal with railway border crossing – or, failing that, to consider updating the International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage carried by Rail of 10 January 1952 and the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail of 10 January 1952.

The Inland Transport Committee noted that the Working Party on Intermodal Transport and Logistics had decided to defer new activities concerning the question of the opportunities for reconciling and harmonising civil liability regimes in intermodal transport. The Committee nevertheless asked the Working Party and its ad hoc expert group to continue to follow attentively all the activities undertaken in this field, particularly by UNCITRAL, and if necessary to prepare proposals for solutions at the pan-European level.

With regard to the facilitation of border crossing, the Inland Transport Committee adopted the final text of the draft Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under cover of the SMGS consignment notes. The Committee decided that the Convention would be opened for signature in Geneva from 1 August 2005 to 31 July 2006. The Convention will enter into force six months after the date on which five States have signed the Convention without reservations concerning ratification or have deposited their instrument of ratification or accession.

(Translation)

European Conference of Ministers of Transport (ECMT)

Group on Railways

Paris, 1/2 February 2005

The ECMT Group on Railways met in Paris on 1 and 2 February 2005 under the chairmanship of Mr F. Crocchio (Italy) and was linked in with a Workshop

on Rail Infrastructure Charges. The Secretariat of OTIF was represented by an observer.

The Group on Railways approved the final report concerning the reform of the railways in Russia, document CEMT/CS/CF(2005) 2 dated 28 January 2005, the final report concerning user charges for railway infrastructure, document CEMT/CS/CF (2005) 1 dated 7 January 2005, together with further conclusions in document CEMT/CS/CF (2005) 4 and the document entitled "Independent Regulation and Competitive Tendering – the state of play in European rail systems", document CEMT/CS/CF (2005) 5 dated 18 January 2005. The Group on Railways also approved, with minor amendments, the guidelines for the Transport Ministers' discussions in Moscow 2005 on the question of railway policy, document CEMT/CS/CF (2005) 3 dated 12 January 2005.
(Translation)

Organization for Railways Cooperation (OSZhD)

OTIF-OSZhD Meeting

Warsaw, 26 January 2005

On the basis of the "OTIF-OSZhD Common Position" (see Bulletin 1/2004, p. 13), a meeting was held in Warsaw on 26 January 2005 with the OSZhD Committee, attended by the former and new Director General and another officer of the Central Office. The basis for discussions was a document prepared by the OSZhD Committee entitled "Plan for OSZhD and OTIF joint activities in 2005". This had been drafted on the basis of OSZhD's and OTIF's work plans for 2005 and the Joint Declaration of the Conference on International Rail Transport Law held in Kiev on 21/22 October 2003 (see Bulletin 4/2003, p. 81-85).

The representatives of the Committee and the Central Office were all of the view that last year's plan for the two Organisations' joint activities had not yet led to the desired intensification of co-operation. In addition to problems with dates, other joint initiatives had also been altered because the arrangements made previously had obviously not been precise enough.

In order to remedy this, the plan of joint activities set for 2005 was put in concrete terms in one respect, in that for the priorities which have now been established, both parties settled on and nominated people responsible for

developing the work. Thus in carrying out the plan, unbroken communication should in any case be ensured in preparing the total of 13 events where joint participation is planned.

The plan of joint OTIF and OSZhD activities is concentrated in six sections on

- the drafting and implementation of measures for developing the OSZhD transport corridors,
- aligning SMPS with other legal documents applicable to international passenger traffic,
- with a particular focus on work concerning provisions for the carriage of dangerous goods (in respect of which the OSZhD Committee gave a firm commitment to participate in the RID/ADR/ADN Joint Meetings and the RID Committee of Experts),
- the ongoing work headed by CIT, which should be concluded in 2005 if possible, to develop a uniform CIM-SMGS consignment note,
- technical rail transport issues (for which OSZhD will also take part in the meetings of the OTIF Committee of Technical Experts, which is provisionally to be convened in autumn), and
- matters relating to the facilitation of border crossing, particularly in view of the preparations for the international UN/ECE and OSZhD conference on facilitating border crossing in rail transport.

From the Central Office's point of view, this meeting, which the new Director General also used as an opportunity for an inaugural visit to the OSZhD Committee, therefore succeeded in getting adopted an ambitious, but also realistic programme for joint work in 2005. Thus the conditions are also in place to enable this plan to be carried out with a greater degree of achievement of objectives than was possible last year as a result of the teething troubles referred to. It is particularly encouraging that the OSZhD Committee has given a firm commitment to take part directly in this year's RID/ADR/ADN Joint Meetings and the sessions of the RID Committee of Experts, and in the meeting of the OTIF Committee of Technical Experts, which will be convened for the first time.

(Translation)

International Rail Transport Committee (CIT)

Standard CIM/SMGS Consignment Note

Large Working Group

Berne, 8-10 February 2005

The CIT "standard CIM/SMGS consignment note" project originated from a mandate contained in the Joint Declaration issued by the Conference on International Transport Law in Kiev (see Bulletin 4/2003, p. 81-85). The project is being advanced in the context of efforts to achieve increased performance and attractiveness of rail transport in the pan-European and OSZhD transport corridors, particularly in pan-European corridors I-III. Following the working group's first meetings, attended by representatives of CIT, UIC and OSZhD and the rail transport undertakings operating in Germany, Austria, Poland, Belarus, Russia, Ukraine and Latvia, interim conclusions were discussed at the seminar held in Paris on 1/2 December 2004 (see Bulletin 4/2004, p. 110).

The idea behind the project consists of "producing an integrated standard consignment note based directly on the CIM/SMGS conditions of carriage, with the associated CIM/SMGS transport manual as a sum of equivalent or comparable data". The integrated standard consignment note is to be used independently for each of the areas of competence of the CIM and SMGS railways.

The organisation of the work fulfils the need to cover all the specialist areas concerned – law, consignment, charging and customs – and to make progress as quickly as possible: a large working group, in whose meetings OTIF is also called upon to take part, has to take decisions of principle which a restricted working group will then use as a basis for developing both the model consignment note and the draft manual.

The meeting of the large working group held in Berne from 8-10 February 2005, which OTIF attended, had before it an initial draft of the consignment note and a catalogue of questions. The first question dealt with was the legal basis of the CIM/SMGS consignment note. While Article 6 § 8 of CIM 1999 provides a sufficient legal basis and the requisite scope for this project; the project requires an amendment to SMGS because the model consignment note constitutes a part of SMGS. Bearing this fact in mind, the large working group produced a work timetable, according to which, in accordance with the internal rules of procedure applicable to OSZhD and CIT, the drafts should be

approved by March 2006 and the consignment note model and the manual should be presented in a seminar at CIT's headquarters in April 2006 and should be introduced on 1 September 2006.

Other decisions were taken with regard to the consignment note languages and the interface. However, the large working group will have to return to some of the matters in connection with the interface at its next meeting, which will be held in Warsaw from 17-19 May 2005, particularly matters relating to liability and the payment of charges.

(Translation)

Studies

Liberalised rail transport in the competitive market

by Hon. Prof. Dr. Kurt Spera, Vienna

The liberalisation of rail transport, ushered in through the requirements of the European Union, is now directly in its implementation phase, with open access to the network already taking shape. It also seems that the imminent entry into force of the new transport law regulations in accordance with the 1999 Vilnius Protocol, with a substantially modified "Convention concerning International Carriage by Rail" (COTIF), will become a reality in about May 2005, since at present, 23 ratifications¹ have been obtained. From that point on, inherent necessities which have hitherto been considered as fundamental, such as the obligation to carry and tariff obligations, will no longer be routine, and the rail transport undertakings involved in the transport operation will have available – provided they are used – wide-ranging opportunities for tailoring individual contracts with their partners. The resulting significant improvements in the transport market require effective strategies to support rail transport, in order that it can survive in competition with other modes of transport, particularly road freight haulage.

In this context, the following exposition is to highlight the nature of the problem of future decisions affecting transport, with a comparison, based on the legal situation, of existing transport requirements:

Firstly, with regard to the future of rail transport:

¹ This study was written at the end of October 2004. With regard to the number of ratifications of the 1999 Protocol and the end of March 2005, see p. 1/2.

As already mentioned above, the comprehensive improvements adopted in 1999 at the General Assembly of the "Intergovernmental Organisation for International Carriage by Rail (OTIF)" held in Vilnius, Lithuania, will be introduced in 2005. The resulting important amendments mean for the rail transport undertakings that they will have to rethink along the lines of a variety of conditions which will then exist.

In connection with this, the position at the outset, which is now emerging, must be taken into consideration:

Firstly, set out below is the effect of the provisions of the amended

"Convention concerning International Carriage by Rail (COTIF)"

brought into force as international law.

The Convention has been considerably extended and now has seven (instead of the previous two) Appendices. These are the:

- "Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)", Appendix A
- "Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)", Appendix B
- "Regulation concerning the International Carriage of Dangerous Goods by Rail (RID)", Appendix C
- "Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV)", Appendix D
- "Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI)", Appendix E
- "Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU)", Appendix F
- "Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF)", Appendix G.

On the one hand, for some of the provisions listed above, detailed regulations still need to be developed.

This is particularly the case for Appendices D, E, F and G. The hitherto applicable provisions of RIV, RIP and UIC leaflet 433 will also be affected, and will need to be replaced accordingly. It must also be borne in mind that for the validation of technical standards and the approval of railway equipment, the necessary specific requirements, in the form of uniform standards, do not exist.

On the other hand, the endeavours of the Commission of the European Communities should not be overlooked. At present, the Commission is presenting a proposal in the Third Railway Package which, in the event of non-fulfilment of contractual quality requirements in rail freight transport, provides a reorganisation of compensation for rail transport undertakings, their customers, if appropriate, and recourse against infrastructure managers. In this regard, rail service providers should be held to increased efforts in the direction of improved quality. In this respect, the contract of carriage would for instance have to take into account special conditions which go considerably beyond the principles laid down at present (CIM, Consignment Note Manual). In further consequence, it has been provided to increase the limit of liability for loss of or damage to goods to € 75 per kilogramme, as well as new rules in the event of loss or damage caused by delays.

Brussels' demonstration of the desire to compel the rail transport undertakings to achieve better quality is, on the one hand, to be welcomed, particularly as by introducing improved quality, freight customers would have a better choice when using the services provided by rail transport. It also seems worth mentioning in this connection that following the process of revision of COTIF 1999, a request was made for a limited increase in the amounts of compensation intended to cover the liability of the railways, bearing in mind the loss in value of the special drawing right (SDR) as the unit of account. However, there was no majority among the Member States in favour of the endeavours made at that time.

Inevitably, in the face of such reforms as are being discussed, the undoubtedly pertinent problem arises as to whether improvements in quality imposed on rail transport undertakings by means of EU law is an effective measure for increasing the railways' potential for achievement. This question comes to mind as a result of the fact that the improvements to rail transport law adopted in Vilnius in 1999 in the form of a COTIF adapted to the requirements of liberalisation have not yet entered into force. In itself, the Convention

concerning this matter would allow carriers a considerable degree of freedom, within which they could fulfil the above-mentioned quality criteria themselves, without the need for a related regulation. However, there is no clear answer as to whether and how the market strategy of the rail transport undertakings can adapt to the increasing demands of competition. Irrespective of this question, the rail transport of the future should be characterised by full use of the opportunities for the wide-ranging freedom of contract provided by COTIF 1999.

On the other hand, there is a serious problem to the effect that any EU rules encroaching upon the phase required for the consolidation of COTIF 1999 may entail possible uncertainty in the law for international rail transport. Thus any resulting differentiation of the contractual prerequisites for rail transport is best avoided. Rail transport undertakings performing international transport operations would thus be well advised to use the freedom accorded to them by liberalisation themselves to enshrine the quality standards considered necessary by the Commission of the European Community in the contracts of carriage which are to be concluded. This is a fundamental requirement that rail transport undertakings performing cross-border transport operations should face up to, partly in anticipation of future statutory rules. Such a plan is currently being implemented by the members of the ARGE Corridor X consortium working in the Danube area, in the context of a project which is underway there to develop quality criteria in rail transport.

With reference to the Appendices of COTIF mentioned at the start, the International Rail Transport Committee (CIT) has in the meantime prepared rules in the form of "General Terms and Conditions (GTC)", referred to as its "products", which are available to CIT's members in the form of a recommendation to use them as a working tool. Those that are relevant to freight transport are listed below.

Already completed:

"General Terms and Conditions for International Freight Traffic by Rail (GTC-CIM)"

Essentially, these form a supplement to the CIM UR and are intended primarily for those cases where single consignments are dispatched or such transport operations are performed for which a special "customer agreement" is not concluded.

In addition to the GTC-CIM, a model "customer agreement" is also provided for.

Using this, a special agreement may be concluded with the customer, in which more favourable conditions with regard to carriage can be agreed than those laid down in the CIM UR. Such conditions would for instance provide for a wider scope for compensation or other rules benefiting the customer, and more extensive quality standards could also be agreed in this context. However, in general there have not so far been any declarations of intent in this direction from the major rail transport undertakings operating in Europe, which is why an attempt should be made to effect an example in the context of future projects. The CIM UR that will apply in future also provide the opportunity, as in road transport, to agree delivery periods, which would also accord with the EU quality criteria referred to above. However, it is not possible at present to infer their scope as it will later apply (which ultimately depends on the decisions, with regard to their acceptability, of the rail transport undertakings as carriers).

"CIM Consignment Note Manual (GLV-CIM)"

Here, the consignment note receives a great deal of attention, and in contrast to the provisions of Art. 4 of the CIM UR, the obligation to issue it and to ensure that it is accurate is imposed on the consignor, unless agreed otherwise, for instance by agreeing to use an electronic consignment note (transport order). The model that is henceforth available has two functions. On the one hand, it serves as a transport document for each consignment, and on the other it serves as a wagon note for wagons consigned as goods, which are the subject of a CUV contract of use. A new feature in the consignment note, in addition to the dangerous goods indication (RID) required hitherto, is the description for carriage of an "exceptional consignment". Nevertheless, some of the elements of a contract required by the European Commission in order to improve standards of quality have still not been taken into account for consignment notes. It should also be noted in this respect that no deadline has been set for using up the forms used at present, while from the day COTIF 1999 enters into force, only the new consignment notes will be valid. Moreover, the question arises as to whether there is general agreement with regard to the numerous obligations, prescribed in the manual referred to, incumbent upon the consignor as a contracting party of the carrier. To the extent that this must be doubtful, this presents a not inconsiderable advantage for road freight haulage.

"General Terms and Conditions Applying to Joint-contracting for Freight Traffic (GTC joint contract)"

These apply to cases in which carriage is performed by several carriers. Other contractual guidelines – see below – are provided for the exchange of services between carriers, and partly with their customer partners:

"General Terms and Conditions Applying to Contracts for Sub-contracting the Carriage of Freight Traffic (GTC sub-contract)"

"General Terms and Conditions Applying to Contracts for Services for Freight Traffic (GTC provision of services)"

"General Terms and Conditions Applying to Contracts for the Hire of a Locomotive with a Driver for Freight Traffic (GTC hire)"

"General Terms and Conditions Applying to Traction Contracts for Freight Traffic (GTC traction)"

Being finalised or at the draft stage:

"Freight Traffic Manual (GTM-CIT)"

"International Information Index (RII-CIT)"

"CIM/SMGS traffic", update of the RSM applied hitherto and creation of a uniform consignment note.

When rail transport operations are performed in CIM-SMGS traffic and vice versa, considerable problems arise owing to the lack of a through contract of carriage. On the one hand, the problems result from the requirement that exists at present for the stationmaster to carry out re-registering, and on the other, from the fact that there is no through rule concerning liability because of the largely differentiated transport regimes. The controversial legal personality of the "stationmaster" for the services he provides in the re-registering procedure referred to here also raises considerable problems. In pursuing a solution in the direction of a planned uniform consignment note, such a note is only able – as can be seen in the procedure to put it into concrete terms which has already been introduced – to deal with the abolition of reconsignment, not with the requisite through-going material responsibility.

"General Terms and Conditions for the Use of Infrastructure (GTC-I)"

These are currently being drafted by UIC and CIT, but because of primary competence, they must be developed jointly with RailNetEurope (RNE), which – in view of the urgency aspect – will require an amount of time which is difficult to assess at present. This then results in an obviously relatively short implementation period for the existing need for regulations. The extent of the material which has briefly been touched on here can be seen from the study by Dr. T. Leimgruber, "Contractual basis for the use of infrastructure", published in the Bulletin for International Carriage by Rail, 3/2004, p. 55 et seq.

In this context, the "connecting railways" must also be considered, which on the one hand are to be allocated to the "infrastructure", and on the other, have a considerable disadvantage in a number of States, including Austria, with regard to through liability (as is customary in road transport). This results from the fact set out in the conditions for connecting railways (BH 510) that the contract of carriage only becomes valid from the time the railway accepts the goods or the time they are handed over at the wagon exchange office or from the competent handling station. In the regulations for connecting railways in Switzerland, the contract of carriage is already valid from when the rail transport undertaking accepts the goods at the loading point located in the area of the connecting railway undertaking. (Such a rule means that rail transport can be placed on an equal footing – which should be considered very important - with road freight haulage).

"General Contract of Use of Wagons"

UIC and UIP have been preparing the principles for this for a considerable time, but there are still considerable differences of opinion (replacement for RIP and RIV and UIC leaflet 433 and the current registration contracts), whereby a range of unresolved questions concerning consideration of the owners and of the carriers are cropping up. In this respect, there is still no agreement on wagon hire charges, empty running charges and the discounts to be granted for private wagons. On top of this, there is also the requirement to design wagon management systems and the problem that according to the new COTIF, private wagons must no longer be hired by a rail transport undertaking. These problem areas give reason to assume that the new Convention could become valid even before agreement is reached on the rules required.

The following should be referred to here as a **largely finalised version**, in which only a few matters of a financial nature still need to be sorted out:

The "Agreement concerning the Relationships between Carriers in respect of International freight Traffic by Rail (AIM)".

This says, with regard to its scope:

This agreement applies to all carriage performed in accordance with the CIM Uniform Rules between several successive carriers where those carriers have declared that they are prepared to apply this agreement or are members of the CIT and have not made a general reserve against its application or withdrawn from the agreement. The General Secretariat of the CIT publishes a list of the carriers who apply the agreement and updates it regularly.

If a successive carrier in the transit chain does not apply the agreement, it nevertheless remains applicable to the other carriers. Relationships with carriers who do not apply the agreement are determined by the CIM Uniform Rules.

As a comparison with the new features for rail transport set out here, the following details the rules which apply at present to transport operations in cross-border road freight haulage:

Road transport operations, which nowadays travel far beyond Europe, are performed in accordance with the conditions of the "Convention on the Contract for the International Carriage of Goods by Road (CMR)", which have been in force since 1956. Such transport operations enjoy wide-ranging freedom of contract. The opportunity based on the Convention of concluding agreements with the carrier provides extensive scope for special arrangements. The fact that the vehicles approved for international transport by the competent State authority for each transport undertaking can perform services based on a uniform, through-going contract of carriage valid in both the east and the west, i.e. virtually worldwide, also speaks for itself.

The structure of the CMR referred to here provides a uniform framework of liability, which includes through door-to-door transport, and in general prescribes compensation for missing or damaged goods of 8.33 SDR per kilogramme of gross mass. Liability for exceeding the transit period is one times the carrying charge and in the event of loss or damage which, according to the given legal position, is equivalent to a deliberate act, the full indemnification according to value is paid.

Although the limited liability mentioned above is considerably less than that for rail transport, the

significant advantage of an immediate start to the transport operation (leaving aside contractual requirements with carriers and infrastructure managers) and of a consignment which is directly accompanied – and hence supervised - by the carrier must be taken into account in any assessment.

The rules discussed here, which will apply in future, particularly to rail transport – which this study makes no claim to have presented fully – make clear the immense requirements that will have to be taken into account in the rail transport undertakings' future activities as carriers, and in those of infrastructure managers, and hence the degree of knowledge of their employees. It therefore seems appropriate to start giving serious consideration to simplifying the legal basis that will apply to international rail transport in future, with the help of which a number of the prerequisites presented in this essay should be made easier for the carriage of goods by rail.

(Translation)

Case Law

Landgericht Frankfurt am Main

Ruling of 15 October 2003

1. **The exclusion of claims resulting from delay in accordance with § 17 of the *Eisenbahnverkehrsordnung* – EVO (German Rail Transport Act) is still lawful following rail privatization. In particular, the applicability of the provision is not affected by EC Directive 93/13/EEC on unfair terms in consumer contracts.**
2. **Recourse to general rules regarding liability in case of positive breach of contract in the event of damage caused by delay is excluded even if there is a fault on the part of railway staff.**

Cf. § 17 of EVO¹.

Grounds for the ruling

The plaintiff claims compensation totalling € 797.21 (= DM 1559.20) for a train delay on 14 August 2001 on

¹ With regard to international traffic, Article 47 § 2 of CIV 1980 refers to national law. The same legal position arises under Article 32 § 3 of CIV 1999 (not yet in force).

the line between Bonn and Frankfurt am Main (Airport), in particular compensation for the loss of one leave day and of a one day excursion for himself and his wife. On 14 August 2001, the plaintiff and his wife wished to board a Condor Airlines flight to Mexico (flight No. 2156), which was due to depart Frankfurt am Main Airport at 11.10. For the journey from Troisdorf, they wished to take the IC 609 from Bonn which, according to the timetable, leaves Bonn at 7.13 and arrives at Frankfurt am Main Airport at 8.55. The plaintiff and his wife did not make the flight because of a delay of more than two hours. They were only able to take a replacement flight on 15 August 2001 from Munich. For the onward journey to Munich, they received free tickets from the defendant under 2); they also received a voucher for one night's free accommodation in a hotel in Munich.

The plaintiff stated that because of a person being injured on the Bonn – Bad Godesberg line, the train passengers, including him and his wife, were taken to Cologne by IC 823 and from there along the left bank of the Rhine via Koblenz to Frankfurt am Main, and in the course of this journey there was a series of further delays which caused an overall delay of about 2 hours. Following an announcement, according to which it might still be possible to make Condor flight No. 2156, there was another delay of approximately 10 minutes in Rüsselsheim at about 10.50, for which no reason was given at all. The train finally arrived at Frankfurt am Main Airport at about 11.15 as the aircraft was leaving for Mexico. The plaintiff is claiming damages to cover rebooking fees (DM 100.-), the cost of a light meal in Frankfurt am Main (DM 42.20) and for dinner in Munich (DM 267.-), a sum to cover the loss of 2 leave days (DM 700.-) and of 2 days for the excursion that had been booked (DM 400.-) and a further DM 50.- to cover all additional sundry expenses (telephone calls, tips).

The defendant under 1) disputed its capacity to be sued, as passenger transport in its group of companies was operated exclusively by the defendant under 2). In addition, the defendants invoked the exemption from liability in accordance with § 17 of EVO and disputed that the delays were attributable to them.

The Amtsgericht (local district court) rejected the claim as unfounded in the contested ruling. Regarding the facts, an additional reference is made, in accordance with § 540 I No. 1 of the *Zivilprozessordnung* – ZPO (Code of Civil Procedure), to what the Amtsgericht had established. It declared that the defendant under 1) could not be sued because there had been no contractual relationship between the defendant and the plaintiff; in

the group of companies of the defendant under 1, intercity passenger transport was undisputedly operated exclusively by the defendant under 2).

Neither would the defendant under 1) be liable from the colour of law standpoint for any obligation of the defendant under 2). The defendant under 2) would not be liable for the damages claimed for delay either, because according to the rule of § 17 of EVO, it would be exempted from liability for delays not caused by its staff. This rule would still be applicable; in particular, it did not infringe Directive 93/13/EEC, as it was a legal standard and not a clause in a contract.

In his appeal, in which he pursues his claim against both defendants, the plaintiff objects that the Amtsgericht had not recognized that the liability privilege under § 17 of EVO – if the provision still had any validity at all – had in any case to be applied in a very restricted manner, as there are no longer acceptable grounds for granting the defendant a privilege under this rule, as distinct from previously, when the railways were managed as a sovereign State company. According to this, the defendant could not contract out of its errors, in particular out of its completely wrong recommendation under discussion here to use the unsuitable route deviation along the left bank of the Rhine. In the plaintiff's view, the defendant under 1) was also liable, at least from the apparent legal standpoint, since it and its allied undertakings respectively left it open in the routine business of rail transport as to who contracts were concluded with.

The appeal, which is permissible and, particularly with regard to the form and deadline, is correctly submitted and justified, is not successful in this case. The local district court rejected the claim with appropriate justification. The court adopts the grounds for the decision of the contested ruling and in order to avoid repetitions, refers to the contested ruling in accordance with § 540 I of ZPO. The grounds for appeal, which do not contain any new submission of facts, do not change anything in the relevant decision either.

In the first instance, the Amtsgericht correctly dismissed the capacity of the defendant under 1) to be sued, because no contractual relationship had been established between the plaintiff and the defendant. The plaintiff did not answer the defendant's allegation that in the undertaking belonging to the defendant under 1), intercity passenger transport was the responsibility of the defendant under 2) (who, according to press reports, will shortly be trading as DB Fernverkehr AG), while DB Regio AG is responsible for local transport – as the court is aware. In particular, the plaintiff did not present

any ticket, booking confirmation or any other contractual documents from which it can be seen who was operating the passenger transport in dispute. It is therefore indisputable that the plaintiff's contractual partner with regard to the rail journey in dispute from Bonn to Frankfurt am Main was exclusively the defendant under 2) as the service provider.

Liability of the defendant under 1) is not justified from the point of view of there being an apparent mandate either, as the specific behaviour attributable to the defendant under 1) upon which liability should be based has not been argued. The view that is certainly still widely held among members of the public that the defendant under 1) is the legal successor to the former State Deutsche Bundesbahn and Deutsche Reichsbahn in respect of all their previous fields of activity is incorrect and can be avoided, because if they ask, every passenger can be informed when making a booking or at the ticket counter which undertaking they are making a contract with. If, when purchasing his ticket, these details are of no interest to the passenger, as is understandable in the routine business of rail transport, and he does not therefore note them, the passenger who is unaware of the structure of the group of companies belonging to the defendant under 1) is, however, not without rights, as he can also, if necessary, find them out afterwards by looking at the ticket or by asking the defendant under 1) or the group of companies concerned.

The defendant under 2) is not liable for the damages relating to the delay either, because as a railway undertaking within the meaning of § 1 of EVO, outside the scope of the Convention of 9 May 1980 concerning International Carriage by Rail (COTIF), the defendant is not obliged to provide such compensation in accordance with the rule in § 17 of EVO. The provision reads as follows:

"Delay or cancellation of a train does not constitute grounds for claiming compensation. However, if a train is cancelled or prevented from continuing its journey, the railway shall, where possible, provide onward transport for the passengers."

The court cannot accept the argument that the provision, which comes originally from 1938 (*Reichsgesetzblatt* – RGBL. (The Reich's Law Gazette) II, 633), is obsolete and thus no longer applicable or is only applicable with amended regulatory content because it necessitates the existence of a State railway undertaking. This argumentation ignores the fact that in the period following privatization of Deutsche Bundesbahn under the *Bundeseisenbahnneugliederungsgesetz* - (Federal

Railway Restructuring Act) – *Bundesgesetzblatt* – BGBL. (Federal Law Gazette) 1993 I, 2378 - which entered into force in 1994, the EVO was repeatedly amended and in 1999 was even promulgated in a new version dated 20 April 1999 (BGBL. I, 782), without the competent Federal Minister for Transport, Construction and Housing, who is also empowered in accordance with § 26 I No. 1 of the *Allgemeines Eisenbahngesetz* – (German General Railways Act) to issue general conditions for the carriage of passengers and goods by railway undertakings, having seen the need to delete or amend § 17.

Neither are there any serious concerns against the validity of § 17 of EVO, contrary to criticism that has occasionally been expressed (cf. Staudinger in *Neue Juristische Wochenschrift* (New Legal Weekly) 1999, 3664 and *ReiseRecht aktuell* (Travel Law Today) 2000, 19; Rott et al in *Verbraucher und Recht* (Consumers and Law) 1999, 75; Däubler in *Neue Juristische Wochenschrift* 2003, 2651) arising from European Directive 93/13/EEC on unfair terms in consumer contracts – the Terms Directive – (published in *Neue Juristische Wochenschrift* 1993, 1838).

Article 3 of Directive 93/13/EEC contains, among other things, a rule for checking the content of unfair terms in consumer contracts which corresponds to § 9 of the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* - AGBG (General Terms of Business Act)/§ 307 *Bürgerliches Gesetzbuch* - BGB (German Civil Code). However, Article 1, paragraph 2 of Directive 93/13/EEC reads:

"The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive."

Hence the Directive does not concern conditions of carriage which – like EVO – are issued as statutory regulations and which are therefore themselves mandatory statutory provisions in accordance with Article 80 of the *Grundgesetz für die BRD* (Basic Constitutional Law of the Federal Republic of Germany). The court therefore upholds the view it had already expressed previously – although it was not then in relation to a consumer contract – in the ruling of 1 November 2000 (File ref.: 2/1 S 164/00) - of which the litigants are aware, that the exemption for railway undertakings from liability for damages resulting from delays in national passenger transport in accordance with § 17 of EVO continues to apply (idem *Landgericht*

Essen (Essen Provincial Court), *Neue Zeitschrift für Verkehrsrecht* (New Journal of Transport Law) 2003, 139; *Amtsgericht Berlin-Lichtenberg* (Berlin-Lichtenberg District Court), *Transportrecht* (Transport Law) 2001, 212; *Amtsgericht Frankfurt* (Frankfurt District Court), *Neue Zeitschrift für Verkehrsrecht* 2001, 132 (the decision confirmed by the court in the ruling of 1 November 2000); *Amtsgericht Berlin-Mitte* (Berlin-Mitte District Court), ruling of 7 February 2001 – 5 C 592/00). Even after the privatization of Deutsche Bundesbahn, the regulation in § 17 of EVO, which is in any case applicable not just to Deutsche Bundesbahn, but to all railway undertakings operating national passenger services, retains its acceptable nature, even from a legal policy standpoint, i.e. in the interest of cost-effective mass rail transport, to exonerate from disputes concerning the avoidability of repeatedly occurring delays and from the costs of the otherwise highly time-consuming documentation of the causes of disruption and from the numerous legal disputes that might be expected, those railway undertakings which, owing to their being rail-bound, are vulnerable to disruptions to the normal course of operations.

Lastly, the point of view submitted by the plaintiff that the defendant under 2) is not just being sued on the basis of breach of contract in terms of the delay, but also in terms of a wrong decision following the (first) delay that occurred, which is not covered by the liability privilege for damages resulting from delay, because the railway undertaking is liable for this from the point of view of positive breach of contract and – according to the reform of the law of obligations – because of culpable breach of duty in accordance with § 280, paragraph 1 of BGB cannot be accepted as a reason for the claim either. This argumentation misconstrues the delimitation between the claim arising from positive breach of contract (because of breach of duty) and the claim for compensation for damage resulting from delay as well as the regulatory content of § 17 of EVO. The provision means that a claim for compensation because of damages for delay for which the railway undertaking is responsible in accordance with § 280, paragraph 2 of BGB/§ 286, paragraph 1 of the old version of BGB is excluded. This claim presupposes fault on the part of the late-running defaulter (§ 286, paragraph 4 of BGB/§ 285 of the old version of BGB). What the fault consists of, and in particular whether it consists of having taken, in view of an initial delay which arose through no fault of its own, inappropriate decisions to avoid additional complications and further delays, has no role to play in classifying this fault as that which, in accordance with § 286, para. 4 of BGB/§ 285 of the old version of BGB, is a pre-condition for claiming compensation of the loss arising from the delay. There is no room for attributing

the same fault from the point of view of the general legal institute of positive breach of contract (breach of duty), in view of the special provisions on damage or loss due to delays which fully regulate the conflict of interests of the parties to the contract. Exclusion of this claim, as done under § 17 of EVO, also therefore rules out recourse to the general liability circumstances of positive breach of contract (breach of duty).

The plaintiff has to bear the costs of the unsuccessful appeal (§ 97, para. 1 of ZPO).

Admission of the re-examination could not be considered, as the decision was not dependant upon legal questions that needed to be clarified which were of general significance (§ 543, para. 1 of ZPO); the Court of Appeal's decision did not differ from a High Court decision.

Comment by

Michael A. Pohar, Münster

1. The ruling of the Landgericht Frankfurt can be endorsed to the extent that a rail transport undertaking is in no way liable if it is not responsible for the delay because – as in this case² – it was a matter of *force majeure*³. One must also agree with the Court when it considers that subsequent delays propagated throughout the network are also covered by the exclusion from liability in § 17 of EVO⁴. However, in so far as

2 However, if an obvious organisational fault leads to unending propagation of one specific delay on the network, fault liability would in principle be conceivable. However, this is also limited by § 17 of EVO.

3 With regard to cases of *force majeure* in relation to the carriage of passengers by rail, see Staudinger, *Weichen stellen für zeitgemäße Fahrgastrechte, Gutachten für das Ministerium für Umwelt und Naturschutz, Landwirtschaft und Verbraucherschutz des Landes Nordrhein-Westfalen* (Setting course for up to date passenger rights, report for the Ministry of the Environment, Nature Protection, Agriculture and Consumer Protection of North Rhine-Westphalia, p. 32 et seq., available on the internet under www.munlv.nrw.de/sites/arbeitsbereiche/verbraucher-schutz/pdf/dokumentationfahrgastrecht_final-04.pdf, soon to be published under the title: "*Verbraucherrechte im Öffentlichen Schienen-Personenverkehr – Entwicklung konkreter rechtlicher Vorgaben für eine Gesetzesinitiative*" (Consumer rights in public rail passenger transport – development of specific legal guidelines for a proposed Act), Peter Land Verlag, 2004.

4 However, § 17 of EVO does not exclude liability for breaches of the duty to provide information in connection with delays, see Finger/Eiermann, *Eisenbahntransportrecht, Loseblattsammlung* (Rail Transport Law, loose-leaf collection) (as at January 1999), § 17 of EVO, note 3; Czerwenka/Heidersdorf/Schönbeck, *Eisenbahntransportrecht, Loseblattsammlung* (as at August 2001), 70 (EVO),

the Court states that the first sentence of § 17 of EVO⁵ is neither to be considered as ineffective nor to be interpreted in a restrictive manner, even against the background of European law – particularly EC Directive 93/13/EEC⁶ on unfair terms in consumer contracts, this cannot pass without comment⁷. The Court's reference to infrequent criticism⁸ of the unrestricted applicability of the first sentence of § 17 of EVO has found ever more supporters⁹, particularly in recent times. It is therefore worth looking at the first sentence of § 17 of EVO more closely and the connection it has with European law:

The first sentence of § 17 of EVO rules out any liability for delay and cancellation of a train, irrespective of whether it was caused by grossly negligent or wilful behaviour on the part of the railway undertaking.

The provision of the legal regulation thereby assumes the function of a General Condition of Trade excluding liability¹⁰. As such, it would be ineffective according to §§ 305 et seq. of BGB. This total exclusion of liability for non-fulfilment or inadequate fulfilment of the main duty to provide a service¹¹ also constitutes an

unreasonably disadvantageous rule for the consumer within the meaning of the EEC Terms Directive¹². The Court also seems to see it in this light. In the judges' view however, the breach against the content of the Directive has no effect, as Article 1(2) of Directive 93/13/EEC¹³ excludes mandatory regulatory provisions and hence also § 17 of EVO¹⁴ from the control of terms.

Staudinger's concerns are directed against this argumentation¹⁵. He points to the little observed 14th point of consideration of Directive 93/13/EEC¹⁶, which contains not only the requirement for the Member States to regulate¹⁷ to prevent unfair terms in consumer contracts, but which also requires the national legislator to check laws and regulations for provisions which discriminate against consumers and to amend them accordingly¹⁸.

To the extent that the national legislator has not implemented the Directive sufficiently¹⁹, Article

§ 17 note 1b aa (2); also comprehensively on this subject Pohar, *Neue Zeitschrift für Verkehrsrecht – NZV* (New Journal of Transport Law) 2004, 72 (73 et seq.).

5 RGBL. 1938 II 663 as amended by the notice of 30.4.1999 (BGBl. 1999 I 784), last amended by the *Eisenbahnverkehrsordnung-Änderungsverordnung* (Rail Transport Act Amendment Act) of 15 October 2002 (BGBl. 2002 I 4046).

6 OJ of the EC No. L 95, 21.4.1993, p. 29 = *Neue Juristische Wochenschrift* 1993, 1838.

7 See also Staudinger/Schmidt-Bendun, *Neue Juristische Wochenschrift* 2004, 646 et seq.

8 See Staudinger, *Neue Juristische Wochenschrift* 1999, 3664 (3665); Däubler, *Neue Juristische Wochenschrift* 2003, 2651; Rott/Butters, *Verbraucher und Recht* 1999, 75 et seq.

9 Fühlich, *Reiserecht*, 4th edition 2002 § 47 marginal 814; *Münchener Kommentar/Basedow, Bürgerliches Gesetzbuch – BGB* (German Civil Code), volume 2a, 4th edition 2003, § 305 marginal 6; see also: European Commission, COM (2000) 248 final, p. 16; also Kapnopolou, *Das Recht der missbräuchlichen Klauseln in der Europäischen Union* (The law on unfair terms in the European Union) 1997, p. 97 et seq.; Grabitz/Hilf/Pfeiffer, *Das Recht der Europäischen Union* (European Union Law), volume III, *Sekundärrecht, Loseblattsammlung* (Secondary Legislation, loose-leaf collection) (as at April 2003) A 5, Article 1 marginal 24.

10 Staudinger (footnote 7), 3664; Rott/Butters (footnote 7), 107 et seq.

11 The timetable becomes part of the contract, so transport according to the timetable constitutes the main service due.

12 A breach of the content has occurred against in particular No. 1(b) of the Annex to Article 3 (3) of Directive 93/13/EEC: "Terms which have the object or effect of inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier (...) in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations (...)."

13 Article 1 (2) of 93/13/EEC: "The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive."

14 As part of a legal regulation, § 17 of EVO in principle constitutes a "mandatory regulatory provision" in the sense of the Directive.

15 Staudinger (footnote 7); the same author in *ReiseRecht aktuell* 2000, 19.

16 Point of consideration 14 of Directive 93/13/EEC: "The Member States must however ensure that unfair terms are not included, (...)" ("included" refers to the Member States' legal provisions, in which, directly or indirectly, the terms for consumer contracts are laid down, cf. point of consideration 13, 1st sentence).

17 In this respect, see also the ruling of 11 July 2001 of the French Conseil d'Etat. For the first time, the Conseil examined, in the sense of the Directive, the public services regulated by legal provisions on the basis of the civil conditions for unfair terms in consumer contracts, see Tilmann, *Zeitschrift für Europäisches Privatrecht* (Journal of European Private Law) 2003, 129.

18 See, however, Butters, *Vertragsgerechtigkeit in der öffentlichen Versorgungswirtschaft* (Fairness of contracts in the public utility industry), Munich 2003, 140, which does not deem the points for consideration to be binding.

19 It is true that the legislator reformed § 17 of EVO through the Act on the Protocol of 3 June 1999 for the Modification

249, paragraph 3 and Article 10 of the Treaty establishing the European Community (EC Treaty) say that all national bodies, and hence also the courts²⁰, are called upon to help²¹ implement Community law as far as they are able to do so²². Provisions which contravene Community law must be interpreted in conformity with Directives²³, as the Bundesgerichtshof²⁴ clearly demonstrated in the Heiningers²⁵ case.

Accordingly, in the light of Directive 93/13/EEC, the first sentence of § 17 of EVO would only have to be applied restrictively. The scope of the first sentence of § 17 of EVO would have to be reduced²⁶ teleologically in conformity with European law, so that the provision is not applied in consumer cases when train cancellation or delay is the result of a deliberate act or gross negligence²⁷. The general provisions of BGB are applicable instead of the exclusion from liability.

of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (BGBl. 2002 II 2140). However, the new version is not yet in force and neither does it fulfil the guidelines of Directive 93/13/EEC as to the outcome, see also Pohar (footnote 3).

- 20 Courts are also national bodies in the sense of Article 249, paragraph 3 of the EC Treaty and in accordance with Article 10 of the EC Treaty are also committed to the guidelines of Community law, see Grabitz/Hilf/von Bogdandy, *Das Recht der Europäischen Union* (European Union Law), volume I, loose-leaf collection (as at April 2003) Article 10 of the EC Treaty, marginal 55; *Münchener Kommentar/Basedow* (footnote 8), note on § 305 marginal 42.
- 21 See Grabitz/Hilf/von Bogdandy (footnote 18), Article 10 of the EC Treaty, marginal 55; *Münchener Kommentar/Basedow* (footnote 8), note on § 305 marginal 4; Schwarze/Berg, *EU-Kommentar* (EU Commentary), Baden-Baden 2000, Article 288 marginal 75.
- 22 The limit of the application of the law in conformity with Directives is therefore the domestic methodology, consistent practice of the European Court of Justice, cf. evidence in Franzen, *Juristenzeitung* (Lawyers' Journal) 2003, 324, footnote 47.
- 23 See, in particular, Brechmann, *Die richtlinienkonforme Auslegung* (Interpretation in conformity with Directives), Munich 1994.
- 24 *Neue Juristische Wochenschrift* 2002, 1881 et seq.
- 25 Cf. the question submitted by the *Bundesgerichtshof* (BGH), *Neue Juristische Wochenschrift* 2000, 521; on this subject, the Court of Justice of the European Communities, *Bundesgerichtshof, Neue Juristische Wochenschrift* 2002, 281; implementation of the preliminary ruling by the BGH, *Neue Juristische Wochenschrift* 2002, 1881.
- 26 Also according to Staudinger (footnote 7), (3668).
- 27 It is to be noted that it is not, for example, the definition of consumer in BGB, but the definition in the Directive which prevails. Like the business traveller, a passenger commuting to and from work does not come within the scope of the Directive, thus the first sentence of § 17 of

However, it remains to be seen whether the wording of the first sentence of § 17 of EVO is amenable to interpretation or the clearness of the provision and the clear intention of the legislator²⁸ prohibit such a reduction²⁹, or whether, through the judicial limitation of the first sentence of § 17 of EVO the boundary with direct third party application of Directives between private parties³⁰ has already been crossed unlawfully. In principle, the judiciary is not in fact the suitable body for implementing the obligations under Community law arising from Article 249, paragraph 3 of the EC Treaty³¹. However, in view of the Heiningers case and Staudinger's argumentation, proceeding thus is at least not ruled out³².

However, the Court only looks into these objections under European law in the margins. In order to justify its interpretation of the law, not to want to apply Directive 93/13/EEC to the first sentence of § 17 of EVO, it simply refers to the ruling of 1 November 2000³³, which has been cited several times. However, this reference might not really be convincing, because in that ruling, the Court emphasized expressly that it did not wish to say anything either with regard to the interpretation in conformity with the Directive or with regard to the question of a submission to the

EVO applies to him without there being any doubt under Community law.

- 28 The legislator wished to limit the railway's liability as much as possible, Staudinger/Schmidt-Bendun (footnote 6).
- 29 According to the case of Heiningers and the interpretation of § 5, para. 2 of the *Haustürwiderrufgesetz* (Door to door sales revocation Act): Hochleitner/Wolf/Großrichter, *Wohnungswirtschaft und Mietrecht* (Housing Industry and Rent Law) 2002, 529 et seq.; Piekenbrock/Schulze, *Wohnungswirtschaft und Mietrecht* 2002, 521 et seq.; also according to *Bundesgerichtshof, Neue Juristische Wochenschrift* 2000, 521 (522).
- 30 Directives do not apply directly between private parties: consistent practice of the European Court of Justice: cf. European Court ruling of 14.7.1994 – case C-91/92, 1994 corpus (Faccini Dori), I-3324, 3357, marginal 25; also Gundel, *Europäische Zeitschrift für Wirtschaft* (European Journal of Economics) 2001, 143 (144 et seq.).
- 31 Cf. Franzen, *Juristenzeitung* 2003, 321 (328).
- 32 Generally critical with regard to the effects of the Heiningers decision on Community private law: Franzen (footnote 29); cf. also note by Felke, *Monatsschrift für Deutsches Recht* (Monthly Journal of German Law) 2002, 226 (227); Abersack/Mayer, *Wohnungswirtschaft und Mietrecht* 2002, 253 (257); Piekenbrock/Schulze (footnote 27).
- 33 Landgericht Frankfurt am Main, *Transportrecht* 2001, 313.

European Court of Justice³⁴. With its renunciatory view, the Court nevertheless finds itself, in its outcome, along the lines of the case law that prevails nationally³⁵.

It is worth noting that the decision that re-examination³⁶ against the appeal ruling was not allowed on the basis of the justification that the case did not occasion any legal questions³⁷ of general significance³⁸ that needed to be clarified. In view of the concerns that exist in the literature³⁹ and with the number of contracts of carriage which are concluded with customers every day and the frequency of train cancellations and delays, the Court, with its justification, probably makes it too easy for itself in this respect.

2. However, in so far as one follows the view of the Court and the first sentence of § 17 of EVO really constitutes an "impregnable fortress"⁴⁰, which is not amenable either to clause control by the Directive or to an interpretation in conformity

with European law, the question arises as to the liability of the legislator.

The character of State liability for legislative unjustness⁴¹ as a penalty⁴² for neglected obligations under secondary legislation on the part of the legislator is generally current⁴³. A claim of State liability because of a legal situation which conflicts with Community law firstly requires, according to the case law of the European Court of Justice⁴⁴, a qualified violation of Community law; secondly, the Community law that has not been observed must aim at providing the individual with rights; and thirdly, there has to be a direct causal connection between the breach of contract of the Member State and the individual case of loss or damage⁴⁵.

For a qualified violation, the Member State must have overstepped the limits of Community law patently and to a considerable extent. This is at least the case when a clear regulatory instruction has been ignored over lengthy periods⁴⁶. In so far as one correctly assumes, with Staudinger⁴⁷, a mandatory regulatory instruction under consideration No. 14 of Directive 93/13/EEC, qualified violation of Community law is clear: the first sentence of § 17 of EVO was not amended,

34 Verbatim: "as there is no question of the Directive quoted being applied, there is no need to decide" whether § 17 of EVO is to be interpreted in conformity with the Directive, or whether it requires a submission to the European Court of Justice. Landgericht Frankfurt am Main, *Transportrecht* 2001, 313 (314).

35 Cf. Landgericht Mainz, ruling of 22.3.1988 – 3 S 379/87; Amtsgericht Berlin-Lichtenberg, *Transportrecht* 2001, 212; Amtsgericht Frankfurt am Main, *Neue Zeitschrift für Verkehrsrecht* 2001, 132; *ReiseRecht aktuell* 2000, 171, with note by Staudinger; Amtsgericht Berlin-Mitte, ruling of 7.2.2001 – 5 C 592/00; Landgericht Essen, *Neue Zeitschrift für Verkehrsrecht* 2003, 139; Amtsgericht Cologne, *Neue Zeitschrift für Verkehrsrecht* 2003, 345, on this subject: Pohar (footnote 3).

36 Since the *Zivilprozessreformgesetz* (Civil Action Reform Act) of 17.7.2001 (BGBl. 2001 I 1887), it is always possible to have matters re-examined by the Bundesgerichtshof – provided re-examination has been allowed.

37 These exist if there are diverging opinions in the literature, *Münchener Kommentar/Wenzel, Münchener Kommentar zur Zivilprozessordnung*, 2nd edition, Munich 2002, § 543, marginal 7.

38 A legal question has general significance if it affects an indeterminate number of cases, cf. *Münchener Kommentar/Wenzel* (footnote 36), § 543, footnote 8; Zimmermann, *Zivilprozessordnung*, 6th edition, Heidelberg 2002, § 543 marginal 2; *Drucksachen des Deutschen Bundestages – BT-Drucks.* (Federal Diet Printed Matter) 14/4722, 104.

39 See footnote 7 et seq. above.

40 Thus, critically, with regard to dealing with § 17 of EVO, Staudinger, note on ruling of Amtsgericht Frankfurt am Main of 30.3.2000, *ReiseRecht aktuell* 2000, 171.

41 On liability for tortious Community case law, cf. Wegener, *Europarecht* 2002, 785 et seq.

42 The obligation of compensation should take account of the full effectiveness of Community law for protecting the rights of individuals, Schwarze/Berg (footnote 20), Article 288, marginal 75.

43 Cf. Schwarze (footnote 20), Article 235 of the EC Treaty marginal 3, Schwarze/Berg (marginal 20), Article 288 marginal 72 et seq.; European Court of Justice, 19.11.1991, case C-6/90, corpus I 5405 et seq. (Francovich) = *Neue Juristische Wochenschrift* 1992, 165 et seq.; Franzen, *Juristenzeitung* 2003, 321 (328, 330); Schoch, in: *Staat Kirche Verwaltung, Festschrift für Hartmut Maurer zum 70. Geburtstag* (State Church Administration, Festschrift for Hartmut Maurer on his 70th birthday, Munich 2001, p. 759; Brechmann (footnote 21), p. 24.

44 European Court of Justice, 5.3.1996 – case C-46, 48/93, corpus 1996, I-1029 marginal 57 (Brasserie du pêcheur); European Court of Justice, 15.6.1999 – case C-140/97, corpus 1999, I-3540 marginal 50.

45 Cf. also Grabitz/Hilf/von Bogdandy (footnote 18), Article 288 marginal 123 et seq.

46 Cf. Schwarze/Berg (footnote 20), Article 288 EC Treaty marginal 85.

47 Staudinger (footnote 7), (3666).

despite a regulatory instruction and an implementation deadline of 1 January 1995⁴⁸. The second condition is also fulfilled: the result of the Community law rule is aimed at according the customer contractual claims for compensation, which were excluded from national law before the Directive was passed. The direct causal connection between the continued validity of the first sentence of § 17 of EVO and the sustained legal practice of denying claims for compensation – even in the event of liable delays and cancellations – is obvious.

Thus in so far as gross negligence or wilful misconduct by the carrier or his auxiliaries⁴⁹ leads to a train being cancelled or delayed, against this background, a claim against the Federal Republic of Germany may be more successful than one against the railway carriers, who according to current case law can hide ever more successfully behind the first sentence of § 17 of EVO.

Finally, with respect to this legal dispute, it should be noted that its European law dimension will remain unsettled. The claim of non-admission⁵⁰ in accordance with § 544 of ZPO⁵¹ was inadmissible because of the low appeal sum⁵² (§ 26 No. 8 of the Introductory Act of ZPO)⁵³. The Landgericht Frankfurt therefore became the Court of last instance. It would have been a good opportunity, at least from a jurisprudential point of view, to have submitted the question of the interpretation of Article 1, para. 2 and

consideration No. 14 of Directive 93/13/EEC to the European Court of Justice in accordance with Article 234 of the EC Treaty for a preliminary ruling, which however the Court – from its standpoint correctly - did not do. However, in so far as the Court, which in principle is obliged to make a submission (Art. 234, para. 3 of the EC Treaty), wilfully neglects a submission⁵⁴, the right of the plaintiff against the statutory judge in accordance with Article 101, para. 1, second sentence of the Basic Constitutional Law⁵⁵, similar at least to the base law and capable of being asserted under the constitution in accordance with Article 93 I No. 4a of the Basic Constitutional Law of the Federal Republic of Germany, could be infringed.

(Taken from: *Transportrecht*, Hamburg, volume 4/2004, pp. 170-174).
(Translation)

Miscellaneous Information

Transport & Logistics Forum 2005

Brussels, 15 February 2005

The Transport & Logistics Forum 2005 was organised by the law firm, Lawfort, which is one of the largest in Belgium. This forum provided the representative of the Director General of OTIF, as the keynote speaker, with the opportunity of drawing the attention of the approximately 100 representatives from the field of transport law and the transport industry to the imminent entry into force of COTIF 1999 and the 1999 CIM Uniform Rules, and to highlight the legal consequences this will bring.

The event also enabled him to point out the possibilities provided by the CIM Uniform Rules as a legal basis for

48 Cf. Article 10 para. 1, p. 1 of Directive 93/13/EEC: "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 1994."

49 The railway infrastructure manager is also an auxiliary of the rail carrier, cf. Tavakoli, *Privatisierung und Haftung der Eisenbahn* (Rail Privatisation and Liability), Baden-Baden 2001, p. 337.

50 On this subject, cf. Wenzel, *Neue Juristische Wochenschrift* 2002, 3353 (3357).

51 Newly worded by Article 2 of the *Zivilprozessreformgesetz* of 17.7.2001 (BGBl. 2001 I 1887).

52 What is required is a claim, asserted by the attempted re-examination, which exceeds 20,000.- €, § 26 No. 8 of the Introductory Act of ZPO, cf. Also Bundesgerichtshof, *Neue Juristische Wochenschrift* 2002, 2720 and 3180.

53 Transitional provision of the *Gesetz zur Reform des Zivilprozesses* (Act for the Reform of Civil Actions) of 27 July 2001 inserted as a result of Article 3 of the *Zivilprozessreformgesetz* of 17 July 2001 (BGBl. 2001 I 1887) amended by Article 5, para. 1a of the *Gesetz zur Modernisierung des Schuldrechts* (Act on the Modernization of the Law of Obligations) of 26 November 2001 (BGBl. 2001 I 3138).

54 Corpus of decisions of the Federal Constitutional Court 82, 159; *Neue Juristische Wochenschrift* 01, 1267; Jarass/Pieroth, *Basic Constitutional Law*, 6th edition 2002, Article 101 marginal 12.

55 Cf. also Schulze/Fielitz in: Dreier (editor), *Grundgesetz-Kommentar* (Commentary on the Basic Constitutional Law), volume 3, 2000, Article 101 marginal 61; Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz* (Commentary on the Basic Constitutional Law), 9th edition 1999, Article 101 marginal 8a; Sensburg, *Neue Juristische Wochenschrift* 2001, 1259; Füßer, *Deutsches Verwaltungsblatt* (German Administration Gazette) 2001, 1574; Tillmanns, *Bayrische Verwaltungsblätter* (Bavarian Administration Gazette) 2002, 723.

multimodal transport operations. His presentation also gave a brief overview of endeavours by various international authorities to find legally satisfactory solutions for multimodal transport.

After the joint meeting with the introductory presentations, there was an opportunity to look in more detail at the issues dealt with in so-called "break out sessions" organised separately for each of the transport modes (road, air, sea and rail). In the concluding joint meeting, short reports were given on the outcome of these "break out sessions".

Participants from the transport sector, who attended primarily in the context of their work in practice, showed great interest in the legal matters dealt with by the OTIF representative. All the presentations and talks will be made available on the organiser's website www.lawfort.be.
(Translation)

Book Reviews

Alléret, Marc, Taïana, Philippe, *Transport ferroviaire interne* (Inland Rail Transport), *Juris-Classeur commercial*, volume 630 (11, 2004 – up to 30.9.2004)

In about fifteen pages, volume 630 deals with the ascertainment of damage (examination), the warehousing and sale of goods and other procedures connected with the contract of carriage for the inland (French) transport of goods by rail.

The question of the examination is important because the carrier is subject to an obligation to achieve a result and a presumption of liability rests on him in the event of loss of or damage to the goods or delayed delivery. However, he can be relieved from this presumption if he provides proof of a reason for exoneration, i.e. by providing the often "perishable" proof of facts – such as the composition of the consignment, protection of the goods, internal conditioning of packages or containers, the condition of perishable foodstuffs carried – which must be "photographed" while things are still in order. Thus it is important that proof of these facts is established and safeguarded rapidly.

Firstly, the authors analyse in depth the special examination procedure instituted by Article 106 of the Commercial Code, right from its inception in 1807. These provisions were supplemented and improved by a law dated 12 February 1927, to be incorporated finally

into Article L. 133-4 of the Commercial Code by the order of 18 September 2000.

They then set out the other means of proof (common law judicial review, amicable review and unilateral review) before tackling the questions of transferring goods to a public warehouse, sale of the goods and returning the goods to the State Property Department.

While the legal authority and case law find their rightful place in the volume, considerations for use in practice are not neglected. With a clear presentation, the commentary on the provisions examined is as usual preceded by key points, an analytical summary and an alphabetical index.

As one of the co-authors is one of the best legal experts in rail transport law, both national and international, the volume is recommended to legal professionals.
(Translation)

Kunz, Wolfgang (editor), *Eisenbahnrecht* (Railway Law): systematic collection with explanations of the German, European and international requirements, loose-leaf work with supplements. Nomos Publishing, Baden-Baden, ISBN 3-7890-3536-X, 17th supplement, status as at 30 September 2004.

The base volume appeared in 1994 (see Bulletin 1/1995). The ongoing provision of supplements means that in addition to the necessary updating, the texts and commentaries are made more complete step by step (see Bulletin 3/2004, p. 73). In addition to the publisher, 20 other authors have also worked in partnership.

The 17th supplement has further increased the scope of the collection, so that it now has four volumes rather than three. The first two volumes cover the law of the Federal Republic of Germany and the third covers the law applicable in the Federal Lander and European law; the fourth volume covers the categories of "international law", "recommendations/requirements/tariffs" and "other law". Each volume contains a brief summary and an index covering the whole collection.

A major part of the 17th supplement is taken up with a new version of the commentary on the Act founding a Deutsche Bahn joint-stock company (160 pages). This commentary, written by the publisher himself, explains the legal position of DB AG from a variety of perspectives, bearing in mind the case law and including numerous further references to the specialist literature.

The section on "European law" has been extended and brought up to date with the inclusion of two European Community directives concerning environmental protection.

"Railway Law" has gradually developed into a comprehensive compendium of regulations concerning the many legal relationships in the rail sector and it has proved to be a practical aid to the work of railway specialists.

(Translation)

Langenscheidt Collins Active German-English/English-German Dictionary, 959 pages, first edition, ISBN 3-468-10401-4, Langenscheidt Verlag, Munich, 2004.

This dictionary is one of a series published by Langenscheidt in cooperation with Collins Dictionaries in a new format with a new concept. It contains over 85,000 headwords and idioms in each language, and is aimed primarily at the active use of language. Throughout the dictionary, concise "info-windows" explain cultural and regional aspects of daily life, thus aiding understanding of the language, the country and its people. The use of "key words" (e.g. modal verbs, prepositions) is also explained clearly and concisely. Head words are printed in blue, with the main text in black, so that visually the dictionary is attractive and easy to use.

A 60 page Appendix, "Language in Action", provides further practical help for everyday situations, such as writing letters, e-mails, making telephone calls and addressing envelopes for different countries.

This dictionary is part of the long-term cooperation between Langenscheidt and Collins. This means that experienced English and German editors from both publishers develop, revise and update the contents, thus ensuring authentic, contemporary use of language and reliable translations. The dictionary takes full account of the German spelling reform, contains a pronunciation guide and lists of irregular verbs in both languages. Also useful for learners of German is the short list of regular German noun endings showing their genders and declension.

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

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Idem, n° 3065/2005, p. 42 – Dangereux. Par petites touches (N. Grange, J.-M. Fabre)

Idem, n° 3068/2005, p. 93/94 – Dommages au conteneur. Quelle responsabilité ? (M. Tilche)

Idem, n° 3069/2005, p. 118/119 – Fluvial. Entrée en vigueur de la CMNI (Ch. Hübner)

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1 Disponible sur l'Internet /verfügbar im Internet /available on the Internet: www.litra.ch; www.cargorail.ch