



Intergovernmental Organisation
for International Carriage
by Rail

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by Rail

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Official communications from the Secretariat of OTIF

Accession to COTIF

Russian Federation

On 21 August 2009, the Government of the Russian Federation made an application for accession to COTIF. As Depositary of the Convention, the Secretary General brought the application for accession, including the reservations and declarations made with it, to the attention of the Governments of the OTIF Member States in a circular dated 27 August 2009.

Unless five Member States of OTIF lodge objections, the application for accession will be deemed to be accepted as legally binding three months after this notification, i.e. on 27 November 2009. The accession will then take effect on the first day of the third month following the Secretary General's notification to the Member States that the application for accession has been accepted as legally binding.

Initially, Russia will subject the carriage of goods on a small part of its railway infrastructure to the CIM Uniform Rules, i.e. from the landing stage at the Baltiysk ferry terminal to Baltiysk railway station, which is situated near the port, and from the landing stage at the Ust-Luga ferry terminal to Luzhskaya

railway station, which is situated near the port, subsequent to the Sassnitz-Baltiysk-Ust-Luga ferry connection.

Work of OTIF's General Organs

9th General Assembly

Berne, 9/10 September 2009

The General Assembly, which, according to COTIF 1999, meets every three years, was held in Berne on 9 and 10 September 2009. It was the 9th session of OTIF's highest organ since the entry into force of the COTIF of 9 May 1980 (1.5.1985). Delegations from a large majority of the Member States were present, as well as from three States that intend becoming Members, i.e. the Russian Federation, the Hashemite Kingdom of Jordan (see Bulletin 2/2009, p. 23) and Azerbaijan (see Bulletin 4/2008, p. 51-53), and representatives of the European Community and four international associations (see below).

In accordance with the mandate from the 8th General Assembly (see Bulletin 3/2006, p. 33-37), the agenda included an item on "the resolution of the outstanding legal and practical problems between the European Commission and OTIF concerning Appendices E, F and G". Fortunately, it was possible to submit the results of the Revision Committee, which had produced a suitable

solution, to the General Assembly. The texts adopted by the Revision Committee at its 24th session concerning the revision of Appendices E, F and G were prepared in numerous working group sessions (see Bulletin 2/2009, p. 14). The General Assembly approved the results of the 24th session of the Revision Committee (subject to some editorial amendments).

Other decisions of the General Assembly that should be highlighted are as follows: raising the maximum amount of the budget to increase the number of staff in the Organisation's Secretariat, the election of a new Administrative Committee for the period of office from 1 October 2009 to 30 September 2012 and the re-election of Mr Stefan Schimming as Secretary General for the period from 1 January 2010 to 31 December 2012.

It was planned that the General Assembly would also take a decision on the conditions of the EC's accession to COTIF. However, as the EC's internal decision-making procedures had not yet been completed, it was not possible to take the relevant decisions. An extraordinary General Assembly will have to decide on these at a later date.

Not only the Revision Committee, but also the Administrative Committee had carried out important preparatory work for the General Assembly. As the Chairman of the Administrative Committee, Ambassador Riquelme Lidón (Spain), highlighted in his report to the General Assembly, the Administrative Committee's work had been characterised by the desire to create the necessary conditions, in terms of legal, organisational and financial aspects, for the Organisation to fulfil its tasks and to meet the challenges that existed at present as well as those which would arise in the near future. In taking its decisions, the General Assembly was guided by the same objectives.

The specific decisions can be found in the final document, reproduced below.

Final document

1. Pursuant to Article 14 § 3 COTIF of 9 May 1980 in the version of the Vilnius Protocol, the 9th General Assembly met on 9 and 10 September 2009 in Berne.
2. The following took part in the General Assembly:

2.1 35 of 43 Member States

Albania, Austria, Germany, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Denmark, Spain, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Macedonia (FYR), Norway, Netherlands, Poland, Romania, United Kingdom, Serbia, Slovak Republic, Slovenia, Sweden, Switzerland, Czech Republic, Tunisia, Turkey, Ukraine.

2.2 3 States with observer status

Azerbaijan, Jordan, Russian Federation

2.3 1 supranational organisation

European Community (EC)

2.4 4 international associations

Community of European Railway and Infrastructure Companies (CER)

International Rail Transport Committee (CIT)

International Association of Tariff Specialists (IVT)

International Union of Railways (UIC)

3. In accordance with Article 8 of the Rules of Procedure, the Secretary General provided the Secretariat.

4. The **General Assembly** elected

as chair:

Mrs Brigit C.M. Gijssbers (Netherlands)

as first deputy chairman:

Mr Veysi Kurt (Turkey)

and

as second deputy chairman:

Mr Petr Stejskal (Czech Republic)

5. The General Assembly formed the Committees as set out below:
- 5.1 **Credentials Committee**
- chairman:
- Mr. Jasmin Kahil Minister plenipotentiary, Chargé d’Affaires, Embassy of FYR of Macedonia
- deputy chairman:
- Mr. Daniel Soto Gúrpide Counsellor at the Embassy of Spain and Permanent Representation of Spain to OTIF
- members:
- France, Lithuania, Romania.
- 5.2 **Editorial Committee**
- chairman:
- Mr François Davenne (France)
- co-chairmen:
- Mr Thomas von Gäßler (Germany)
- Mr Michael Franklyn (United Kingdom)
- members:
- Tunisia, Switzerland, Ireland.
6. The General Assembly deliberated on the basis of its Rules of Procedure as applicable from 1 July 2006.
7. The General Assembly
- 7.1 adopted its agenda;
- 7.2.1 noted and approved the results of the 24th session of the Revision Committee (amended texts and Explanatory Report) as set out in document AG 9/2 and Adds. 1 to 5 subject to editorial amendments submitted during the General Assembly and
- 7.2.2 approved
- the editorial amendment to the references to “Article 27 §§ 2 to 5” contained in
- Article 14 § 6 and Article 33 § 4 a) of the Convention,
- the Explanatory Report on Articles 1, 4, 8 and 9 of CUI,
 - the editorial amendments and the Explanatory Report concerning Articles 1, 3 and 9 to 11 of APTU and
 - the editorial amendments and the Explanatory Report concerning Articles 1, 3 and 9 of ATMF;
- 7.2.3 noted that the amendments approved under point 2 are not decisions in accordance with Article 34 of COTIF and instructed the Secretary General with regard to bringing these amendments into force to proceed in accordance with Article 35 of COTIF;
- 7.2.4 authorised the Secretary General to summarise its decisions on the results of the Revision Committee in each of the points of the general part of the Explanatory Report;
- 7.3 with regard to the accession of the European Community to COTIF, instructed the Secretary General to convene an extraordinary General Assembly, as soon as the necessary conditions are in place, so that the General Assembly can take a final decision on the accession agreement. One of the conditions for this is that the European Community’s internal decision-making process concluded before the date of the extraordinary General Assembly. The Administrative Committee was instructed to establish that all the necessary conditions are in place and to pay particular attention to ensuring that these binding specifications from the General Assembly are observed;
- 7.4 re-elected Mr. Stefan Schimming as Secretary General for the period from 1 January 2010 to 31 December 2012 and authorised the Chair to sign the letter of appointment for the elected Secretary General and give him the letter at this General Assembly;
- 7.5 noted and approved the report on the activities of the Administrative Committee for the period from 1 October 2006 until 30 September 2009;
- 7.6 designated the following members of the Administrative Committee and a deputy member

for each of them for the period from 1 October 2009 until 30 September 2012:

Members Deputy member

Germany United Kingdom

Belgium Luxembourg

Croatia Bosnia and Herzegovina

Spain Portugal

France Italy

Iran Syria

Liechtenstein Monaco

Lithuania Latvia

Slovenia

Sweden

Czech Republic

Tunisia

Turkey

Ukraine

Former Yugoslav Republic of Macedonia

Finland

Slovakia

Algeria

Bulgaria

Hungary;

elected the Czech Republic to the chairmanship of the Administrative Committee for the same period;

7.7 set the maximum amounts for the period from 2007 to 2012 that the expenditure may reach in the budget period from 2010 to 2012 as follows:

Base = Budget 2006 SFr. 3,301,890.-						
Year	SFr.		3.0 % cumulative			SFr.
2007	3,301,890.-	+	99,060.-	+	--	= 3,400,950.-
2008	3,400,950.-	+	102,030.-	+	--	= 3,502,980.-
2009	3,502,980.-	+	105,090.-	+	--	= 3,608,070.-
2010	3,608,070.-	+	108,240.-	+	350,000.-	= 4,066,310.-
2011	4,066,310.-	+	118,690.-	-	110,000.-	= 4,075,000.-
2012	4,075,000.-	+	122,250.-	+	--	= 4,197,250.-

The annual increase in expenditure in the Organisation's budget may not exceed the assumed average 3% increase in inflation from the average in the States in the Euro zone and Switzerland, and the theoretical maximum amount of expenditure at the end of the period in 2012 is rounded up to **SFr. 4,200,000.-**;

7.8 noted the information on the situation concerning membership of OTIF

– decided in accordance with the third sentence of Article 26 § 7 of COTIF 1999 that in view of two payments received on 4

September 2009 (final contribution for 2008 and advance for 2009), Serbia's attitude with regard to the contributions which have not been paid since 2002 is not regarded as a tacit denunciation of the Convention;

– instructed the Secretary General to continue his efforts to achieve payment of the outstanding contributions in full from Serbia;

- requested the Administrative Committee to monitor developments on this issue until

the outstanding contributions are paid in full;

- 7.9 noted the Memorandum of Understanding between OTIF and ECO signed by the Secretary General and the Secretary General's explanatory report on the current state of affairs;
- 7.10 mandated the Secretary General in accordance with Article 14 § 2 d) of COTIF 1999 to convene the 10th General Assembly in September 2012 in accordance with the first sentence, first alternative, of Article 14 § 3 of COTIF 1999;

instructed the Administrative Committee in accordance with Article 14 § 2 d) of COTIF 1999 in preparing for the 10th session to take as a basis – particularly with regard to the election of a Secretary General – the same decisions that the General Assembly took on this subject at its 8th session in September 2006.

*

The Secretary General will send the Governments of the Member States of OTIF and all other delegations a copy of this final document, adopted by the General Assembly on 10 September 2009.
(Translation)

Legal Matters concerning COTIF

Publications and interesting links

Bulletin des transports et de la logistique, Paris, n°3280/2009, p. 439 – CMR. Application distributive (M. Tilche)

Idem, n°3281/2009, p. 456/457 – « Combiné. » Indomptable CMR ?; p. 458/459 – Auxiliaires de transport. L'opérateur fantôme (M. Tilche)

Idem, n°3282/2009, p. 471/472 – Règles de Rotterdam. Suspicion légitime; p. 472-474 – « Vol camionné ». Quel régime? (M. Tilche)

Idem, n° 3285/2009, p. 520/521 – Rotterdam. La Convention qui fait des vagues ... (M. Tilche); p. 522/523 – Aérien voyageurs. Tribulations des usagers ... (B. Colette)

Idem, n° 3287/2009, p. 556/557 – Préjudice du chargeur. Dissection; p. 557 – Tractionnaire. L'inconnu du droit (M. Tilche)

CIT-Info (Comité international des transports ferroviaires / Internationales Eisenbahntransportkomitee / International Rail Transport Committee, CIT)
<http://www.cit-rail.org>, édition/Ausgabe/edition 6/2009

DVZ - Deutsche Verkehrszeitung, Hamburg, Nr. 85/2009, S. 9 – Rotterdam Rules scheiden die Geister. Reederverbände sehen letzte Chance für Harmonisierung des Seehandelsrechts (M. Hollmann)

Transportrecht, Hamburg, Nr. 7-8/2009, S. 281-289 – Die EG-Verordnungen Brüssel I, Rom I und Rom II aus der Sicht des Transportrechts (R. Wagner)

Idem, Nr. 9/2009, S. 346-371 – United Convention on Contracts for the International Carriage of Goods Wholly or Partially by Sea ("Rotterdam Rules"). Symposium of Deutsche Gesellschaft für Transportrecht held at Hamburg on 25 June 2009. Contributions to the Symposium and Results (R. Herber, A. von Ziegler, U.L. Rasmussen, Ph. Bonnevie, V. Polić Foglar, J. Ramberg, A. Tschiltschke)

Transport of Dangerous Goods

RID/ADR/ADN Joint Meeting

*Berne, 8 - 11 September 2009, and
Geneva, 14 - 18 September 2009*

The RID/ADR/ADN Joint Meeting was held from 8 to 18 September 2009 in Berne and Geneva to conclude the work on the 2011 edition of the dangerous goods regulations for European land transport. 23 States were represented at this meeting, as well as the European Commission, the Committee of the Organization for the Cooperation of Railways (OSJD) and 17 non-governmental organisations.

Standards

EN 15507:2008

In order to be able to refer to standard EN 15507:2008 (Packaging. Transport packaging for dangerous goods. Comparative material testing of polyethylene grades) in RID/ADR, an informal working group had met at the invitation of the European Plastics Converters Association (EuPC) to resolve problems of application (see

Bulletin 1/2009, p. 2). Reservations on referring to this standard were expressed in both the working group and the Joint Meeting. For this reason, it was agreed to continue the work in the next biennium to rule out a reduction in the level of safety that is feared by various States, because packagings that have already been tested positively in accordance with this standard have had to be rejected when applying the current procedure for assessing chemical compatibility.

Reports of informal working groups

Informal working group on the safety obligations of unloaders

At the last Joint Meeting, the majority had already adopted the definition of unloader drafted by an informal working group, as well as the unloader's new obligations and the adapted obligations of the consignee (see Bulletin 1/2009, p. 4). The text drafted by the working group and translated into all the Joint Meeting's working languages was again submitted for a second reading.

This text was again discussed at length for one and a half days in conjunction with an opposing proposal from the International Road Transport Union (IRU), although the working group's text was preferred. On the basis of the new definition of unloader, the existing definition of loader was also amended.

In the end, a Note was included in 1.4.2 to explain that an undertaking may be responsible for the obligations of various participants, and that vice versa, the obligations of a participant may also be carried out by different undertakings.

Informal working group on the periodicity of testing for refillable welded steel cylinders for liquefied gases (LPG)

In packing instruction P 200, special packing provision v is assigned to liquefied gases of UN Nos. 1011, 1075, 1965, 1969 and 1978. This special provision allows the inspection interval to be extended from 10 to 15 years with the agreement of the competent authority. As this possibility is managed completely differently in the various Member States, an informal working group had met in this biennium with the aim of harmonising the conditions for granting an extended period for the periodic inspection of refillable welded steel cylinders for LPG.

The Joint Meeting adopted the conditions developed by this working group, although the conditions laid down by the competent authorities in accordance with the

previous system may still be used for cylinders built before 1 January 2015. With regard to the periodic inspection, the conditions laid down by the competent authority also apply to these cylinders until the end of their service life.

For the time being, the Joint Meeting rejected a more wide-reaching proposal by the European Industrial Gases Association (EIGA) to have the extension of the inspection period for pressure receptacles for industrial gases reviewed in an informal working group, as the representative of the European Cylinder Makers Association (ECMA) also considered that the periodic inspections in accordance with the periodicity required at present often revealed traces of corrosion in the case of industrial gases, and that extending the periodicity might therefore lead to a reduction in the level of safety. It was also pointed out that contrary to LPG, which are carried locally, industrial gases are carried in multi-modal international transport over large distances, and that it would therefore perhaps be preferable to discuss this issue at the UN Sub-Committee of Experts.

Informal working group on including provisions relating to the retention of documents, additional inspection requirements and conformity assessment procedures for gas cartridges

This informal working group had been set up at the last Joint Meeting at relatively short notice to discuss amending RID/ADR/ADN to include provisions relating to the retention of documents, additional inspection requirements and conformity assessment procedures for gas cartridges. The European Commission had pressed for this so as to be able to dispense with including corresponding provisions in a revised directive for transportable pressure equipment (1999/36/EC) (TPED).

The texts proposed by the working group were adopted with some amendments.

Interpretation of RID/ADR/ADN

Use of cylinders in bundles of cylinders, battery-wagons/battery-vehicles and MEGC

Germany raised the question of whether bundles of cylinders, battery-wagons/battery-vehicles and MEGC can include a mixture of cylinders built partly in accordance with the provisions of 6.2.1 and 6.2.2 (UN pressure receptacles) and partly in accordance with the provisions of 6.2.3 and 6.2.4 (RID/ADR pressure receptacles).

The Joint Meeting confirmed that only UN pressure receptacles may be used in UN bundles of cylinders or UN MEGC and that RID/ADR bundles of cylinders and RID/ADR MEGC may contain RID/ADR or UN pressure receptacles or both, provided that the cylinders in the bundles are of the same type and have the same test pressure.

The representatives of Germany and the United Kingdom would draft texts for the next Joint Meeting to reflect this interpretation.

Tanks

6.8.4, special provision TT 8

Special provision TT 8 stipulates that tanks approved for the carriage of UN 1005 ammonia, anhydrous and constructed of fine-grained steel with a yield strength of more than 400 N/mm² shall be subjected at each periodic test to magnetic particle inspections to detect surface cracking. As these tanks are also used for the carriage of liquefied gases, the International Union of Private Wagons (UIP) was of the view that special provision TT 8 should be amended to say that the magnetic particle inspections only need be carried out if the tanks are actually used to carry ammonia.

The Joint Meeting agreed with the proposal, provided that gas UN 1005 ammonia, anhydrous, was deleted from the tank plate and/or the tank, together with a final magnetic particle inspection.

Period of validity of design type approvals and transitional provisions

At its last session, the Joint Meeting had adopted an extensive proposal by an informal working group, the aim of which was to limit the period of validity of design type approvals for pressure receptacles of Chapter 6.2 and for tanks, battery-wagons/battery-vehicles and MEGC of Chapter 6.8 to ten years, or else to extend it if the body which issued the design type approval establishes that the design type approval still complies with the provisions after the ten year period has expired (see Bulletin 1/2009, p. 4).

With regard to the continued use of pressure receptacles and tanks, battery-wagons/battery-vehicles and MEGC built before the design type approval expires or is withdrawn, it was explained that if they no longer comply with the provisions of RID/ADR, they may only continue to be used if so allowed by a suitable transitional provision.

Provisions for flame arresters

It had already been established at the Joint Meeting in September 2008 that at present, Chapters 4.3 and 6.8 of RID/ADR do not contain any technical or operational requirements concerning flame arresters. In order to harmonise the requirements, which up to now have varied from State to State, in September 2008 the Joint Meeting laid down some technical requirements in principle, which should be included in RID/ADR.

Based on a proposal from Germany, the technical requirements were included in 6.8.2.2.3, and the continued use of tanks that do not comply with the provisions on the position of the flame trap or the flame arrester was ensured by means of transitional provisions.

Portable tanks / RID/ADR tank-containers

In an informal document, the representative of Belgium highlighted provisions for RID/ADR tanks and portable tanks that differed for one and the same substance. In a roadside check, a vehicle with a tank-container with tank code "L4BN" loaded with UN 1296 triethylamine was stopped because for this substance, a tank with tank code "L4BH" (hermetically sealed) should have been used. However, the consignor provided documents showing that the tank-container was also approved as a portable tank with portable tank instruction T 7 (not hermetically sealed), which may be used for the carriage of triethylamine.

The Joint Meeting's tank working group did not feel able to make a list of the differences between Chapters 6.7 and 6.8 in its normal working time, to establish the acceptable safety level for each type of tank and, if necessary, to make the appropriate amendments to columns 12 and 13 of Table A. It was noted that the tank provisions of Chapters 6.7 and 6.8 were based on different approaches in terms of technical safety and therefore, they were not directly comparable.

With regard to the inspection problems raised by Belgium, the Joint Meeting pointed out that in future, portable tanks should be marked with the code for portable tanks (see also "Revision of the marking requirements for portable tanks"). If a tank was marked with two codes (a portable tank code and an RID/ADR code), it was allowed to carry substances authorised under either code.

Harmonisation with the 16th edition of the UN Model Regulations on the Transport of Dangerous Goods

At its last session of a biennium, it is customary for the Joint Meeting to deal with harmonisation with the latest edition of the UN Recommendations on the Transport of Dangerous Goods. This work had been prepared by an ad hoc working group at a three day meeting in May.

In connection with this harmonisation work, the following amendments that will be included in the 2011 edition of RID/ADR/ADN should be highlighted.

Environmentally hazardous substances (aquatic environment)

The criteria for aquatic pollutants included in RID/ADR/ADN in 2009 are being revised on the basis of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS). At the same time, in the 2011 edition, the entire German text is being aligned as far as possible with the text of EC Regulation No. 1272/2008 on classification, labelling and packaging of substances and mixtures.

The Joint Meeting noted that, given the procedures for amending the MARPOL Convention (International Convention for the Prevention of Pollution from Ships), the implementation of the new GHS criteria relating to substances hazardous to the aquatic environment might be delayed in the case of maritime transport (IMDG Code).

The Joint Meeting agreed that if the International Maritime Organization (IMO) was not able to reflect the criteria set out in the third revised edition of the GHS in the forthcoming edition of the IMDG Code, transitional measures would have to be envisaged so that multi-modal transport was not impeded.

New UN Numbers in Table A

14 new UN Numbers were added to Table A of Chapter 3.2, including, among others, substances toxic by inhalation of Class 6.1 with subsidiary hazards of classes 3 and 8 and classes 4.3 and 3.

Carriage of dangerous goods packed in limited quantities

In connection with the new marking for limited quantities adopted by the UN Committee of Experts, the ad hoc working group on the harmonisation of RID/ADR/ADN with the 16th edition of the UN Recommendations on the Transport of Dangerous Goods had established that this marking could not be included in

RID/ADR/ADN just as it was, as there was a big difference between the UN Recommendations and RID/ADR/ADN with regard to the quantity threshold for carriage in limited quantities. The ad hoc working group had therefore asked the Secretariat to draft a proposal to introduce the quantity limits of the UN Recommendations into RID/ADR/ADN, but at the same time, the proposal should keep the current quantity limits of RID/ADR/ADN for a long transitional period in those cases where these exceed the quantity thresholds prescribed in the UN Recommendations. In these cases, both the quantity thresholds of the UN Recommendations and the current LQ code should be shown in column 7a of the Table in Chapter 3.2.

After a lengthy discussion, the Joint Meeting decided that the current Chapter 3.4 of RID/ADR/ADN could continue to be used in parallel until 30 June 2015 by virtue of a transitional provision, but that in contrast to the Secretariat's proposal, the present wording of Chapter 3.4 and the LQ codes in column 7a of Table A would no longer be included in the provisions.

The Joint Meeting was also of the view that a list of the provisions only applicable to the carriage of dangerous goods packed in limited quantities in Chapter 3.4 would be more user-friendly than the approach used in the UN Model Regulations, which was to list certain applicable provisions and other inapplicable provisions.

Use of electronic data processing (EDP) and electronic data interchange (EDI) techniques in connection with the provisions of Chapter 5.4 concerning documentation

The Joint Meeting welcomed the introduction of new provisions in the UN Model Regulations facilitating the use of electronic data interchange techniques. It noted, however, that RID/ADR/ADN already contained such provisions.

Therefore, some delegations were not in favour of inserting 5.4.1.4.3 of the UN Model Regulations requiring the consignor to be able to produce the information required in the transport document without delay as a paper document; such a requirement seemed difficult to comply with during transport and was not in line with the spirit of facilitation through the use of EDI.

Based on the outcome of an ad hoc working group, a text was ultimately agreed that took the current provisions of RID/ADR/ADN into account and which only required the consignor to give the information to the carrier on paper.

It was also agreed to amend footnote 9) of RID/ADR/ADN section 5.4.2, which reproduces the provisions of section 5.4.2 of the IMDG Code for the sake of information, after IMO had taken its decision.

Revision of the marking requirements for portable tanks in Chapter 6.7

The marking requirements for portable tanks in the various sub-sections of Chapter 6.7 (6.7.2.20, 6.7.3.16, 6.7.4.15 and 6.7.5.13) were revised, with the information on the tank plate being grouped into information on the owner, manufacture, approval, pressures, temperatures, materials, contents and periodic inspections. It was also stipulated that the appropriate marking for portable tanks must be shown on the portable tank itself or on a metal plate.

Lithium batteries

At its June 2009 session, the UN Sub-Committee of Experts had adopted provisional amendments to special provision 188 (b) and (c), permitting lithium batteries that did not display a Watt-hour rating to continue to be carried after 31 December 2010 and to exempt certain devices that were intentionally active in transport (see Bulletin 2/2009, p. 19).

The Joint Meeting decided, exceptionally, to introduce these amendments into RID/ADR/ADN. In order to avoid inconsistencies of wording with special provision 188 as contained in the 16th revised edition of the UN Recommendations, a special provision on the subject would be included in RID/ADR/ADN.

Information on wastes in the transport document

In RID/ADR/ADN, the sequence of the information concerning wastes in the transport document would be aligned with the sequence in the UN Model Regulations. Accordingly, the word “waste” would no longer be shown before the UN Number, but before the proper shipping name.

Miscellaneous proposals for amendments to RID/ADR/ADN

Carriage in bulk and in bulk containers

Since provisions for bulk containers had been introduced into the 2005 edition of RID/ADR/ADN, there had been two parallel systems for carriage in bulk, one of which was the traditional RID/ADR system with the assignment of VW/VV special provisions (7.3.3), the other being the multimodal system of the UN Model

Regulations with the assignment of the BK 1 codes (covered bulk containers) or BK 2 codes (closed bulk containers) (Chapter 6.11 and section 7.3.2).

Several delegations supported the proposal of the United Kingdom to amalgamate the two parallel systems for carriage in bulk into a single system based on the multimodal BK 1 and BK 2 system. It was pointed out, however, that using BK codes for substances not currently intended for carriage in bulk in the UN Model Regulations could be confusing. Furthermore, some delegations were not in favour of adding administrative measures for the approval of wagons/vehicles for carriage in bulk, which were currently unnecessary under the RID/ADR system.

The United Kingdom would prepare a new document on the basis of any comments he might receive.

Used batteries and nickel-metal hydride batteries

The Joint Meeting adopted the proposal of France to introduce in advance UN No. 3496 for nickel-metal hydride batteries, indicating that such batteries were not subject to RID/ADR/ADN, and to amend Special Provision 304 by specifying the scope of UN No. 3028 (Batteries, dry, containing potassium hydroxide, solid, electric storage), in accordance with the decisions taken by the UN Sub-Committee of Experts on the Transport of Dangerous Goods at its June 2009 session (see Bulletin 2/2009, p. 19).

Information on environmentally hazardous substances in the transport document

In connection with the carrier's obligation to affix the correct placards to the means of transport, it had already been recognised at the last Joint Meeting that it was necessary to include information in the transport document as to whether the substance being carried was environmentally hazardous (see Bulletin 1/2009, p. 3).

On the basis of a proposal from Sweden, for environmentally hazardous substances which do not come under UN Nos. 3077 and 3082, the additional words “environmentally hazardous” must now be indicated in the transport document. For carriage in a transport chain including maritime carriage, the words “marine pollutant” are also permissible in accordance with the information prescribed in the IMDG Code.

Classification of fireworks

At the Joint Meeting in September 2008, the representative of Germany had already pointed out that

the competent authority's recognition of classification prescribed in accordance with special provision 645 in conjunction with 5.4.1.2.1 (g) as a result of the Enschede disaster is entered in the transport document even though final classification has not been carried out or is not yet available (see Bulletin 3/2008, p. 32).

The Joint Meeting adopted the specific proposal from Germany and the United Kingdom submitted to this session to indicate in the transport document the reference number of the competent authority's recognition of classification, taking into account the decisions of the UN Sub-Committee of Experts at its meeting in June 2009 (see Bulletin 2/2009, p. 18).

Any other business

Railway accident in Viareggio, Italy (29.6.2009)

The deputy Secretary General of OTIF informed the Joint Meeting of the results of the conference on rail safety organised by the European Commission in Brussels on 8 September 2009. With regard to the accident in Viareggio, possible solutions for improving safety had been mentioned, such as speed reduction, avoiding built-up residential areas, more frequent maintenance and inspection of rolling stock and automatic braking mechanisms.

As the chairman of the RID Committee of Experts, the representative of Germany reminded the meeting that the RID Committee of Experts had decided to introduce provisions into RID requiring derailment detectors to be fitted to tank-wagons. He greatly regretted that at the 44th session of the Committee in November 2007, the European Commission had demanded that this decision be suspended on the advice of the European Railway Agency (ERA), which, on the basis of a cost/benefit analysis in terms of safety, had judged that the costs were disproportionate.

It was recalled that in contrast to RID, ADR contained provisions relating to the safety of vehicles and that the UNECE Working Party on the Transport of Dangerous Goods (WP.15) had checked the provisions on the construction and safety of vehicles intended for the carriage of dangerous goods. However, it cooperated very productively with another UNECE organ responsible for matters relating to vehicle construction, the World Forum for Harmonization of Vehicle Regulations (WP.29). WP.29 provided its expertise depending on the safety requirements defined by WP.15. Several delegations therefore wished that a similar mechanism be set up for RID, i.e. better cooperation between the technical

organs responsible for the safety of railway rolling stock and the RID Committee of Experts.

The representative of the European Commission pointed out that the European Commission considered the RID Committee of Experts to be the competent organ for matters relating to safety in the transport of dangerous goods by rail and assured the Joint Meeting that the European institutions responsible for the safety of rolling stock or railway safety in general would cooperate fully with the RID Committee of Experts.

Entry into force of decisions

All decisions taken by the RID/ADR/ADN Joint Meeting in 2008 and 2009 will be submitted to WP.15 and the RID Committee of Experts at their meetings in November 2009 for final decision so that they can enter into force on 1 January 2011.

Next meeting

The next Joint Meeting will begin between 22 and 26 March 2010 with a discussion on the 2013 amendments to RID/ADR/ADN.
(Translation)

Studies/Essays/Speeches

The author of the following study is known as the author of the "International Rail Freight Law" commentary (GOF-Verlag, Vienna, 1986, with addendum dated 1.1.1991). This work, which relates to the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) as Appendix B to COTIF 1980 and in which can be found a detailed analysis, information on case law and a comparison with SMGS, is still useful inasmuch as provisions from the 1980 CIM UR have been taken over into the 1999 CIM UR. Information on this can be found in the Explanatory Report published on OTIF's website¹. The version of Article 36 of CIM that is currently in force corresponds to Article 44 of CIM 1980 as amended by the 1990 Protocol. This Protocol² was adopted by OTIF's 2nd General Assembly and entered into force on 1 November 1996. One of the amendments contained in the Protocol at that time concerns liability in the event

¹ <http://www.otif.org/en/publications.html>

² See Bulletin 1991, p. 12 et seq.

of qualified fault. The following study analyses the rule that applies to such cases of liability³.

Comments on Article 36 of CIM

by Hon. Prof. Dr. Kurt Spera, Chairman of the International Association of Tariff Specialists (IVT), OTIF Arbitrator and Conseiller honoraire

The partial revision of the “Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)” on 1 November 1996 and the transfer of the unaltered wording into the COTIF that has been in force since 1 July 2006, as amended by the Vilnius Protocol, has resulted in a fundamentally new way of considering the terms “intention” (intent to cause) and “gross negligence” (recklessly). The following study attempts to explain this with reference to the text of Article 36 of CIM.

Article 36

Loss of right to invoke the limits of liability

The limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7, Article 30 and Articles 32 to 35 shall not apply if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

This provision corresponds to Article 44 of CIM 1980, as amended by the 1990 Protocol.

For cases of gross negligence, the version in force before 1 November 1996 (old version)⁴ prescribed a liability limit of twice the maximum amounts. In the case of wilful misconduct or wilful omission, the proven full damage had to be compensated. With regard to the legal consequences – the loss of the limit of liability for the railway – the current version deals identically with the two different cases of liability it standardises. It is not necessary for the claimant to furnish proof of the full extent of the damage. In the absence of other stand-

ardisation in connection with this, it would suffice to assert the extent of the damage and if the appropriate facts of the fault were proved, the railway would have to dispute the extent of the damage claimed if it did not consider the claim to be justified.

The old version stated positively that the injured party had to prove the full damage; in the absence of other rules, the existence of wilful misconduct or gross negligence had to be asserted by the claimant and it was easy to prove the assertion, at least in the area of gross negligence, which is based mainly on objective requirements. In the case of inapplicability, the railway would have to have provided proof to the contrary. Now, in contrast, it is the claimant who has the burden of proof that the damage was the result of wilful misconduct or that it was caused recklessly and with knowledge that loss or damage would probably result. It may be difficult to provide proof in respect of the subjective facts, at least with regard to the bipartite concept of negligence. The court will in fact be able to conclude from the existence of objective facts that the party causing the damage has acted recklessly. However, similar difficulties lie in the element relating to the outcome of the damaging conduct, i.e. in the knowledge that the damage was likely to occur. Like every other internal fact, this knowledge can also only be deduced from proven objective facts.

In the old version, the cases of liability of “wilful misconduct” and “gross negligence” were known to a multitude of national legal systems and could thus be easily interpreted and adjudged in the context of the domestic understanding of the law. For example, the Austrian penal code defines

- wilful misconduct: “an act is intentional if it manifests a statutory depiction of facts; for this, it is sufficient that the perpetrator seriously considers this manifestation to be possible and accepts it.”
- negligence: “a person acts negligently if he disregards the care he is obliged to take in the circumstances and which he can take on the basis of his mental and physical abilities and which is expected of him, and who does not therefore recognise that he could cause a state of affairs equivalent to a statutory depiction of the facts. A person acts negligently if he considers it possible that he is causing such a state of affairs without wishing to do so.”

³ See also Case Law, p. 41

⁴ “**Article 44 – Compensation in case of wilful misconduct or gross negligence** – When the loss, damage or exceeding of the transit period, or the failure to perform or failure to perform properly the railway’s additional services provided for in the Uniform Rules, has been caused by wilful misconduct or gross negligence on the part of the railway, full compensation for the loss or damage proved shall be paid to the person entitled by the railway.

In case of gross negligence, liability shall however be limited to twice the maxima specified in Articles 25, 26, 30, 32, 33, 40, 42, 43, 45 and 46.”

In this context, “gross negligence” is understood to mean particularly unacceptable disregard for the standard of care in the circumstances.

In the current wording of the Article in question, there are different cases of liability in conformity with the Warsaw Convention. Unlike the original version, not wilful misconduct, but **intent** is a condition. By analogy with the problem of interpreting Article 25 of the Warsaw Convention, the national interpretation of the law, particularly the concept of intent acknowledged in criminal law, cannot be taken as a basis here either. Instead, as an aid to interpretation, the term of intent used in civil law, defined as action or omission “done with intent to cause damage” must be drawn on. From this perspective, the “intent” required must be transposed and implemented into our interpretation of the law in terms of “wilful misconduct”. Thus for the premeditation originally demanded, the new version contains the analogous case of liability.

In addition to intent, the provision in Article 36 describes a further possibility of wilful wrong conduct with a bipartite structure. However, this is to be considered as a limitation of the scope of unlimited liability, especially in civil law regulations. This is because the concept of gross negligence this replaces covered not only intentional, but also unintentional gross negligence. As a result of the limitation to intentional gross negligence created by the new wording, unintentional gross negligence would again come under the limitation of liability. International case law has made some controversial points with regard to this form of fault. In relation to the types of liability in the German legal system, this form of fault should be classified between gross negligence and wilful misconduct with indirect intent. However, the result is equivalent to a restrictive interpretation of the provisions concerning liability, because henceforth, in order to drop the limitation of liability, “more” than mere gross negligence is being called for. If need be, for the Austrian legal system, an aid to interpretation might be found in the legal concept of “blatant gross negligence” developed from the doctrine. As compared with mere gross negligence, this would be characterised by a stricter degree of care or a more pronounced responsibility for neglecting the said degree of care.

The following should be noted with regard to the bipartite structure: firstly, **recklessness** must be proved with regard to conduct, the aim of which is to give expression to the fact that the carrier or his people have ignored the safety interests with which they have been entrusted in a particularly crass manner. Secondly, **awareness** in respect of the damaging outcome must be demonstrated. In international case law, it is debatable

as to whether this second component of the bipartite concept of fault should be understood as subjective, or whether awareness of the probable occurrence of damage is to be ascertained abstractly. In the latter case, the conduct of the party causing the damage would have to be judged objectively, i.e. it would have to be compared with the conduct of a rational person under the same circumstances. However, in this particular case, the question can only be answered by the judge deciding questions of fact. It is up to him to deduce from the external course of events, the precipitating and accompanying circumstances, whether awareness as to the likelihood of damage occurring is to be affirmed.

As is thus evident, the differentiated interpretation of those acts that would fall under the terms “wilful misconduct” and “gross negligence” presents here and consequently a not inconsiderable problem in judging the overall questions of liability for the through (multi-modal) carriage of goods.

Irrespective of the fact that in the new version of the Austrian Rail Transport Act, which implements the applicable provisions of COTIF, and hence of CIM, it is planned to maintain the terms “wilful misconduct” and “gross negligence” in national law, some facts relevant to the application of these provisions should nevertheless be pointed out here. If Article 36 addresses awareness of the damaging outcome of the act leading to fault, the fundamental circumstance that must be brought into the attack here is that the persons acting on behalf of the carrier and the infrastructure manager⁵ have completed thorough training appropriate to their professional activities. In its framework, the safety interests of the persons and goods entrusted to them enjoy absolute priority. This results in the fact that they have been made fully aware of the particular potential hazardous situations that might arise. This means that in his training and the ongoing refresher training and aptitude tests, the locomotive driver has very probably been made aware of what it means to overlook a stop signal, or that in his extensive area of responsibility, a traffic controller is able to assess the incorrect position of a set of points and the resulting effects. The same also applies to personnel carrying out marshalling movements, in whose activities the special instructions provided in the transport document (such as shunting restrictions A, C and such like) must be strictly followed in the interest of avoiding damage to the goods being carried. For this reason, when dealing with points of fact, the qualification requirements linked to the exercise of functions would very probably have to be

⁵ See Article 40 of CIM

examined. These requirements must be seen in consideration of the high level of responsibility of members of staff working in railway operations and the high standards required. Following what has been said above, if inadequate training has been provided, the carrier and/or the infrastructure manager would also have to be charged with a corresponding degree of fault.

In connection with this, it seems important to note that despite its problems, the provision provided for rail transport here is more clearly structured than that for the carriage of goods by road. For road transport, the CMR (Convention on the Contract for the International Carriage of Goods by Road) simply considers fault equivalent to wilful misconduct in accordance with the law of the court seized of the case to be a prerequisite for losing the opportunity of excluding or limiting liability (see Art. 29 of the CMR). According to this, such cases in the context of road transport as a competitor are more difficult to decide than is generally the case in international carriage by rail, which should be seen as a positive assessment.

Comparison with SMGS:

No such provision as set out in the CIM Uniform Rules exists in this Agreement. This is because according to the perception of the law in SMGS, there is no differentiation between liability on the basis of the type of fault and the step-by-step assessment thereof. This is mainly attributable to the fact that in the event of loss or damage – apart from those individually named goods for which information on their value must be provided – compensation is not subject to a maximum limit, as is the case in the CIM UR or the CMR.
(Translation)

Case Law

Oberster Gerichtshof (Austria)¹

Ruling of 20 June 2006

- 1. Manifest failure to perform systematic cleaning and inspection of the state of wagons before the carrier makes them available to the consignor for the carriage of sensitive goods, e.g. foodstuffs, constitutes gross negligence.**

- 2. Contributory negligence lies with the consignor, whose assistant loaded pallets of sugar into a noticeably contaminated wagon. Gross negligence on the part of the carrier does not automatically exclude the defence of contributory negligence.**

Cf. Articles 94 and 102 of the *Eisenbahnbeförderungsgesetz* (Austrian Rail Transport Act – EBG).²

Extract:

...

The disputed ruling is amended to reinstate the ruling of the court of first instance.

...

Grounds for the ruling:

The defendant, a railway undertaking, regularly carries sugar for the plaintiff. Sugar is a very sensitive foodstuff which can easily absorb odours. Therefore, only neutral and uncontaminated wagons can be used to carry sugar. The plaintiff's ordinary wagons are suitable. The intervening party operates a distribution warehouse for the plaintiff.

At the end of May 2002, the defendant was carrying sugar from the intervening party's warehouse in Vienna to commercial premises belonging to the plaintiff in Tulln. According to the consignment note, the intervening party was the consignor and the plaintiff was the consignee of the goods being carried. The defendant's staff who were in charge knew that sugar was to be carried, and the consignment note also contained information to this effect. The plaintiff supplied several wagons to transport the sugar. One of these was contaminated with phenol, obviously from a previous consignment. Phenol exudes a characteristic, intense odour. The floors and walls also exhibited the discolouration characteristic of this chemical. However, no contamination was visible on the surface. Despite the bad smell, on 28 May 2002 the intervening party's staff loaded 25 pallets containing 24,000 one kilo bags of sugar onto this wagon. At the place of destination, the wagon was initially left unopened for several days. When the sliding doors were opened, the loading area and sugar gave off an intensely bad smell. The sugar was spoilt. As it could not be used as animal feed either, the plaintiff had to have it destroyed. The sugar was

¹ Case No. 4Ob77/06m

² Cf. Articles 23 and 36 of CIM 1999 and the related study by Spera, "Comments on Article 36 of CIM", p. 38

valued at 14,412 €, the disposal cost 7,338 €. The plaintiff also had to bear part of the carriage charges for the contaminated wagon (105.80 €) and the costs of storing and removing the sugar from storage (342 €).

Even for previous consignments, the defendant had repeatedly provided deficient wagons (packages left over from previous consignments, rubbish bags, dung, pieces of pallets, plastic waste, etc.). A live dog was once found in a wagon provided for the carriage of sugar. In these cases the defendant regularly took the wagons back after complaints from the loading staff and provided cleaned wagons. Until the disputed case, there had not been any contamination with phenol. However, during the proceedings, the defendant again provided a wagon contaminated with phenol to carry sugar.

The plaintiff is claiming 22,197.80 € in compensation, with interest. The principal amount is made up of the value of the goods (14,412 €), the costs of disposal (7,338 €) and the carriage and storage charges (105.80 € and 342 € respectively). When it was loaded, the sugar was in perfect condition. The intervening party had specifically requested the defendant for a wagon onto which sugar could be loaded. It had not been possible to detect the bad smell from the wagon at the time of loading. As a result of the severe contamination, it had not been possible to use the sugar for other purposes. The spoilt sugar had therefore had to be disposed of completely. It was not possible to determine how the wagon had become contaminated; it was the defendant's obligation to explain this to the court. As the defendant was grossly negligent with regard to the contamination of the goods carried, it was liable for the plaintiff's entire losses.

The intervening party agreed with these arguments.

The defendant disputed the plaintiff's claim. According to § 94, paras. 2 and 3 of the EBG, it was relieved of liability if the damage was attributable to fault on the part of the party entitled, particularly in connection with the loading. The consignor had loaded the goods itself. The defendant had merely provided the wagon, without knowing which goods were to be carried. In principle, the wagon provided by the defendant had been suitable for the carriage of goods. If there had really been evidence of an intense odour and the wagon was not therefore suitable for the carriage of sugar, it was up to the plaintiff or the intervening party not to load the wagon. If due care had been taken, the intervening party, whose conduct was attributable to the plaintiff, should have returned the wagon that was unsuitable for the goods. The loss had occurred either before or during loading of the wagon, not during carriage.

The amount being claimed was not correct either, as the defendant only had to compensate the loss of value of the goods. The defendant was not liable for the costs of disposal. In addition, the defendant would have been able to provide much cheaper disposal options itself.

The court of first instance ordered the defendant to pay half the amount claimed (11,098.90 €) with 5% graduated interest and dismissed the additional claim. The defendant had not met its obligation to provide transport free of defects. As, according to the contract of carriage, foodstuffs were to be carried, the defendant was obliged to provide properly cleaned wagons. The intervening party was the source of contributory negligence, because its staff should have been able to recognise that the wagon was contaminated. This contributory negligence was imputable to the plaintiff. It carried the same weight as the fault on the part of the defendant, so that half the damage was to be compensated. The defendant had indeed disputed the amount of the claim, but had not specifically explained how it would have been able to dispose of the sugar itself at less cost. Therefore this loss position should also be awarded to the plaintiff. According to the EBG, the plaintiff was only due interest of 5%. The court of appeal upheld the plaintiff's appeal and ordered the defendant to pay the full claim amount (apart from the additional interest claim which was no longer in dispute). The defendant was liable in accordance with § 94 of the EBG. The plaintiff bore no fault within the meaning of § 94, para. 2 of the EBG; there was also no evidence of the special risk of the load in accordance with § 94, para. 3, letter c of the EBG. The plaintiff did not have to accept fault on the part of the intervening party. The latter had not been the former's auxiliary. The defendant had to plead gross negligence, because it had several times provided contaminated wagons for the (sensitive) carriage of sugar. In addition, there had been a further occurrence of a wagon contaminated with phenol during the proceedings. The defendant had not explained why, notwithstanding these circumstances, there was no gross negligence within the meaning of § 102 of the EBG. By analogy with Article 29 of the CMR and § 438 of the Handelsgesetzbuch (Commercial Code - HGB), this ruled out the defence of contributory negligence.

The defendant's appeal to reduce the award to half the value of the goods and half the carriage charges (i.e. completely to dismiss the claim for compensation of the costs of disposal and storage) was unsuccessful. Owing to the gross negligence, there were no maximum amounts of liability.

The court of appeal allowed the ordinary appeal, because there was no Supreme Court case law on the liability of the consignee for negligent conduct on the part of the consignor in the branch of rail freight law and on the exclusion of relief from liability in the event of gross negligence by the (rail) carrier. The question also remained open of whether § 94, para. 3, letter c of the EBG recognised a special risk resulting from errors in loading, which could lead to a reversal of the burden of proof in accordance with § 95, para. 2 of the EBG.

Legal ruling:

The defendant's appeal is admissible for the reasons referred to by the court of appeal, and is also partly justified.

1. Even in the appeal, the defendant did not dispute the award of half the value of the goods and half the carriage charges. For the remaining amount, the defendant also asked for the action to be dismissed in the appeal. In so doing, the defendant invoked two points: firstly, it could not be accused of gross negligence, hence liability was limited to the value of the spoiled goods (§ 100 of the EBG). Secondly, the defendant would have to impute an (at least) equal part of contributory negligence to the conduct of the loading staff in accordance with § 94, para. 2 or para. 3 letter c of the EBG.
2. The court of appeal correctly assumed gross negligence on the part of the defendant (§ 102 of the EBG).
 - 2.1 According to the case law, there is gross negligence if a duty of care has been neglected in an extreme and conspicuous manner and if this makes the likelihood of loss or damage probable rather than just possible (Legal information system-justice (*RIS-Justiz* RS0030644, RS0030477)). The breach of the duty of care must have been committed by a person who had that particular duty of care (cf. *RIS-Justiz* RS0030272, RS0031127).

In transport law, intent and gross negligence must in principle also be claimed and proven by the injured party. However, the special situation under freight law can mean that the injured party is burdened with proving circumstances that lie within the carrier's sphere and of which he cannot be aware without receiving sufficient information. According to the principle of good faith, in these cases the carrier also has a duty to

present the facts concerning his organisation of the safe-keeping of the goods taken over and concerning the measures taken in this specific case (7 Ob 540/93 = SZ 66/89: *RIS-Justiz* RS0062591; on rail freight law see Schütz in Straube, Commentary on HGB3, Appendix to § 453 HGB, § 102 of the EBG, marginal 2).

- 2.2 In this specific case, the plaintiff claimed gross negligence from the beginning. There are good reasons to support this: the defendant was aware that sugar was to be carried. Even to a layman, it is also obvious that for the carriage of foodstuffs, clean wagons are required. Nevertheless, contaminated wagons were repeatedly provided. Also in this particular case, the intense odour was noticeable. The conclusion from this is that the defendant does not systematically check the condition of the wagons, but trusts that the loading staff will notice any contamination. Such conduct must be qualified as conspicuously careless; the risk that damage or loss may occur is obvious. Therefore, even in the first instance, the defendant should have explained why, despite these circumstances, there was no grossly negligent conduct. This would perhaps have been the case if at least systematic cleaning and checking had been carried out before recognisably sensitive consignments were carried, which only failed in isolated cases. The Supreme Court (Senate) cannot understand that such measures, obvious in themselves, would have catastrophic consequences for the entire economy or would make the railways the ultimate loss-making concern, as claimed in the appeal. The defendant did not explain which measures it had taken to avoid such occurrences. Instead, the defendant first disputed having had any knowledge at all that sugar was to be carried (despite the information in the consignment note). The defendant's assertion in the appeal is not convincing either. According to the court of first instance, consignments of sugar can be carried in normal wagons, they just have to be properly cleaned. Thus the defendant is not being accused of not having special wagons for sugar. It may be true that statistically, certain incidents (such as the one involving the live dog) are unavoidable. But that does not change the fact that the defendant should have explained what systematic measures it took to avoid such incidents, at least before sensitive goods were carried. This is particularly the case in the light of the recent supplying (during the proceedings) of a wagon contaminated with phenol.

- 2.3 ... (Reference to a deficiency in the appeal procedure)
- 2.4 As gross negligence is already demonstrated as a result of the obvious lack of systematic cleaning and checking prior to the carriage of sensitive goods, the decision is not whether supplying an obviously unsuitable wagon is to be considered as grossly negligent in itself (see Koller, *Transportrecht* (Transport Law) (5th edition 2004) § 435 HGB marginal 10; cf. also Spera, *Internationales Eisenbahnfrachtrecht* (International Rail Freight Law), Art. 44 CIM marginal 8, and Ob II 139/27 = SZ 9/60: according to this, there is gross negligence when the defective condition of the wagon should have been noticeable to the railway employee concerned under normal conditions of attentiveness, and when despite this, the employee ignores any concerns about using such a wagon).
- 2.5 As the defendant acted with gross negligence, according to § 102 of the EBG, it cannot invoke the limitation of liability to the value of the goods carried (§ 100, paras. 1 and 2, letter a of the EBG). The appeal is unsuccessful on this point.
3. The defendant argued that the plaintiff acted with contributory negligence, as the intervening party's employees should have noticed the odour. The court of appeal rejected this argument for two reasons. Firstly, it was already excluded as a result of the gross negligence on the part of the defendant and secondly, the intervening party was not the plaintiff's auxiliary. Neither reason is convincing.
- 3.1 According to § 102 of the EBG, in the event of gross negligence the railway must compensate the party entitled for the full loss or damage proved. With reference to Article 29 CMR and § 438 HGB, the court of appeal deduced from this that the claim of contributory negligence was also excluded. It is true that Article 29 CMR is interpreted by the High Court as meaning that in the event of gross negligence, the carrier can (also) not claim any grounds for relief from liability, such as contributory negligence on the part of the party entitled (5 Ob 521/77 = SZ 50/43; 6 Ob 664/81 = SZ 55/20). However, this is explicitly laid down thus in Article 29 CMR. That Article says that in the event of fault that is considered as equivalent to wilful misconduct, the carrier cannot invoke the provisions of this Chapter. This includes not just

the maximum amounts of liability, but also the grounds for relief from liability in accordance with Article 17, paras. 2 and 4 CMR and the division of fault in accordance with Article 17, para. 5 CMR. However, the opinion contained in the literature is that the claim of contributory negligence is nevertheless possible, at least in the event of gross negligence (also) on the part of the party entitled (Basedow in *Münchener Kommentar zum HGB* (Munich Commentary on HGB), *Transportrecht*, Art. 29 CMR marginal 33 with other evidence).

In contrast, § 102 of the EBG does not contain any specific exclusion of the grounds for relief from liability. It can certainly therefore be restricted to the lapse of the maximum amounts. This is in accordance with the legal situation in international rail freight law. The 1990 Protocol version of Article 44 of CIM (only) prescribes that certain provisions do not apply in the event of gross negligence on the part of the carrier. This includes, in particular, the maximum amounts of liability, but not the relief from liability in accordance with Article 36 § 2 and § 3 of CIM, which correspond largely to those of § 94, paras. 2 and 3 of the EBG. As the EBG is basically a vehicle for international rail freight law (according to the explanatory remarks on the Government bill, 436 supplement No. 17. GP 35), § 102 of the EBG should also be understood in this sense. It is true that the EBG was still based on the version of CIM prior to the 1990 Protocol; but in that version too, it could already be understood from Article 44 that it only covered certain limitations of liability. The 1990 Protocol amendment only brought with it, in essence, the full equivalence of wilful misconduct and – even if it is not described as such – gross negligence (explanatory remarks on the Government bill, 238 supplement No. 18. GP 13); an amendment to § 102 of the EBG, which dealt with both forms of fault in the same way right from the start, was apparently not considered necessary by the legislator.

Neither can it be deduced from the general principles of freight law that the appeal on the basis of contributory negligence on the part of the party entitled would be excluded in the event of gross negligence. Even the clear provision of Article 29 CMR is also interpreted differently, as explained; § 438 HGB cited by the court of appeal is not relevant. In contrast, Article 25 of the Warsaw Convention (WCon, aviation), like-

wise Article 44 CIM, only refer to maximum amounts of liability; grounds for relief from liability, particularly contributory negligence on the part of the party entitled (Art. 21 WCon), are not affected by gross negligence by the air carrier. § 430, para. 3 HGB also only covers the maximum amounts of liability (cf. Schütz op. cit., § 430 HGB marginal 22).

Gross negligence on the part of the defendant does therefore automatically exclude the defence of contributory negligence.

- 3.2 The question as to whether the consignor (intervening party) can be considered as the consignee's (plaintiff's) auxiliary is asked wrongly. The court of appeal rightly acknowledged that the contract of carriage is a contract for the benefit of third parties (Schütz, op. cit. § 425 HGB marginal 26 with other evidence; specifically with regard to the contract of carriage by rail, Mutz in *Münchener Kommentar zum HGB, Transportrecht*, Art. 11 CIM marginal 1). The parties to the contract are the consignor and carrier (Legal information system-justice (RIS-Justiz RS0116125, RS0106763)), and the beneficiary third party is the consignee (4 Ob 525/78; 6 Ob 664/81 = SZ 55/20; with regard to contracts with (only) protective benefits for third parties 1 Ob 603/95 = wbl 1996, 410 (for a critical commentary on this, see Jesser-Huss, *ecolex* 2000, 22)).

The consignor can generally be determined from the consignment note, but this assumption can be refuted in the proceedings (3 Ob 257/03w = *ecolex* 2005, 372). In this particular case, the wagons were ordered by one of the intervening party's employees and the intervening party is also shown as the consignor in the consignment note. The contract was therefore negotiated between the intervening party and the defendant and the plaintiff is the beneficiary third party.

In such cases, the party liable can argue contributory negligence on the part of its direct contracting partner in respect of the third party, but quite generally. This is because the third party can in no way be in a better position than the person from whom it derives its rights. This has specifically been stated with regard to the contract with protective consequences for third parties (1 Ob 580/94 = ÖBA 1995, 314; RIS-Justiz RS0013961, latterly, for example 8 Ob 42/05t); in accordance with § 882, para. 2 of the

Allgemeines bürgerliches Gesetzbuch (General Civil Code – ABGB) it must therefore apply all the more to contracts for third parties (cf. 1 Ob 580/94). The decision cited by the court of appeal for its contrary opinion (6 Ob 215/02i = RdW 2003, 83) did not concern such a case, but rather (vice versa) the contracting party's (consignor's) responsibility for the third party's (consignee's) conduct.

The same conclusion can be drawn from the wording of § 94, para. 2 of the EBG. According to this, fault on the part of the party entitled results in relief from liability. This accords with Article 36 § 2 CIM. In that Article, the reference to the party entitled is understood as the reference to the right of disposal over the goods being carried (Csoklich, *Einführung in das Transportrecht* (Introduction to Transport Law), (1990) 213; Mutz, op. cit., Art. 36 CIM marginal 8; Koller, op. cit., Art. 36 CIM marginal 5, all with other evidence). However, it is indisputable that upon consignment and subsequently, it was the intervening party that had the right of disposal (§ 79 of the EBG). Therefore, according to § 94, para. 2 of the EBG, the defendant may invoke fault on the part of the party entitled (the loading staff). It is not relevant whether the defendant could also invoke the preferential ground for relief from liability of § 94, para. 3, letter c of the EBG (in contrast for Art. 36 CIM Koller, for example, op. cit. marginal 11). It does not depend on the related special presumption of causality of § 95, para. 2 of the EBG. The fact that the damage would not have occurred if the loading staff had reacted correctly to the noticeable contamination (i.e. if they had returned the wagon) is obvious.

- 3.3 If, as in this case, the damage was caused by fault on the part of both the party entitled and the carrier, the rule in § 1304 ABGB concerning contributory negligence applies. This cannot be concluded directly from the wording of § 94, para. 2 of the EBG, but results from the very prevalent doctrine on the corresponding provision in Article 36 § 2 CIM (Mutz, op. cit. marginal 8, Koller, op. cit. marginal 5, both with other evidence). For grounds for relief in accordance with § 94, para. 3 of the EBG, this legal consequence even results specifically from § 95, para. 2 of the EBG: according to this, the party entitled is entitled to demonstrate that the damage did not occur, or did not occur exclusively, as a result of one of the risks referred to in § 94,

para. 3. If the contributory cause can even be relevant in the preferential grounds for relief, this must apply all the more if § 94, para. 2 EBG is invoked in the event of contributory negligence (implying contributory causation) on the part of the party entitled. There is no reason in rail freight law to derogate from the general principle of § 1304 ABGB, according to which (gross) faulty conduct on the part of the injured party may also be relevant if the injuring party is grossly negligent. As a rule, only wilful misconduct rules out the claim of contributory fault (RIS-Justiz RS0016291).

The analogous application of Article 17, para. 3 CMR considered by the court of appeal did not change this legal position either. According to this provision, the carrier may not invoke defects in the vehicle. However, contributory fault on the part of the party entitled would have to be taken into account (Koller, *op. cit.* Art. 17 CMR marginal 34; cf. 3 Ob 2006/96p = SZ 69/34).

- 3.4 The court of first instance judged the share of contributory fault correctly. The defendant's gross negligence is accompanied by equally substantial carelessness by the loading staff. It is also obvious even to a layman that sugar should not be loaded into a wagon with a noticeable odour (stench). Ignoring this obvious point in the specific activity is just as serious as the defendant's obvious organisational deficiencies.
4. The defendant is therefore liable for half the damage, the amount of which is undisputed. For this reason, the ruling by the court of first instance was upheld.

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(Translation)

Book Reviews

Allégret Marc, Taïana Philippe, *Transport ferroviaire interne* (Inland Rail Transport), LexisNexis Juris-Classeur Transport, volume 635 (1,2009 – up to 1.11.2008)

In volume 635, the authors analyse in detail the general principles of SNCF's liability in the context of the con-

tract of carriage of goods in domestic (French) rail transport.

In connection with this, it is important to recall that since June 2005, Fret-SNCF's new commercial conditions have contractually adopted CIM to govern domestic French transport (see Bulletin 1/2007, p. 13). Only a few provisions of French law are still applicable. These restrictions on the application of CIM cover: the carrier's liability for loss and damage, the obligation of conditional acceptance of the goods on arrival, the court-ordered appraisal and the sale of the goods as well as the limitation of actions brought under the contract of carriage.

As these restrictions do not cover the carrier's liability for delays, such liability must be assessed in relation to CIM, not domestic law.

The volume is divided into five parts which deal with SNCF's liability system, contractual liability, the obligation to achieve a result, the presumption of liability, the causes of liability and the duty of care concerning the goods respectively.

As usual, the legal authority, case law and considerations useful in practice find their rightful place in these various parts, preceded by key points, an analytical summary and an alphabetical index.

This publication is once again characterised by the depth and relevance of its analysis and its reliability and comprehensiveness. It is co-authored by one of the best national and international legal experts in rail transport law. All these qualities make it an essential working tool for legal professionals.
(Translation)

Andresen, Bernd/Valder, Hubert, *Speditions-, Fracht- und Lagerrecht* (The Law on Forwarding, Freight and Storage), transport law handbook with commentaries, ISBN 3 503 05904 0, supplement 1/09, as at July 2009, Erich Schmidt Verlag, Berlin.

This loose-leaf volume, which was first published in 2000 (see Bulletin 4/2004, p. 111), contains the texts of regulations (acts, general conditions) concerning the law on forwarding, freight and storage and related commentaries. The volume also contains texts of international conventions that are applicable to the carriage of goods performed by different means of transport in international traffic.

In supplement 1/09, the text is amplified and brought up to date with current sets of clauses on the carriage of packages and heavy cargo. In addition, the conditions and documents recommended by FIATA, the global freight forwarding organisation, are reproduced for the first time, particularly the FIATA FBL, as an important international document in the flow of trade¹.

The commentary section is not restricted solely to the most important provisions of the German Commercial Code. Commentaries on other regulations are also being incorporated gradually. The major part of supplement 1/09 contains explanations on the German general conditions for forwarders (Allgemeine Deutsche Spediteur-Bedingungen), with its clauses on liability that are important for practical use in the forwarding business. The explanations are illustrated by means of numerous practical examples.

The commentary on the Convention on the Contract for the International Carriage of Goods by Road (CMR) has also been completed by including explanations on Articles 34 to 51. Among these are also the provisions on carriage performed by successive carriers. Unlike rail transport though, these are only used in road transport as an exception.

The authors, who are practising lawyers, have made use of their experience in applying the provisions of transport law and associated branches of law, thus producing this practice-based guide, which provides answers to a lot of important questions.

With expanding globalisation and the growing pressure of competition, it is becoming increasingly important to have a good knowledge of the contractual basis and legal relationships in the law on freight, forwarding and storage. This handbook makes all the important sources and information on the current legal situation accessible. It is aimed at all practitioners and lawyers as an aid to their work, whether it be in undertakings, insurance companies or associations.

(Translation)

1 FIATA Combined Transport Bill of Lading is a standardised transport document used by the forwarder in both unimodal and multimodal transport (interrupted traffic). When it is filled out, the forwarder puts himself under an obligation to deliver the goods described in the document to the place of destination, which is also specified in the document. The FBL is most often filled out purely as a marine bill of lading.