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by Rail

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Official communications from the Secretariat of OTIF

Accession to OTIF

Jordan

On 4 February 2010, the Government of the Hashemite Kingdom of Jordan made an application for accession to OTIF as an Associate Member. Article 37 §§ 2 to 5 of COTIF applies to the accession procedure accordingly. As Depositary of the Convention, the Secretary General notified the Governments of the Member States of OTIF of this application for accession in a circular dated 12 February 2010.

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 12 May 2010). The accession will then take effect on the first day of the third month following that in which the Secretary General notifies the Member States that the application has been accepted as legally binding.

Legal Matters concerning COTIF

Revision of COTIF

On 21 December 2009, the Secretary General gave notification of the amendments to Articles 9 and 27 of COTIF and to Appendices B (CIM), E (CUI), F (APTU) and G (ATMF) to COTIF adopted by the Revision Committee (see Bulletin 2/2009, p. 14) and approved by the General Assembly (see Bulletin 3/2009, p. 31-33).

In accordance with Article 35 §§ 2 and 3 of COTIF, these amendments will enter into force on 1 December 2010.

The amendments to COTIF, the CIM UR and the CUI UR are published below, along with the Explanatory Reports concerning these amendments. The amendments to the APTU UR and the ATMF UR will be published in a future edition of the Bulletin.
(Translation)

**Convention
concerning International Carriage by Rail
(COTIF)**

Text modifications

**Title II
Common Provisions**

**Article 9
Unit of account**

1. § 4 shall be deleted.
2. §§ 5 and 6 shall become §§ 4 and 5.
3. § 4 (former § 5) shall read as follows:

“§ 4

Each time that a change occurs in their method of calculation or in the value of their national currency in relation to the unit of account, States shall notify the Secretary General of their method of calculation in accordance with § 3. The latter shall inform the Member States of these notifications.”

**Title IV
Finances**

**Article 27
Auditing of accounts**

1. §§ 3, 5, 6, 8 and 10 shall be deleted.
2. § 4 shall become § 3.
3. § 7 shall become § 4.
4. § 9 shall become § 5.

Explanatory Report

NOTE:

The general remarks and the remarks on individual provisions in this Explanatory Report contain a summary of the information in relation to the following points:

- a) Background to and justification for the amendments that were submitted to the Revision Committee and adopted by it, and

- b) Discussion on the provisions for which the General Assembly is responsible in accordance with Article 33 §§ 2 and 4 (a) of the Convention, including editorial amendments.

The information referred to in

- a) has been examined and approved by the Revision Committee, together with the approved amendments and the General Assembly has noted them;
- b) has been examined and approved by the General Assembly following the Revision Committee's considerations and recommendations in this respect.

General Points

1. According to Article 33 § 4 a) of the Convention, the Revision Committee is competent to take decisions about proposals aiming to modify Articles 9 and 27 §§ 2 to 10 of the Convention. In order to take account of developments in the use of the gold franc and in the role of the International Monetary Fund (IMF) and in order to follow requests from the Auditor, the Secretary General has for a while felt compelled to propose to the Revision Committee amendments to provisions of both Articles. However, for reasons of economy, such proposals were deferred until further important modifications justified convening a meeting of the Revision Committee. This is the case with the current revision process that needs to take place in order to resolve problems of incompatibility with the law of the EC, of provisions in Appendices E, F and G of the Convention for the modification of which the Revision Committee is competent to a large extent.
2. The Revision Committee adopted in its 24th session the amendments to Article 9 with the pertinent explanatory remarks as proposed by the Secretary General. With regard to Article 27 the Revision Committee decided not to delete §§ 3 to 10 of Article 27 and to integrate the entire content into the Finance and Accounts Rules as initially proposed by the Secretary General but to keep §§ 4, 7 and 9 of Article 27 in the Convention because of their fundamental importance. On the other hand it was decided to delete §§ 3, 5, 6, 8 and 10 of Article 27 and renumber accordingly.

3. The 9th General Assembly (Berne, 9/10.9.2009) noted the results of the 24th session of the Revision Committee concerning the amendments to Articles 9 and 27 of the Convention and the Explanatory Report and approved the editorial amendment to the references contained in Article 14 § 6 and Article 33 § 4 a) of the Convention to read “Article 27 §§ 2 to 5”. It noted that these amendments are not decisions to which Article 34 of the Convention applies and instructed the Secretary General with regard to bringing these amendments into force to proceed in accordance with Article 35 of COTIF. It also authorised the Secretary General to summarise its decisions on the results of the Revision Committee in the general part of the Explanatory Report.

In particular

Title II Common Provisions

Article 9 Unit of account

1. §§ 4 and 5 refer to Member States of OTIF which are not also members of the IMF.
2. Nowadays the IMF is a global organisation¹ with 185 members encompassing all OTIF Member States except Liechtenstein and Monaco.
3. However for Liechtenstein and Monaco, currencies of IMF members are valid. This means that § 4, which refers to an OTIF Member State not being a member of the IMF, whose legislation does not permit the application of § 2, i.e. to calculate the value of its national currency, in terms of the Special Drawing Right, in accordance with the method of valuation applied by the IMF, does not refer either to Liechtenstein or to Monaco.
4. Thus § 4 apparently does not refer to any current or future OTIF Member State and has in fact become irrelevant.
5. § 5, which will become § 4, can be editorially amended in order to eliminate the reference to the elapsed deadline mentioned at the beginning and the reference to the deleted former § 4.

Title IV Finances

Article 27 Auditing of accounts

1. In the context of the provisions in § 1, which comes within the competence of the General Assembly, the audit must be carried out in accordance with
 - the rules in §§ 2 to 10, which, according to Article 33 § 4, come within the competence of the Revision Committee,
 - any special instructions from the Administrative Committee and
 - the Finance and Accounts Rules and
 - the statutory provisions of the host state that apply to the Auditor’s activities.
2. As the Auditor must comply with all the provisions referred to in the same way, the provisions must not be contradictory.
3. § 2 deals fundamentally with the tasks and activities, but it is hardly to be expected that there will frequently be a need to align with the requirements of the Administrative Committee or the host state.
4. §§ 3, 5, 6, 8 and 10 are deleted because they contain provisions on the specialist carrying out of the audit, for which there may be a need to make changes, but without justifying the Revision Committee’s extensive involvement. Instead, these provisions should be integrated into the Finance and Accounts Rules and hence be subject to direct control by the Administrative Committee, which, as a rule, meets twice a year, but in any case considerably more often than the Revision Committee. The period of around one year resulting from Article 35 § 2 of the Convention for the entry into force of the proposed deletion, and hence for the corresponding addition to the Finance and Accounts Rules, would seem sufficient.
5. The new §§ 3 to 5 contain the provisions of former §§ 4, 7 and 9 of Article 27 which, because of their fundamental importance, remain in the Convention.

¹ see <http://www.imf.org/external/np/sec/memdir/members.htm>

6. Due to the deletions and the renumbering in Article 27 the Article will no longer contain §§ 6 to 10, which would make the references in Articles 14 § 6 and 33 § 4 a) of the Convention partly redundant. The General Assembly is responsible for these Articles.

Uniform Rules Concerning the Contract of International Carriage of Goods by Rail

(CIM - Appendix B to the Convention)

NOTE:

According to Article 33 § 4 (c) of the Convention, the Revision Committee could decide on these Articles.

Editorial adaptation of the English text:

**Article 3
Definitions**

- a) “carrier” means the contractual carrier with whom the consignor has concluded the contract of carriage pursuant to these Uniform Rules, or a ~~subsequent~~ successive carrier who is liable on the basis of this contract;

Justification: harmonisation of the terminology with Articles 26 and 49 § 2.

**Article 6
Contract of carriage**

- § 7 In the case of carriage which enters takes place on the customs territory of the European Community or the territory on which the common transit procedure is applied, each consignment must be accompanied by a consignment note satisfying the requirements of Article 7.

Justification: editorial alignment with the French and German versions.

Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic

(CUI - Appendix E to the Convention)

Text modifications

**Title I
General Provisions**

**Article 3
Definitions**

Amend b), c), f) and g) to read:

(For the purposes of these Uniform Rules, the term)

- b) “manager” means the person who makes railway infrastructure available and who has responsibilities in accordance with the laws and prescriptions in force in the State in which the infrastructure is located;
- c) “carrier” means the person who carries persons or goods by rail in international traffic under the CIV Uniform Rules or the CIM Uniform Rules and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;
- f) “licence” means the authorisation issued by a State to a railway undertaking, in accordance with the laws and prescriptions in force in that State, by which its capacity as a carrier is recognized;
- g) “safety certificate” means the document attesting, in accordance with the laws and prescriptions in force in the State in which the infrastructure is located, that so far as concerns the carrier,
- the internal organisation of the undertaking as well as
 - the personnel to be employed and the vehicles to be used on the infrastructure,

meet the requirements imposed in respect of safety in order to ensure a service without danger on that infrastructure.

Title II
Contract of Use

Article 5
Contents and form

Amend §§ 1 and 2 to read:

“§ 1

Relations between the manager and the carrier or any other person entitled to enter into such a contract under the laws and prescriptions in force in the State in which the infrastructure is located shall be regulated in a contract of use.

§ 2

The contract shall regulate the necessary details for the determination of the administrative, technical and financial conditions of use.”

Insert, after Article 5, a new Article 5bis as follows:

“Article 5bis
Law remaining unaffected

§ 1 The provisions of Article 5 as well as those of Articles 6, 7 and 22 shall not affect the obligations which the parties to the contract of use of infrastructure have to meet under the laws and prescriptions in force in the State in which the infrastructure is located including, where appropriate, the law of the European Community.

§ 2 The provisions of Articles 8 and 9 shall not affect the obligations which the parties to the contract of use of infrastructure have to meet in an EC Member State or in a State where Community legislation applies as a result of international agreements with the European Community.

§ 3 The provisions of §§ 1 and 2 concern in particular:

- agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers,
- licensing,
- safety certification,
- insurance,

- charging involving performance schemes to minimise delays and disruptions and improve the performance of the railway network,
- compensation arrangements in favour of customers and
- dispute resolution.“

Article 6
Special obligations of the carrier and the manager

Amend § 1 to read:

“§ 1

The carrier must be authorised to undertake the activity of a carrier by rail. The personnel to be employed and the vehicles to be used must satisfy the safety requirements. The manager may require the carrier to prove, by the presentation of a valid licence and safety certificate or certified copies, or in any other manner, that these conditions are fulfilled.”

Article 7
Duration of the contract

Delete § 1, renumber §§ 2 to 6 accordingly and modify the heading to read “Termination of the contract”.

Explanatory Report

NOTE:

The general remarks and the remarks on individual provisions in this Explanatory Report contain a summary of the information in relation to the following points:

- a) Background to and justification for the amendments that were submitted to the Revision Committee and adopted by it, and
- b) Discussion on the provisions for which the General Assembly is responsible in accordance with Article 33 §§ 2 and 4 (e) of the Convention, including editorial amendments.

The information referred to in

- a) has been examined and approved by the Revision Committee, together with the

approved amendments and the General Assembly has noted them;

- b) has been examined and approved by the General Assembly following the Revision Committee's considerations and recommendations in this respect.

General Points

1. Decisions taken by the General Assembly at its 7th and 8th sessions in support of initiatives to solve the legal and practical problems between European Community (EC) law and COTIF envisage that in relation to Appendices to COTIF other than F and G outstanding issues shall be addressed at the appropriate level in order to find practical solutions which may lead to the creation of appropriate working groups.
2. In accordance with these decisions and with an initiative by the Council Land Transport working group of 12 December 2007 an ad hoc working group concerning Appendix E (CUI) was established (consisting of representatives of the European Commission, the OTIF Secretariat and legal experts from European Union (EU) Member States and Switzerland, hereinafter the "CUI Group") in order first to review the respective legal regimes and identify areas of potential difficulty and then to propose practical solutions.
3. In several meetings the CUI Group identified and discussed contested areas of incompatibility between EC law and the CUI and agreed a number of suggestions for amendments to the CUI in order not only to deal with such areas but also to clarify certain parts of the CUI, which in part, caused legal difficulties between the two regimes. These amendments and clarifications concern
 - the scope of application,
 - the definitions of "manager", "carrier", "licence" and "safety certificate",
 - the provisions on the contract of use,
 - the special obligations of carriers and managers,
 - liability for loss or damage caused by delay / disruption of operations and
4. The primary aim of the amendments suggested by the CUI Group has been to take account of developments in the legislation of the EC including those instruments which, at the time when CUI was adopted, were not yet in force, e.g. Directives 2001/14/EC, 2004/49/EC and 2004/51/EC as well as Regulation EC/1371/2007.
5. Furthermore, this Explanatory Report gives notice that international rail operations entering into the EU from non EU Member States are subject to EC law in addition to any existing obligation under COTIF. The Report is drafted so as to be taken to be 'supplementary means of interpretation' as understood by Article 32 of the Vienna Convention on the Law of Treaties 1969. It is further intended to highlight those areas of legal ambiguity or uncertainty caused by the existence of two separate systems of law which have been identified to overlap in some respects and therefore gives notice to operators of the existence of EC legislative provisions.
6. When the Explanatory Report refers to EC Member States, it also applies *mutatis mutandis* to States where the Community legislation applies as a result of international agreements with the European Community.
7. The Revision Committee followed to a large extent the suggestions made by the CUI Group. The wording of the definition of "licence" was however modified in order to better match the meaning of this term in the law of the EC, and in the proposed Article 5bis (law remaining unaffected), a distinction was made between the liability provisions in Articles 8 and 9 of the CUI where only the law of the EC remains unaffected but not national law and provisions of other Articles where national law also remains unaffected (for details see the relevant particular remarks).
8. The 9th General Assembly (Berne, 9/10.9.2009) noted the results of the 24th session of the Revision Committee concerning the amendments to Appendix E (CUI) of the Convention and the Explanatory Report and approved the Explanatory Report on Articles 1, 4, 8 and 9 of CUI. It noted that these amendments are not decisions to which Article 34 of the Convention applies and instructed the Secretary General with regard to bringing these amendments into force to
 - conciliation procedures.

proceed in accordance with Article 35 of COTIF. It also authorised the Secretary General to summarise its decisions on the results of the Revision Committee in the general part of the Explanatory Report.

In particular

Title I General Provisions

Article 1 Scope

1. According to § 1, the CUI Uniform Rules (UR) are applicable insofar as the purpose of the contract of use of railway infrastructure is international carriage by rail within the meaning of the CIV Uniform Rules and the CIM Uniform Rules.
 - a) In this context the term “carriage” has the same meaning as in other transport law conventions, such as CMR, Warsaw and Montreal Convention, Hamburg Rules and Athens Convention.
 - b) Regarding the term “international carriage within the meaning of the CIV UR and the CIM UR” see explanatory notes with regard to Article 1 CIV and Article 1 CIM.
 - c) The question of whether a “national” or a “foreign” railway undertaking/carrier is using the infrastructure is irrelevant with regard to the application of CUI.
 - d) CUI also applies to the use of the railway infrastructure in those States where there has been no separation of infrastructure management from the provision of transport services and hence where an integrated undertaking is working in both areas of railway operation, in so far as foreign railway undertakings are allowed access to the infrastructure in these States.
2. The expression “for the purposes of” (CIV/CIM international carriage) in § 1, makes it clear that the purpose of use is a crucial point. So it does not mean, for example, “during the performance” of international carriage by rail. Therefore, use for the purpose of preparations before the train is made ready and dispatched (before the first passenger gets into the train or the goods are loaded) and for the purpose of the work carried on once carriage has been completed (e.g. cleaning and empty returns) are also included in the scope of the contract of use as long as these actions are linked to subsequent or preceding carriage under CIV or CIM.
3. Whilst the CIV/CIM UR refer to the performance of carriage on the basis of a contract of carriage which concerns each single passenger and each single consignment of goods, the use of infrastructure usually concerns carriage of trains containing a number of passengers and consignments. Among these, there might be passengers carried under a contract according to CIV as well as other passengers to whom CIV does not apply. The same goes for a train in which there might be consignments carried under a contract pursuant to CIM as well as other consignments to which CIM does not apply.
4. When it comes to claims for indirect damages, for example, under Article 8 § 1 (c) of CUI:
 - a) as regards passengers with national tickets who receive compensation from the carrier under national law, the carrier will have a right of recourse against the infrastructure manager under national law, and,
 - b) as regards passengers with CIV tickets who receive compensation from the carrier under CIV, the carrier will have a right of recourse against the infrastructure manager under CUI.
5. The same approach would apply *mutatis mutandis* to claims for damage to freight.
6. There are however differing views on the scope of application of CUI to the case of direct damage. The scope of application of CUI to the case of direct damage may need further clarification in each specific case.
7. Bearing in mind that the scope of application of CUI in any case partly overlaps with that of corresponding EC law or corresponding domestic law provisions in several other Articles of CUI where a potential misunderstanding could arise with regard to such law are modified accordingly and additional information is given in the Explanatory Report.

Article 3 Definitions

1. By extending the definition of the term “manager” in letter b) it is indicated that where the law of the EC or corresponding domestic law applies, a person falling under the definition has to be aware of all respective obligations.
2. By extending the definition of the term “carrier” in letter c) it is indicated that where the law of the EC or corresponding domestic law applies, a person falling under the definition has to be aware of all licensing obligations. In particular, non-EU carriers have to note that, when contracting with infrastructure managers of EU Member States as “railway undertakings” under the law of the EC, they are subject to EC obligations, in particular licensing and safety certification requirements.
3. The modified definition of the term “licence” in letter f) better matches the meaning of this term in the law of the EC (see Directive 95/18/EC). Furthermore it is clarified that the licence needs to be issued by a State. It is also stated that for the relevant authorisation the law in force in the State of issuance is applicable. If that law is that of the EC or corresponding domestic law, the relevant conditions, in particular the requirement for licensing and safety certification, have to be met, see also the remarks on letters c) and g).
4. The wording of the definition of the term “safety certificate” in letter g) is aligned with the corresponding wording in the other modified definitions. In substance it is already clear from the existing wording that the safety certificate has to be based on the law applicable at the location of the infrastructure, including the law applicable in the EU Member State where the infrastructure is located.

Article 4 Mandatory law

In the context of this Article the term “stipulation” does not refer to any requirement laid down in any other place than in the CUI contract. It does not refer to any legal provision applicable in the EU, its Member States or any other State. As to potential conflicts of the CUI provisions concerning the contract itself, particularly with the law of the EC, see remarks on Article 5.

Title II Contract of Use

Article 5 Contents and form

1. In its modified form, § 1 refers not only to the carrier but also to other persons entitled to enter into a contract of use of the infrastructure. This takes account of the fact that according to the law of the EC not only a carrier but also an “applicant” as authorised under Article 16.1 of Directive 2001/14/EC (e.g. a public transport authority, freight forwarder, combined transport operator or a shipper), who is not at the same time a carrier, is entitled to enter into an agreement with the infrastructure manager on the use of the infrastructure.
2. § 2 no longer contains a list of details which are included in a contract as a matter of a rule in order to ensure that, where such details are already regulated by the law applicable in the State where the infrastructure is located, and in particular that of an EU Member State, clauses containing those details are not reproduced. Instead it is now proposed to state that the contract shall contain all details which are necessary for the parties to the contract to determine comprehensively the administrative, technical and financial conditions of use such as the description of the infrastructure to be used, the period for which the contract is valid and the fees for the use. For restrictions which, with regard to various contents of the contract would be applicable under the law of the State in which the infrastructure is located, see remarks on Article 5bis.

Article 5bis Law remaining unaffected

1. § 1 indicates unaffected obligations based on provisions, in particular in the areas listed in § 3. These provisions are contained in the law of the EC but may also be contained in the domestic law of OTIF Member States which do not apply Community legislation. Such obligations have to be met by the parties to the contract of use of the infrastructure and are not superseded by the provisions of the CUI listed in the introduction to § 1.
2. § 2 has the same intention as § 1. However the obligations remaining unaffected by the liability

provisions of the CUI listed in the introduction to § 2 are only those which have to be met in an EC Member State or in a State where the Community legislation applies as a result of international agreements with the European Community, but do not concern the domestic law in an OTIF Member State which does not apply Community legislation.

3. § 3 contains a non-exhaustive list of the areas which the obligations indicated in §§ 1 and 2 concern. In this sense,
- a) the first indent is important with regard to the issues addressed in Articles 5 and 7, i.e. agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers (see Directive 2001/14/EC),
 - b) the second and third indents are important with regard to the issues in Article 6 §§ 1 and 2, i.e. licensing (see Directive 95/18/EC) and safety certification (see Directive 2004/49/EC),
 - c) the fourth indent is important with regard to the issue in Article 6 § 3, i.e. insurance (see Directive 95/18/EC),
 - d) the fifth and sixth indents, i.e. performance schemes, are important with regard to the issues in Articles 8 § 4 and 9 § 4 to minimise delays and disruptions and to improve the performance of the railway network and compensation in favour of customers (see Directive 2001/14/EC and Regulation EC/1371/2007), and
 - e) the seventh indent is important with regard to the issue in Article 22, i.e. dispute resolution (see Directive 2001/14/EC and Article 292 of the EC Treaty).

Article 6

Special obligations of the carrier and the manager

The drafting of Article 6 § 1 has been modified very slightly. The issues in this Article for which, where the law of the EC or corresponding domestic law applies, certain legal provisions have to be observed are dealt with in the second, third and fourth indents of § 3 in the new Article 5bis.

Article 7

Termination of the contract

Article 7 § 1 is deleted and the heading adapted to the content of the remaining provisions. This modification takes account of the fact that where the law of the EC or corresponding domestic law applies, the duration of the agreement on the use of the infrastructure is always limited. The limit is expressed as one working timetable period or in specific cases more than one such period. This issue is also dealt with in the first indent of the new Article 5bis.

Title III

Liability

Article 8

Liability of the manager

and

Article 9

Liability of the carrier

With reference to Article 8 § 4 and Article 9 § 4 the issue of performance regimes as well as of standardised and immediate compensatory measures in favour of customers in so far as the latter are relevant in the contractual relation of the parties to the contract of use of infrastructure for which, where the law of the EC applies, certain legal provisions have to be observed, is dealt with in the fifth and sixth indents of the new Article 5bis.

Title V

Assertion of rights

Article 22

Conciliation procedures

The issue in this Article for which, where the law of the EC applies, certain legal provisions have to be observed, is dealt with in the seventh indent of the new Article 5bis.

(Translation)

Publications and interesting links

Bulletin des transports et de la logistique, Paris, n° 3300/2010, p. 6/7 – Transports et « services ». Quelle loi ? (M. Tilche)

Idem, n° 3302/2010, p. 36/37 – Aérien. Les mystères de Montréal (M. Tilche)

Idem, n° 3303/2010, p. 52/53 – Pollution des marchandises. Quelle réparation ? (M. Tilche)

Idem, n° 3306/2010, p. 103 – Prescription CMR. Peut-on « grappiller » ?; Retard dû à la douane. Cas pratique (M. Tilche)

Idem, n° 3309/2010, p. 156-158 – Intervenants MD (marchandises dangereuses). Responsabilités (A. Babled et M. Tilche)

Idem, n° 3310/2010, p. 171/172 – CMR. L’empire genevois (M. Tilche)

CIT-Info (Comité international des transports ferroviaires / Internationales Eisenbahntransportkomitee / International Rail Transport Committee, CIT) <http://www.cit-rail.org>, édition/Ausgabe/edition 1/2010

DVZ - Deutsche Verkehrszeitung, Hamburg, Nr. 7/2010, S. 6 – Keine Zahlungspflicht über die Rückgabe hinaus. Eisenbahnen Gerichtsurteil: Entsprechende Klauseln in Waggon-Mietverträgen sind unwirksam (K.-P. Langenkamp)

European Transport Law / Droit européen des transports / Europäisches Transportrecht, Antwerpen, No. 1-2010, p. 9-18 – Canadian case law and beyond... Hague Visby Rules and Hague Protocol loss of carrier liability limitation benefit (M. Katsivela)

Uniform Law Review/Revue de droit uniforme, Rome, Unidroit, 2009-4, Focus on : The Rotterdam Rules / Les Règles de Rotterdam ; p. 831-845 – Freedom of Contract under the Rotterdam Rules (F. Berlingieri); p. 857-867 – Le chapitre 9 des Règles de Rotterdam : la livraison (Ph. Delebecque); p. 885-892 – Obligations of the Shipper to the Carrier under the Rotterdam Rules (Chapter 7) (Ch.D. Hooper); p. 893-900 – What Changes in International Transport Law after the Rotterdam Rules? (R.I. Ortiz); Behind the Numbers : the Limitation on Carrier Liability in the Rotterdam Rules (K. Lannan); p. 931-943 – The New Structure of the Basis of the Carrier’s Liability under the Rotterdam Rules (Si Yuzhou/H. Hai Li); p. 981-995 – Multimodal Aspects of the Rotterdam Rules (G. van der Ziel); p. 997-1009 – Delay and the Rotterdam Rules (A. von Ziegler); p. 1011-1023 – The Carrier and the Maritime Performing Party in the Rotterdam Rules (S. Zunarelli)

Transport of Dangerous Goods

RID/ADR/ADN Joint Meeting

Berne, 22-26 March 2010

The first RID/ADR/ADN Joint Meeting of the 2010/2011 biennium was held from 22 to 26 March 2010 in Berne. In addition to new amendments for a prospective date of entry into force of 1 January 2013, final amendments to the 2011 editions of RID, ADR and ADN were also on the agenda. This meeting had a very heavy workload and dealt with a total of 50 official and 50 unofficial documents. 20 States, the European Commission, the Committee of the Organisation for Railways Cooperation (OSJD) and 14 non-governmental organisations were represented at this meeting.

Tanks

A tank working group meeting in parallel with the plenary session was again set up to deal with documents concerning tank issues. Owing to the extensive workload, documents that did not relate directly to tank technology were also transferred to this working group for preliminary treatment.

Carrier’s obligations with regard to checking the conformity with the test deadline

According to 1.4.2.2.1 (d), the carrier has to ascertain that for tanks, the date of the next test has not expired. However, in certain cases, this date may be exceeded by three months, as in the intermediate inspection in accordance with 6.7.3.15.2 or 6.8.2.4.3. For the sake of legal clarity, UIC suggested taking this into account in 1.4.2.2.1 by replacing “date of the next test” with “deadline for the next test”.

Filling and carriage of tank-wagons/tank-vehicles after expiry of the deadline for periodic inspection and intermediate inspection

In RID/ADR 2009, 6.8.2.4.3 was amended to say that intermediate inspections on tanks may also be carried out within three months before or after the set date. In UIC’s view, this was a partial alignment with the guidelines for portable tanks. For these tanks, Chapter 6.7 specifies that they may not be filled after the date of expiry of the deadlines given in 6.7.19.2 and if they were filled before the date of expiry of the deadline for the periodic inspection, they may be carried for a period not to exceed three months beyond the date of expiry of this deadline. These additional points do not appear for tanks conforming to Chapter 6.8. Therefore, in order to

clarify matters, UIC suggested that an analogous provision be included in Chapter 6.8.

The proposal was not adopted as the working group was of the view that extending the rule that was only included for the first time in RID/ADR 2009 would not improve the situation and was not necessary for European land transport owing to the generally short transport routes.

Obligations of the filler with regard to checking the closures of tank-wagons/tank-vehicles

According to 6.8.2.2.2, each bottom-filling or bottom-discharge opening in tanks must be equipped with at least two or three mutually independent closures, depending on the tank code of the substance to be carried. These closures must comprise

- a) an external stop-valve and a closing device or
- b) an internal stop-valve, an external stop-valve and a closing device.

However, in the context of his obligations, according to the wording in 1.4.3.3 (f), the filler only has to check the leakproofness of the closing device. To avoid drip leaks, UIC was of the view that this checking obligation should also be extended to include the internal and external stop-valve(s).

In the discussion, the majority of the working group noted that for reasons relating to protection at work legislation and for technical reasons, it would not be possible to implement the requirements without difficulty. In particular, it was not clear which technical solutions could be used here in order to achieve the protective aim. Like the second stop-valve and the protective cap, the closing devices normally used up to now often had a screw-thread. Up to now, the operation of these devices had not been defined sufficiently and was therefore carried out in various ways.

Various ways of resolving this were discussed, for example a double check that the device is properly closed, special closures with a greater likelihood of leakproofness or the introduction of working instructions at filling and discharge facilities. These working instructions were also proposed by CEFIC and supported by the working group.

As the engineering design of road and rail vehicles differed, there were also different solutions for each mode. For this reason, further discussions to find a

definitive solution to the problem of drip leaks might be necessary.

For the time being, the filler's obligation was amended to say that he must ensure that all closures are in a closed position and that there is no leakage.

Transitional provisions for tanks

The working group discussed the need to keep transitional provisions that have expired, as it was not always clear whether new provisions applied to older tanks carried in accordance with transitional provisions. Users had different views for example on whether tanks carried in accordance with general transitional provisions must have a subsequent marking or not. Because of such cases, the working group thought it was necessary to maintain the transitional provisions, but recognised a general need to revise these provisions in future. This should be carried out in relation to the specific transport modes.

Qualifications of people carrying out magnetic particle inspections on tanks

The purpose of a proposal from Belgium was to clarify the qualifications that people carrying out magnetic particle inspections on tanks for ammonia, anhydrous in accordance with special provision TT 8 should have.

The discussion in the working group took place against the background that inspection bodies are responsible for inspections of gas tanks marked with π ; these inspection bodies must meet the requirements of special provision TT 9. Some members of the working group were uncertain as to whether these inspections may be carried out only by persons who are certified, and hence qualified, in accordance with standard EN 473.

A large majority was in favour of amending special provision TT 8 by adding a reference to this EN standard.

Proposals to amend RID/ADR/ADN

Legal status of ADR and ADN table of contents and alphabetical index

In contrast to the equivalent tables in RID, the table of contents and the alphabetical index in ADR and ADN are not an official part of the regulations. For this reason, amendments to these lists are not included in the notification texts, so the amendments can only be seen when the official versions of ADR and ADN are available. To speed up the translation work, the Netherlands proposed that these lists in ADR and ADN

should also be included in the legal (official) part of the regulations.

An indicative vote showed that opinions in the Joint Meeting were divided. While some delegations were of the view that the procedure chosen for RID should also be applicable to ADR and ADN, others feared that in preparing the alphabetical index, they could lose the flexibility they had previously been able to have by including additional synonyms. However, the representative of the Netherlands said he would submit a new proposal.

Notification of incidents involving dangerous goods

1.8.5.1 prescribes that in some circumstances, an accident report has to be prepared for incidents in the carriage of dangerous goods. The Joint Meeting agreed to set a deadline of one month from the date of the incident for submission of the accident report to the competent authority.

5.4.1.1.4

5.4.1.1.4 contains an exemption from the documentation provisions of Chapter 5.4 for dangerous goods packed in limited quantities. As the new Chapter 3.4 of the 2011 edition of RID/ADR makes clear which provisions do not have to be observed for the carriage of limited quantities (including the provisions of Chapter 5.4), it was decided to delete 5.4.1.1.4.

Soils and construction and demolition waste contaminated with PCBs

A proposal to delete special provision VW15/VV15 for UN Nos. 2315 and 3151 (polychlorinated biphenyls, liquid and polyhalogenated biphenyls and terphenyls, liquid) was not adopted, as solid waste contaminated with such liquids are still solid. However, the special provision was amended to indicate that it only applies to solids.

The proposal to increase the concentration of PCBs from 0.1% (1,000 ppm) to 5% (50,000 ppm), was also rejected, as this would diverge from the regulations on the management of dangerous waste. However, it was noted that it was difficult to determine the actual concentration in the load precisely, as PCBs were not distributed evenly in the transported waste. This problem would be dealt with later on the basis of a new proposal.

Transitional measure for marking of inner receptacles of composite IBCs

6.5.2.2.4 adopted for the 2011 edition requires that from 1 January 2011, the inner receptacles of composite IBCs must be provided with marking. The Joint Meeting adopted a transitional measure to allow the inner receptacles of composite IBCs manufactured between 1 January and 30 June 2011 to continue to be marked in accordance with the provisions of 6.5.2.2.4, in force up to 31 December 2010. It was noted that it would not be possible to use those composite IBCs in maritime transport, as no such transitional provision had been adopted for the IMDG Code.

Cylinders for breathing appliances

Special provision 655 permits the use of cylinders for breathing appliances, provided they meet the requirements of the pressure equipment Directive. At the request of the European Commission, this special provision, which has so far only applied to UN 1002 Air, compressed, will be extended to cover UN Nos. 1072 Oxygen, compressed, 1956 Compressed gas, n.o.s. and 3156 Compressed gas, oxidizing, n.o.s., as these gases may also be contained in cylinders for breathing appliances.

The representative of Switzerland announced that he would initiate a multilateral special agreement so that these provisions could be used as soon as possible.

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 (section 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).

At the last Joint Meeting, the representative of the United Kingdom had already proposed to amalgamate the two parallel systems for carriage in bulk into a single system based on the multimodal BK 1 and BK 2 system (see Bulletin 3/2009, p. 37).

There was a lengthy discussion on the specific proposal submitted by the United Kingdom to this meeting. The aim of the proposal was to ensure that the substances previously permitted for carriage in bulk in accordance with the VW/VV system continue to be permitted for

this type of transport and that existing wagons/vehicles which might not meet all the provisions of Chapter 6.11 should continue to be permitted.

In the discussion, several delegations were in favour of maintaining the current parallel systems. They were of the view that with a single system, it would no longer be possible to identify substances permitted for carriage in bulk in maritime transport. On the other hand, other delegations supported harmonising the provisions, but thought a number of points in the United Kingdom's proposal should be discussed in an informal working group.

Classification of wastes

According to the simplified system for the classification of wastes in 2.1.3.5.5, it is possible to classify wastes by default in the most appropriate n.o.s. entry of packing group II if the properties of the waste do not correspond to the properties of the packing group I level. If this classification system is used, it is not necessary to provide the technical name (5.4.1.1.3) prescribed in Chapter 3.3, special provision 274.

In a document, Sweden was of the view that using the simplified system for the classification of wastes should also be possible for different n.o.s. entries to which only packing group III is assigned. With the exception of the entries of UN Nos. 3077 and 3082 (environmentally hazardous substances), the Joint Meeting rejected extending the simplified system, because wastes can only be assigned to these specific n.o.s. entries if their composition is known. However, the simplified classification system may only be used in cases where the exact composition of the waste is not known.

Classification of environmentally hazardous substances

As the provisions of 2.2.9.1.10.5.2 adopted for the 2011 edition of RID/ADR/ADN give the EC Directives precedence over the classification provisions of 2.2.9.1.10, this could lead to insufficient compatibility with the provisions for maritime transport. In order to avoid this, the Joint Meeting adopted an amended text of 2.2.9.1.10.5. However, during the report reading, it was established that this text also needed to be improved, so further proposals for amendments for the next session of WP.15 and the RID Committee of Experts were anticipated.

Transitional provisions for environmentally hazardous substances

In the 2009 edition of RID/ADR/ADN, application of the provisions for the classification of aquatic pollutants was extended to substances which meet criteria of classes other than Class 9. In connection with this, a transitional provision was included in 1.6.1.17 which will expire on 31 December 2010.

For the 2011 edition, the categories and criteria for the classification of substances and mixtures in 2.2.9.1.10.3 and 2.2.9.1.10.4 were aligned with the 16th revised edition of the UN Recommendations on the Transport of Dangerous Goods. It was already established at the last Joint Meeting that bearing in mind the procedures for amending the MARPOL Convention (International Convention for the Prevention of Pollution from Ships), application of the new GHS criteria to aquatic pollutants in maritime transport (IMDG Code) might be delayed. To this end, a transitional provision was included in 1.6.1.19 to permit the classification provisions that apply up to 31 December 2010 to be used until 31 December 2012.

In the meantime, it has emerged that application of the GHS criteria to environmentally hazardous substances in the IMDG Code will only be made mandatory from 1 January 2014. For this reason, the Joint Meeting adopted an extension of the transitional provision in 1.6.1.19 to 31 December 2013. In contrast, a further reaching proposal also to extend the transitional period in 1.6.1.17 to 31 December 2013 was not adopted.

Environmentally hazardous substances mark on overpacks

The marking of overpacks is dealt with in 5.1.2.1, which requires labelling, as in 5.2.2 for packages. As the provisions for marking with the environmentally hazardous mark are not contained in 5.2.2, but in 5.2.1.8, this would mean that overpacks must not bear this mark in any case. In order to ensure that overpacks are marked with the environmentally hazardous mark, the Joint Meeting decided to amend 5.1.2.1, which has already been done for the IMDG Code.

Mark for substances carried at elevated temperature

On the one hand, 5.3.2.2 of the UN Model Regulations, 16th revised edition, requires the elevated temperature mark for transport units containing a substance that is transported or offered for transport in a liquid state at a temperature equal to or exceeding 100 °C and in a solid state at a temperature equal to or exceeding 240 °C. On

the other hand, RID/ADR 5.3.3 only requires the elevated temperature mark for substances to which special provision 580 is assigned. This special provision is only assigned to UN Nos. 3257 (elevated temperature liquid, n.o.s.) and 3258 (elevated temperature solid, n.o.s.), but not to UN No. 3256 (elevated temperature liquid, flammable, n.o.s. with flash-point above 60 °C, at or above its flash-point), although this substance can also be transported or offered for transport at temperatures far in excess of 100 °C.

In order to achieve multimodal harmonisation, a Belgian proposal was adopted to divide the entry for UN No. 3256 in Table A depending on the temperature at the time the goods are handed over for carriage.

Marking of containers, wagons and transport units containing dangerous goods in limited quantities

In an informal document, the representative of the International Road Transport Union (IRU) explained that, because of transitional provision 1.6.1.18, most road transport companies had not yet applied the marking provisions applicable to transport units and containers carrying dangerous goods packed in limited quantities that have been in force since 2009. Since the "LTD QTY" marking was being replaced with a diamond-shaped marking by the amendments to Chapter 3.4 entering into force on 1 January 2011, they would prefer as from 1 January 2011 to apply only the diamond-shaped marking so as to avoid problems of interpretation with the authorities carrying out checks. As an alternative, he proposed to extend the transitional provision in 1.6.1.18 to 30 June 2011.

However, as the IMDG Code would authorise the current marking until 31 December 2011, and would only impose the diamond-shaped marking from 1 January 2012, the Joint Meeting was of the view that the maximum permissible flexibility should be maintained. It would thus be appropriate to encourage the industry and transport companies to apply the new mark as from 1 January 2011. The States should also then authorise the new mark for domestic carriage if they have not yet implemented the 2011 amendments on 1 January 2011 for domestic transport.

Hydraulic pressure test for non-UN pressure receptacles

The initial testing of UN pressure receptacles laid down in 6.2.1.5.1 (g) permits either the classic European proof pressure test without permanent visible deformation, or the water jacket test in which the volumetric expansion and any possible permanent expansion are measured. Limit values for such expansion are laid down in the

construction standards. 6.2.3.4.1, which applies to non-UN pressure receptacles, does not permit any permanent deformation and therefore implicitly rules out using the latter test for RID/ADR/ADN pressure receptacles.

The Joint Meeting adopted the proposal by the European Industrial Gases Association (EIGA), the European Cylinder Makers Association (ECMA) and the European Committee for Standardisation (CEN) to refer entirely to the relevant provisions for UN pressure receptacles with regard to the initial test for RID/ADR/ADN pressure receptacles.

Carriage of gas tanks removed from motor vehicles

In connection with the development and commercial launch of alternative vehicle propulsion systems, there is an increasing use of vehicles powered by flammable gases. In the context of maintenance and repair work, quality assurance activities for vehicles and their components and environmentally friendly disposal, used gas tanks or gas storage systems with different degrees of filling have to be carried. As the existing provisions do not offer the possibility of carrying such gas tanks properly and in accordance with the law, Germany submitted a proposal for a new special provision to be assigned to UN Nos. 1011, 1049, 1075, 1954, 1965, 1966, 1969, 1971 and 1978.

Based on various comments made during the meeting, Germany would prepare a revised proposal and a multilateral special agreement to ensure carriage between the States concerned could be performed in accordance with the law before the official entry into force of the amendment on 1 January 2013.

Next meeting

The next Joint Meeting will continue the discussions on the RID/ADR/ADN amendments for 2013 in the week from 13 to 17 September 2010.

(Translation)

Co-operation with International Organisations and Associations

United Nations Economic Cooperation for Europe (UNECE)

Inland Transport Security Discussion Forum

Geneva, 28-29 January 2010

The deputy Secretary General represented OTIF at this event. The large proportion of self-help in road transport under the aegis of the IRU and in the shipping industry with regard to high-value goods under the aegis of the Transported Assets Protection Association (TAPA) stood out from the wide range of information available. In the field of railways, the talk by the head of the National Norwegian Rail Administration's Security Program on secure architecture and the results of the European Commission's research centre in Ispra (I) on the effects of explosions and risks inside means of rail transport received particular attention. In addition, developments in connection with the numerous international governmental and non-governmental initiatives of a non-binding character (forums for the exchange of information, guidelines, tool boxes etc.) were presented and mandatory international legislation or the creation of an international organisation specialising in security were rejected. However, this trend could be reversed if international transport in Europe were also to be subjected to additional restrictions as a result of national legislative acts in the field of security following the American example. In this context, what the delegate of the Russian Federation said seems significant; he referred to the federal laws that have been passed in his country on the protection of transport security with a list of threats and an all-embracing approach.
(Translation)

Inland Transport Committee (ITC)

72nd Session

Geneva, 23-25 February 2010

As usual, OTIF took part, at least for part of the time, in the annual session of the UNECE Inland Transport Committee held from 23 to 25 February 2010.

This year, the discussion on the policy oriented segment (see Bulletin 1/2008, p. 7) focused on inland waterway

transport, particularly the subject of "sustainable transport development – the case of inland water transport".

A distinguished guest, the President of Russian Railways (RZD), **Mr Vladimir Yakunin**, gave a presentation¹ on the modernisation of the Russian railway network and the role RZD hopes to play in the Eurasian rail transport market. In his presentation, Mr Yakunin also referred to the Russian Federation's accession to COTIF (see Bulletin 4/2009, p. 55) and the development of ferry links between Germany (Sassnitz) and the Russian Baltic ports (Baltiysk and Ust-Luga).

With regard to questions relating to the work of the Committee in general, the following items of particular interest to OTIF were included on the agenda: transport and security, facilitation of border crossing in international rail transport and civil liability regimes governing intermodal transport.

The Committee recommended that the Transport Division – in partnership with Member States, international organisations, the private sector and academia – continue its work aimed at enhancing **inland transport security**, in particular by organising events to exchange information and share best practices.

With regard to **the facilitation of border crossing in international rail transport**, the Committee was informed that at its session at the beginning of February 2010, the Working Party on Customs Questions affecting Transport had finalised the new draft Annex 9 (border crossing by rail) to the 1982 Convention on the harmonization of controls of goods (see Bulletin 1/2009, p. 7 and 8). The draft Annex 9 had been submitted to the Administrative Committee responsible for the Convention for final adoption in 2010.

Lastly, the Committee requested the Working Party on Intermodal Transport and Logistics to continue its work on **civil liability regimes governing intermodal transport** and addressing possible conflicts of legal provisions in CMR (road), COTIF/CIM (rail), the Montreal Convention (air) and the newly adopted Rotterdam Rules (maritime) (see Bulletin 1/2009, p. 8 and Bulletin 4/2009, p. 65).
(Translation)

¹ http://www.unece.org/trans/events/docs/2010/ITC72_RussianRailways_Yakunin.pdf

Organization for Security and Co-operation in Europe (OSCE)

Second Preparatory Conference for the
18th OSCE Economic and Environmental Forum

Minsk, 15-16 March 2010

The deputy Secretary General represented OTIF at this event attended by around 180 participants from 40 States and numerous organisations and undertakings. He gave a presentation entitled "Facilitation of international transport by rail between States applying the law of the EU and other States". The meeting looked at new focuses of OSCE's work in connection with security in land transport, facilitation of transport by rail and the promotion of environmentally sustainable transport. As many consider land transport to be the weakest link in the security of the international delivery chain, in future it could increasingly become the instrument or aim of terrorist attacks. However, as there is no intergovernmental body and corresponding legal framework to deal comprehensively with such issues, OSCE feels compelled to take appropriate political initiatives. With regard to other issues, the situation of rail traffic between Asia and Europe was at the forefront. In the absence of a uniform legal regime and the existence of several competent international organisations (OTIF, OSJD and EU), there is also considered to be a political challenge for OSCE in this area as well. It remains to be seen whether OSCE's 18th Economic and Environmental Forum (Prague, 24 – 26.5.2010), which will be attended by high-ranking participants, will give rise to any specific impetus in this regard.
(Translation)

Other Activities

"EurasiaRail 2010"

Istanbul, 9-11 February 2010

The conference organised by the professional firm for such conference events, TERRAPINN, from Dubai, brought together top representatives from, among others, Russia, Turkey, Iran, Azerbaijan, Kazakhstan, Georgia, the Economic Cooperation Organization (ECO), UNECE, the World Bank and the EBRD. OTIF was represented by the Secretary General.

The focus of the sometimes very interesting presentations and panel meetings was on planned railway connections which are also extremely important for the

future of the rail sector in the area between Europe, Central Asia and the Near and Middle East, such as the Kars-Tbilisi-Baku line, which is already under construction, or the route from Islamabad to Istanbul via Tehran, which has already been trialled using a test train. The presentations by the representatives of Turkish Railways and the Turkish Ministry of Transport were also impressive. These dealt with the lines which are already partly in operation or are under construction to handle high-speed traffic between Ankara and Istanbul and the use of the Marmara tunnel under the Bosphorus near Istanbul, which is also already being built. In addition to the usual presentation of the aims and tasks of OTIF, COTIF 1999 with its Appendices, the Organisation's working methods and the main focuses of the OTIF Secretariat's activities, the Secretary General's presentation again concentrated on setting out the obstacles still encountered by rail traffic in border crossing, particularly outside the European Union. As traffic on the routes specified above must cross several borders, the States concerned were urged to start considering how to set up procedures that are as free as possible from red tape, and to develop strategies to enable border controls by the various authorities (customs, visa issues, technical inspections, etc.) to be carried out as smoothly as possible. He also made clear to the approximately 150 participants the particular disadvantages resulting from fraud and corruption that threaten cross-border rail traffic in addition to the obstacles that already exist for administrative reasons. The reactions, which were particularly plentiful with regard to the last two points, showed that unlike previously, this problem is no longer hushed up or marginalised, but is increasingly treated as a serious nuisance, even at Governmental level.

Of particular importance for OTIF was the opportunity the Secretary General had of making extensive and highly informative contact with the "Freight Traffic" Director of Georgian Railways, which succeeded in establishing apparently reliable channels of communication between OTIF and Georgian Railways, as well as with the Georgian Ministry of Transport. This is all the more welcome as this contact was interrupted following the seminar jointly organised by OTIF and the Ministry of Transport of Azerbaijan in Baku in December 2008.

This conference was extremely helpful for OTIF, because in addition to increasing the level of awareness of the Organisation in each of the regions and presenting its capabilities, it was possible to make informal high-level contacts which may considerably ease and optimise achievement of what is contained in the Secretariat's work programme. Other such conferences are to be organised in May 2010 in Dubai for the Arab

region and in autumn 2010 for North Africa. Although there is nothing against it, it should be noted that these conferences are organised and carried out by the TERRAPINN company with the clear aim of making a profit (usual participation fee of up to \$ 4,800.-!).

(Translation)

Case Law

Cour d'Appel de Versailles

Ruling of 2 July 2009

1. **The carrier cannot claim relief on the basis of *force majeure* in a case in which the event – damage to vehicles placed on car-carrier wagons during a hailstorm – was neither unforeseeable (as the risk of a storm had been forecast) nor unavoidable¹. The damage would not have occurred if the carrier had fulfilled his obligations.**
2. **Neither can the carrier invoke the guarantee limitation provided, owing to the carrier's gross negligence, which indicates his unsuitability to carry out the task he accepted, i.e. to keep to the guaranteed time limit. A delay brought about the damage.**

Cf. Article 133-1 of the French Commercial *Code* (*Code de commerce français*).

Facts and proceedings

(Summary/extracts)

SAS Renault entrusted the SA Compagnie d'affrètement et de transport (CAT), the forwarder, with organising the transport of vehicles intended to be sold in Spain from its premises at Douai and Maubeuge. In turn, CAT entrusted the transport to the SA Société de transport de véhicules automobiles (STVA), the intermediate forwarder, who provided the car-carrier wagons and signed various contracts of carriage with SNCF to transfer the vehicles from Douai and Maubeuge to Le Boulou.

¹ Article 23 § 2 of CIM contains a similar provision, although the term “force majeure” is not used and the element of “unforeseeableness” of the “circumstances which the carrier could not avoid and the consequences of which he was unable to prevent” is lacking. See also the case law published in Bulletin 3/2001 (in French and German only).

The wagons loaded with vehicles taken over between 21 and 30 July 2004 remained stabled at Nîmes marshalling yard where, on 3 August 2004, they were exposed to a severe hailstorm at about 18.30.

396 vehicles were damaged and a damage report prepared in the presence of all parties set the resulting amount of the damage at 373,987 €.

SAS Renault, SA AXA Corporate solutions assurances (SA AXA) and Tokio Marine Europe Insurance Limited (Tokio MEI) summonsed CAT, STVA and SNCF to have them ordered to pay Renault the sum of 23,000 € in compensation for the excess it had to pay, and to pay the insurers *ad valorem* the sum of 350,987 € on the basis of a subrogation release.

CAT called upon STVA and SNCF to act as guarantors and STVA also called upon SNCF for the same purpose.

In a ruling handed down on 23 November 2007, the Nanterre Tribunal de Commerce (commercial court) declared the claim inadmissible. SAS Renault and the insurance companies SA AXA and Tokio MEI lodged an appeal and asked the Court to quash the ruling and to order CAT, STVA and SNCF to pay SAS Renault “jointly and severally” the sum of 23,000 € and to pay the two insurance companies the sum of 350,987 € subject to completion, both sums attracting interest at the legal rate to run from the date the summons was issued, with capitalisation per whole year.

The insurers underline that by producing the receipt for 350,987 € signed by SAS Renault on 25 May 2005 and the copy of the payment cheque No. 0597612 written on 19 May 2005, they assume the rights of the latter; taking the conditions of the policy signed by Renault and the circumstances of the incident, they submit that they have the benefit of legal subrogation.

The plaintiffs assert that the action brought by SAS Renault and its subrogated insurers is admissible against the forwarders CAT and STVA by virtue of Articles L 132-4 et seq. of the Commercial Code, and against SNCF by virtue of Article L 132-8 of the same code, which gives the consignor Renault a right of direct action against the carrier.

They assert that in their capacity as forwarders, CAT and STVA have an obligation to achieve a result and are the guarantors of their substitute, SNCF, which is responsible, in accordance with the law, for the damage that occurred during transport, by virtue of Article L 133-1 of the Commercial Code.

They consider that SNCF has not furnished proof of the existence of a case of *force majeure*, as the occurrence of a hailstorm is not exceptional in summer in the region of Nîmes, nor is it unforeseeable for SNCF, which has access to weather alerts and bulletins; that the consequences of a storm were not unavoidable for SNCF, which, with a general duty of care, should have moved the vehicles in its care by adding trains or should at least have covered the vehicles with a tarpaulin.

They assert that in the absence of a case of *force majeure*, CAT cannot invoke relief from liability laid down in the commission contract; that in their capacity as forwarders, CAT and STVA remain bound by the fact that they are (SNCF's) substitutes and particularly by the failure to meet their main contractual obligations, and cannot invoke the contractual liability limitations from the moment that the latter committed gross negligence constituted by an acknowledged serious breach of its main obligation laid down in the "spot" contract.

They maintain that if a case of *force majeure* were to be upheld, because of its blatant breach of contract, SNCF could only enjoy simple partial relief from liability since, if it had observed its commitment in the context of an "express/spot consignment", at least four of the five trains would not have been exposed to the bad weather, which would have reduced the damage suffered by the vehicles by an equivalent amount.

By virtue of Article L 132-8 of the Commercial Code, CAT maintains that Renault's not being shown as the consignor on the consignment note does not give proof of its interest in bringing an action, and that consequently, the same applies to its insurers.

It claims that in any case, the latter companies (the insurers) can only invoke legal subrogation if, by virtue of clause 111.2.1, they only had to cover a natural event on condition that "the usual measures to be taken to prevent the direct material damage likely to occur were unable to prevent the occurrence or could not be taken"; that they can no longer invoke conventional subrogation in the absence of proof of a payment concomitant to the subrogation.

It recalls the provisions of Article L 133-1 of the Commercial Code concerning the carrier's liability and the carrier's relief from liability in the event of *force majeure* and emphasises that to specify the obligations of each of the participants, the contract concluded by Renault and CAT, which was in force at the time of the facts, provides for the latter's exemption *ipso jure* in the

event of *force majeure*, in particular with unavoidable natural events in mind.

It maintains that in view of its unforeseeable and unavoidable nature, the hailstorm that occurred on 3 August 2004 did constitute a case of *force majeure*; that the delay by SNCF in moving the vehicles would not be of such a nature as to deprive the latter of exemption on account of *force majeure* since it was not the delay that caused the damage but the exceptional hailstorm that struck the marshalling yard at Nîmes.

From this, it deduces that it and its substitutes, STVA and SNCF, are relieved of all liability for the damage that resulted from this violent hailstorm, and the claims made by Renault and its insurers are unfounded.

STVA maintains that as the hailstorm on 3 August 2004, which was exceptionally intense, was unforeseeable and unavoidable for SNCF, it constitutes a case of *force majeure*, thus relieving the latter, and consequently STVA, of liability in accordance with the provisions of Articles L 133-1 paragraph 1 and L 132-5 of the Commercial Code.

It points out that if *force majeure* is not deemed to be the cause, SNCF, which is liable, should pay its guarantee.

SNCF requests confirmation of the ruling made.

It acknowledges that some of the delivery deadlines laid down in the "Freight express" delivery regime could not be met; it considers that meeting the deadline is only an incidental obligation and that it fulfilled perfectly its main obligation to carry the goods, emphasising that among the trains stabled at the marshalling yard at the time of the storm, one of them was still within the contractual deadline.

It claims that it had no deliberate intention of not observing the contractual deadlines for moving the goods, and cannot be accused of gross negligence resulting from a single omission to perform a contractual obligation, albeit an essential one; it recalls that as far as contractual issues are concerned, compensation is limited merely to foreseeable and direct damage and that by agreeing to a contractual delivery deadline, it did not agree to reimburse the instructing party for damage resulting from a storm constituting a case of *force majeure*, as the delay did not cause or even enable the damage due to the weather event of 3 August.

Discussion

(extracts)

It is accepted that on 3 August 2004, the five trains loaded with Renault vehicles were exposed to a violent hailstorm while they were stationary, some since several days, in the Nîmes marshalling yard; the damage suffered by the 369 vehicles affected was assessed at 373,987 € and was not contested.

SNCF concluded various contracts of carriage with STVA under the “Freight express” transport regime, specifying a journey time of day+3, not including Sundays, which gave SNCF the main obligation not only to ensure transport, but also to meet the specified deadline.

On 23 July, SNCF agreed to take over, from Douai and/or Maubeuge to Boulou, a train comprising 22 wagons, on 27 July a total of 40 wagons and on 30 July a unit of 7 wagons, even though the daily train between Nîmes and Le Boulou did not permit these wagons to be moved one day at a time to ensure delivery within the required deadline without organising an additional train in due time to enable the continued movement of the trains carrying the vehicles to their final destination, and kept them stationary, without any particular protection, at Nîmes marshalling yard, where they had all been for several days when they were affected by the hailstorm on 3 August at about 18.30.

By virtue of Article L 133-1 of the Commercial Code, the carrier is the guarantor for damage other than that caused by *force majeure*.

The regular weather reports for Nîmes broadcast several times a day between Monday 2 and Wednesday 4 August 2004 all refer to stormy downpours in the Cévennes, with flooding in low-lying areas, and some of the bulletins said that these storms might be violent; the 12 o'clock bulletin on Tuesday specifically referred to storms, sometimes accompanied by hail.

Storms which are sometimes violent are not exceptional in the Nîmes area in August; the risk of a storm with hail was announced and the only elements produced in the discussions do not make it possible to establish that the storm that occurred in the Nîmes region was exceptionally violent; therefore the circumstance of unforeseeableness necessary to establish *force majeure* is absent; in addition, the vehicle trains were exposed to this storm as a result of failure on the part of SNCF to carry out its contractual obligations and moreover, SNCF does not claim to have taken any action

whatsoever between 12.00 and 18.30 to avoid the damage occurring.

In these circumstances, SNCF, and consequently CAT and STVA, who are the guarantors in respect of Renault, cannot invoke *force majeure* as grounds for relief.

CAT, STVA and SNCF *in solidum* must be ordered to pay SA AXA and Tokio MEI the sum of 350,987 € and to pay SAS Renault the sum of 23,000 € corresponding to the excess to be paid as agreed.

Within this joint and several *in solidum* payment, STVA and SNCF *in solidum* must act as guarantor for CAT for rulings pronounced against it and SNCF must act as guarantor for STVA, by virtue of Articles L 132-5 and L 133-1 of the Commercial Code.

CAT, STVA and SNCF concluded a European after-sales agreement applicable to consignments, handed over by CAT, of all new vehicles carried under a contract of carriage by rail on STVA wagons or on wagons chartered by STVA between any stations on the signatory networks. This agreement, which in particular covers all external damage to vehicles, sets out the terms for calculating and reimbursing damages, and stipulates that the railway's share in the cost of any such damage is 50%.

SNCF cannot invoke the guarantee limitation as prescribed, owing to its fault demonstrating its unsuitability to carry out the task in the manner it had agreed.

Based on Article 1146 of the Civil Code, it cannot effectively argue the absence of formal notice, nor that the damage following the storms is not foreseeable damage resulting from a delay.

In fact the compensation being sought from it is not for the consequences of a delay in delivery, but for damage suffered during a transport operation for which it was responsible, for which it cannot claim the benefit of a limitation of its obligation to guarantee the damage, owing to gross negligence which is not characterised by a mere delay in delivery.

It must therefore act as guarantor for the entire cost of the reparable damage.

On these grounds

Rules by judgement after trial in the last instance;

Quashes all the terms of the ruling made;

Issues a new ruling and adds to the previous ruling;

Declares the action brought by SAS Renault, SA AXA and Tokio MEI admissible as directed against CAT, STVA and SNCF;

Orders CAT, STVA and SNCF *in solidum* to pay SAS Renault the sum of 23,000 € plus interest at the legal rate to run from 1 July 2005;

Orders CAT, STVA and SNCF *in solidum* to pay SA AXA and Tokio MEI the sum of 350,987 € plus interest at the legal rate to run from 1 July 2005;

Instructs that the interest due from 1 July 2005 will itself bear interest at the legal rate in so far as it has been due for more than one year;

Orders STVA and SNCF *in solidum* to act as guarantor in full in respect of CAT for the rulings pronounced against it for the principal, costs of the proceedings and expenses;

Orders SNCF to act as guarantor in full in respect of STVA for the rulings pronounced against it for the principal, costs of the proceedings and expenses.

[Ancillary decisions]

(Direct communication)
(Translation)

Book Reviews

Allégret Marc, Taïana Philippe, *Transport ferroviaire interne* (Inland Rail Transport), LexisNexis Juris-Classeur Transport, volume 636 (5, 2009 – up to 1.9.2009)

It is worth reminding readers 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), but that the provisions of French law still apply with regard to the carrier's liability for loss of and damage to goods in accordance with Article L.133-1 of the Commercial Code.

These are the provisions that the authors examine in volume 636 by successively studying the grounds for relief¹ and SNCF's concomitant fault.

The major part of the volume deals with the grounds for relief, which, provided it furnishes proof, allow the carrier to relieve itself from the presumption of liability under which it is placed. These various grounds for relief are *force majeure* or the accidental case, inherent defect of the object and an act of the consignor or consignee.

After presenting the two traditional criteria (unforeseeableness and unavailability) that an event must comprise in order to have the exonerative power of **force majeure**, the authors analyse the types of case likely to be linked to *force majeure*, i.e. the following cases: natural events, an act of state, result of war, third party act, strike, derailment, fire and explosion as well as damage to material.

Each of these cases would merit our devoting several lines to them. We will just underline a few points which might be of most interest to readers of this Bulletin.

While natural events are the classic case of *force majeure*, they must nevertheless be of an intensity that is exceptional for the time and place they occur (see ruling of 2.7.2009 of the Cour d'Appel de Versailles, published on p. 17).

It is with regard to war legislation that the French Court of Cassation was led to define gross negligence as follows: "Gross negligence supposes, at the time, negligence of extreme seriousness, bordering on wilful misconduct and indicating the carrier's unfitness, in control of his actions, to accomplish the contractual assignment it has accepted." (with regard to the concepts of wilful misconduct and gross negligence, see the study "Comments on Article 36 of CIM" published in Bulletin 3/2009, p. 39 et seq.).

Third party acts (*force majeure*) also covers damage caused by demonstrators to goods entrusted to SNCF. In such a case, it is the French State that has to compensate the victims.

A strike by railway workers may also constitute an exonerative case of *force majeure* for SNCF. The French Court of Cassation made a formal announcement to this effect in the ruling made on 11 January 2000 (see Bulletin 3/2001). The authors themselves correctly point out that this ruling by the Court of Cassation handed down in the context of French law retains its validity as a principle in international CIM traffic in so far as it maintains the criterion of the unavailability of the event, unforeseeableness not being an issue.

¹ The general principles of SNCF's liability are dealt with in volume 635 LexisNexis, see Bulletin 3/2009, p. 46

We would also note that when a derailment is attributed to damage to rolling stock belonging to SNCF, the latter is wholly liable.

Since the 19th century, case law has decided that the following are not accidental cases or cases of *force majeure*: splitting of a wheel tyre, splitting or overheating of an axle or breaking of coupling. Unlike the maritime solution, where a concealed defect of the vessel is exonerative for the carrier, in land transport, it had almost never been allowed that a concealed defect of the means of transport was likely to relieve the railway from its liability under the contract of carriage.

On the other hand, the absence of railway case law after 1920 shows that the railways came round to this way of seeing things, in the sense of the development of ideas, legal authority and case law, which pronounced itself increasingly in favour of the idea of risk (car accidents) and, in particular, professional risk at the expense of the undertaking.

In conclusion, we refer readers to the authors' analysis of the considerably more complex situation when a derailment has been caused by the inherent defect of a private wagon included in a train and of the development of the legal situation since COTIF 1999 entered into force on 1 July 2006, and more particularly the new wagon law governed by the CUV UR and the CUU (standard usage contract, see also the study "Wagon law: the 'contract of registration' is replaced by the 'contract of use'", published in Bulletin 4/2005, p. 63 et seq.).

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)

Filthaut, Werner, *Liability Act (Haftpflichtgesetz)*, Beck's Commentary, 8th completely revised edition, Verlag C.H. Beck, Munich 2010, 645 pages, ISBN: 978-3-406-59011-5 (145.- €)

The new edition of this well-known commentary, the 7th edition of which was reviewed in Bulletin 3/2006,

p. 51, focuses on "harmonised protective liability for passengers in Europe". This is because the revised edition has come about as a result of the effects on German liability law of Regulation (EC) 1371/2007 on rail passengers' rights and obligations. This Regulation entered into force for all Member States of the European Union on 3 December 2009, with various exceptions, but by means of an Act, German legislators ensured that the new rules, including the taking over of the provisions of CIV, which are contained in the Annex to the Regulation, already applied to German domestic transport as early as 29 July 2009.

The author has examined each individual provision of CIV in view of Article 11 of the Regulation in order to establish whether German national law or the relevant provision of CIV is more favourable for passengers. This is because the liability provisions of CIV are applicable as Community law in the scope of application laid down for the Regulation "without prejudice to applicable national law granting passengers further compensation for damages". Below are some examples and results of this examination:

For example, a comparison of § 1 para. 2 of the Liability Act (HPfIG) and Article 26 § 1 b) of CIV reveals that § 1 para. 2 of the HPfIG contains more favourable rules concerning liability for passengers than Article 26 § 1 b) of CIV and therefore takes precedence, as the ground for relief of "*force majeure*" allowed in the Liability Act demands a stricter standard of care for the criterion of inevitability. The extent to which this difference might have any effect in practice can probably only be determined on the basis of specific cases.

Another example of a more favourable rule in the Liability Act concerns loss of or damage to property the passenger is carrying on or with him, insofar as the loss or damage does not occur in connection with a passenger's death or injury. According to CIV, the carrier is only liable in such cases when the carrier is at fault (see Art. 33 § 2 of CIV), but in every case, German law prescribes liability irrespective of fault (§ 1 para. 3 of the HPfIG).

With reference to contributory fault on the part of the injured party, for which the Liability Act refers to the German Civil Code (BGB), it has been established that CIV and German national law accord with one another.

The same goes for the scale of compensation in the event of death or injury to passengers, apart from the requirement to make advance payments as prescribed in the Regulation. Although CIV does not deal explicitly with compensation for *pretium doloris*, there is no doubt

that provisions in this regard in accordance with Article 29 of CIV also apply as national law to accidents suffered by railway passengers.

In contrast, with regard to the injured party's right to choose between a capital sum and an annuity, the author comes to the conclusion that Article 30 of CIV contains a more favourable rule for the person entitled, as there is no requirement for the person entitled to posit an important reason for requesting a capital sum.

This standard commentary, prepared as carefully as ever by its well-known author, whose many years of professional experience have shown him to be an expert in this specialist material, can be warmly recommended. It enables insurance lawyers and other legal services, judges, lawyers and other interested parties to find solutions to liability issues without great difficulty. At the moment, the comparison and evaluation of the liability provisions of CIV on the one hand and the rules of German national law on the other are extremely helpful in practice from the point of view of the legal situation of passengers.

(Translation)