



# OTIF



## Bulletin of International Carriage by Rail

**Intergovernmental Organisation  
for international Carriage  
by Rail**

# OTIF



## @ Bulletin of International Carriage by Rail

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## Lists of lines 1999

### Maritime or inland waterway services CIV

(published on 1 July 2006)

As Morocco deposited the instrument of ratification of the 1999 Protocol on 28 April 2011, the Morocco chapter has been included in the CIV list of maritime and inland waterway services in accordance with Article 24 § 1 of COTIF 1999 (See COTIF 1999, art. 24 § 1).

Secretary General's circular No. 12 dated 28 April 2011 can be downloaded from the following website:

[www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/06\\_liste\\_CIV/A\\_60-02\\_502\\_2011\\_28\\_04\\_2011\\_fde.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/06_liste_CIV/A_60-02_502_2011_28_04_2011_fde.pdf)

*Beatrice Moser* ■

## Official Communications concerning COTIF

### Ratification of the 1990/1999 Protocole

Morocco

On 28 April 2011, Morocco deposited its instruments of ratification concerning the 1990 Protocol and the Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (1999 Protocol). The 1999 Protocol version of COTIF (COTIF 1999) entered into force for Morocco on the day on which the instrument of ratification was deposited.

An overview of the state of signatures, ratifications, acceptances and approvals of the Vilnius Protocol and its Appendix, COTIF 1999, and of the accessions to this Protocol or to COTIF, including the reservations and declarations lodged by the Member States, and the texts thereof, are published under:

[www.otif.org/en/publications/conventions/cotif-361999.html](http://www.otif.org/en/publications/conventions/cotif-361999.html)

*Eva Hammerschmiedová* ■

### Accession to COTIF

Armenia

On 30 December 2010, the Government of Armenia made an application for accession to COTIF. In his capacity as Depositary of the Convention, the Secretary General notified the Member States of OTIF of this application for accession (see Bulletin 4/2010, p.89). The period in which the Member States were able to lodge objections in accordance with Article 37 § 3 of COTIF expired on 11 April 2011. No objections were lodged.

This application for accession, which contained no reservations or declarations, is therefore accepted as legally binding.

In accordance with Article 37 § 3 of COTIF, the accession will take effect on 1 July 2011. COTIF and its Appendices will enter into force for Armenia on that date. Armenia will become the 47th Member State of OTIF.

*Eva Hammerschmiedová* ■



**The main obstacles** to achieving earlier agreement were the wording of the so-called “disconnection or transparency clause” and settling the question of the languages in which the accession agreement was to be concluded. Owing to the internal rules that apply in Brussels, the European Union insisted with regard to the latter issue that the text be drafted in all 23 official languages of the European Union. As it was not possible for OTIF to check the texts that were not in the 3 official languages of the Organisation (French, German, English), a letter from the European Union resolved the problem by confirming the authenticity of the versions of the agreement drafted in languages other than the official languages of OTIF.

The Secretary General was able to accept the agreed disconnection clause once the European Union had agreed to make a clarifying unilateral declaration according to international law to place the agreed text on equal terms with the text which the Secretary General had requested throughout the negotiations.



**Stefan Schimming** OTIF    **Tamás Iván Kovács** EU

## Other Communications

### Accession of the European Union to COTIF

On 23 June 2011, the Secretary General of OTIF, Stefan Schimming, and – as the authorised representative of the European Union – the deputy Secretary of State of the Hungarian Ministry of Transport, Dr Tamás Iván Kovács, set their seal on the agreement on the accession of the European Union to COTIF by signing it. A formal ceremony at the Organisation’s headquarters concluded a process that was begun on 9 September 2009 and ended on 25 February 2011 following a number of hiatuses, some of which had lasted several months. As can only be expected in such negotiations, the very controversially conducted negotiations produced an outcome which was not entirely satisfactory for OTIF, but was nevertheless reasonable, and which, in terms of international law, did not establish a precedent for other similar accession procedures. The Secretary General and the other members of the OTIF Secretariat involved in the negotiations succeeded in asserting OTIF’s interests and managed particularly to stay within the negotiating guidelines issued by the 8th and 9th General Assemblies. As a result, he was also able to convince the Member States of OTIF that are not members of the European Union to adopt this negotiating outcome and to prevent opposing votes.

However, the European Union will have to work to achieve legitimacy over, and acceptance by, this group of OTIF States from outside the Community. It will have to bear in mind that owing to OTIF’s geographical reach, it will not be a matter of enshrining European standards in the OTIF regulations by force, but of seeking sector-based solutions within the Organisation that will also be legally acceptable and possible in practice in the non EU Member States of OTIF. The Secretary General’s task will be to bring about the compromises necessary for this to happen so that OTIF can achieve its aims and tasks and the importance of the Organisation in concert with other international organisations and associations can be maintained and, wherever possible, strengthened.





## References

**New-edition: Spera, Kurt: *Trade and transport*** (*Handbook on Freight Transport in External Economic Relations*)

It is almost a decade since the author published a manual with this title and content (see Bulletin 4/2002, p. 94). The continued development of global economic relations, the new version of the INCOTERMS, which can be used as an aid to interpreting contracts in the international freight trade, and the changes in international purchase and transport law, have led him to publish this significantly expanded and now comprehensive 700 page new edition of the work.

The work is aimed at everyone who deals with problems of supplies of goods in export and import, as a logistics service provider, be it in forwarding or in the transport business or in insurance companies or banks, as well as at students and teachers in this area.

A key chapter is dedicated to the "supply relationships in foreign trade", with the focus on the INCOTERMS 2010. Practical implementation of the obligations of sellers and buyers is shown in a "checklist". In addition, the individual Incoterms clauses are discussed in detail, and the link with transport is dealt with in particular detail. Notes on the UN Convention on Contracts for the International Sale of Goods (CISG 1980), as well as its effect on commercial transactions often concluded in the belief that only existing national law applies, show that maintaining the quality of deliverable products is of primary importance. Information concerning the carrier and his complex tasks, from the transport agent up to the full carrier, are characterised by many years of professional experience, which also comes into its own with regard to the explanation of the forwarder's documents and their use. The discussion on the terms and conditions of the individual

It will be crucial to strengthen the trust of those OTIF Member States that are not members of the European Union; that in future, these States speak with one voice – not least because the work has been considerably simplified. It will also be vital to maintain OTIF's working dynamic and to encourage decisions to be taken. In its role as an independent contracting party to COTIF, the European Union will have to let itself be measured by this responsibility and performance. Based on the impression gained in Berne, the Commission will undertake everything that is necessary to achieve this and will be supported in this by the EU Member States.

*Stefan Schimming* ■

## E-CMR in force since June 2011

Thanks to an Additional Protocol to the CMR, which achieved the requisite fifth ratification in March this year, from the beginning of June, international road freight transport can be made simpler by using electronic transport documents, "e-CMR". Starting in Bulgaria, Latvia, Lithuania, the Netherlands and Switzerland, the legal framework for the digital storage and processing of all important information on freight and freight contracts will be established, thus enabling data to be transferred more quickly, free of errors and securely. Accession to the Protocol is still open to all the CMR Contracting States that are members of the UNECE or have consultative status with the UNECE.

In international rail transport, there is already a legal basis for electronic consignment notes, although the conception and hence the scope of this rule in the CIM UR is not comparable to the Additional Protocol to the CMR: Article 6 § 9 of CIM only says that the consignment note may also be established in the form of electronic data registration, and it lays down the principle of equivalence from the functional point of view. Functional equivalence is the necessary condition for replacing the paper consignment note with an electronic consignment note.

In both transport systems, it is up to the participating undertakings to exploit the legal possibilities by creating suitable technical systems.

*Eva Hammerschmiedová* ■



carriers also occupies a considerable amount of space. The legal relationships of rail, road, inland waterways and maritime transport, together with air transport are also comprehensively described. The significantly differentiated basis of railway transport in the freight area is explained - in the light of railway liberalisation - especially in COTIF and the 1999 CIM UR on the one hand and in the SMGS on the other. The legal situation in inland waterway transport (CMNI), maritime transport, with the differentiation between the Hague, Hamburg and Rotterdam Rules, and in air transport is also illustrated. "Multimodal freight transport" is also covered, taking into account the different load units, the activities of transport terminal operators (OTT), the description of special types of transport and transport insurance. A comprehensive Appendix with an overview of liability, texts of agreements, other regulations on relevant activities, as well as other references and a list of abbreviations as a source of information, complete the work and make it a valuable guide for anyone interested in trade and transport.

(only available in German language: ISBN 3-901472-03-2, logotrans, Vienna, 2011)

*Gustav Kafka* ■

## Case Law

### Supreme Court Karlsruhe (Germany)

Ruling of 30 September 2010

(I ZR 39/09 ; lower courts: Landgericht de Ratisbonne, Oberlandesgericht de Nuremberg)

Liability of carrier for wilful misconduct

#### Headnote:

If the carrier commits wilful misconduct within the meaning of Article 29, para. 1 of CMR, the injured party may claim compensation in accordance with the applicable national regulations, irrespective of the limits in Article 23 of CMR. In this case also, the injured party retains the right to calculate his loss on the basis of Articles 17 to 28 of CMR. If he chooses this course, the system of liability according to CMR is applicable in full, i.e. including in particular the limitation of liability according to Article 23, para. 3 of CMR. See Articles 23 and 29 of CMR: Articles 30 and 36 of CIM contain comparable provisions (with variations).

#### The facts: (Summary)

The carriage of a large load of laptops with a market value of almost 1 million Euros from Germany to Italy was agreed between the consignor and the defendant. Certain security measures were included in the contract of carriage - in particular, breaks during transport could only be taken at lighted and monitored parking areas and only on certain legs of the journey, and the vehicle was not to remain unsupervised at any time.

A few kilometres before delivery, the vehicle was stolen, along with the load, as the driver was taking a break of around one hour at an unsupervised parking area.

On the basis of assigned rights, the plaintiff, the consignor's transport insurance provider, claims compensation for the full market value of the consignment.

#### Decision : (Summary)

Like the lower courts, the Supreme Court (Bundesgerichtshof) affirms the existence of a case of liability, but mostly rejects the claim with respect to the amount.

The Supreme Court shares the assessment of the Court of Appeal, that in connection with the loss of the load, as agents in accordance with Article 3 of CMR, the defendant or her driver must be open to the accusation of wilful negligence. This results from the agreement of special security instructions for the transport operation in connection with the particularly high value of the load, of which the driver was aware.



## Review

Dr. K.-H. Thume / H. de la Motte † /  
H. C. Ehlers ; *Transport Insurance  
Law*

Seven years after the first edition (see Bulletin 2/2004, p. 44), the second edition of this comprehensive specialist commentary on transport insurance law has now been published (in German). The main reason for the new edition is the reform of the German Insurance Contract Act (VVG) on 1 January 2008. The new transport insurance law does indeed contain dispositive rules which are virtually identical in terms of content to the hundred years older version of the VVG of 1908. But the consequence of the reform was that almost all the association recommendations on the individual branches of transport insurance were revised or redrafted and aligned with the new VVG. The commentary on these insurance conditions, which it was recommended should be applied, therefore had to be updated.

Compared with the first edition, the number of co-authors has been increased from 13 to 19 well-known experts in transport law and transport insurance law; this edition also contains 200 pages more than the first one. It is again aimed at practitioners involved with transport and transport insurance law in the transport and insurance industries, lawyers and courts.

The new updated and extended edition explains the provisions of VVG 2008 that are relevant to transport insurance and the association recommendations on cargo insurance, physical damage insurance and transport liability insurance and on special insurance services. Transport liability insurance policies are also introduced. In addition, international insurance contract and procedural law is considered.

In addition to the introduction written by Thume and de la Motte (pp. 1-22), Part 7 concerning transport liability insurance (insofar as land transport is concerned, pp. 653-744), is of particular interest to specialists who deal with questions of

However, the Court refused the possibility of determining the amount of compensation in accordance with Article 23, paras. 1 and 2 of CMR on the basis of the market price of the goods and, as a consequence of the wilful misconduct within the meaning of Article 29 of CMR, without taking account of the limitations of liability laid down in Article 23, para. 3 of CMR. The Court of Appeal admitted such a possibility, and justified it with the aim of Article 29 of CMR, i.e. to improve the position of the injured party as effectively as possible at the expense of the party causing the loss, who acted wilfully or in a similarly blameworthy manner.

Instead, in the regime of chapter IV of CMR, the Supreme Court recognises a single, coherent framework of liability. The calculation method laid down in **Article 23, paras. 1 and 2 of CMR**, which is potentially more favourable for the beneficiary, is thus justified from the nature of the objective liability of care and **only in conjunction with the limitation of liability referred to in Article 23, para. 3 of CMR**.

In cases of qualified subjective fault, Article 29 of CMR entitles the injured party instead to invoke unlimited liability under national law (which may also lead to compensation for consequential loss or damage). In this case however, he is also referred to the specific calculation of damages governed by general compensation law (i.e. in Germany in §§ 249 et seq. of the Civil Code, BGB). He may not invoke the provisions of Article 23, paras. 1 and 2 of CMR (commodity exchange price/market price/normal value of the goods at the place and time at which they were accepted for carriage), irrespective of paragraphs 3 and 7 (8.33 SDR/kg).

Ultimately therefore, if the goods being carried are lost, the qualified fault of the carrier gives the beneficiary the choice between two liability regimes, one of which would otherwise be denied him.

In deciding between the types of calculation method, the best way is therefore to weigh the flat-rate compensation based on the market value, bearing in mind the upper limit of liability and the exclusion of indirect damage (consequential damage to the goods, lost profits) against the actual unlimited and indirect damages, which are usually based on the cost of replacing the goods, and to pursue the more advantageous claim. However, in making this consideration, the rules on the burden of proof for calculation of the damages must also be observed, which may turn a claim of objective liability in accordance with Article 23 of CMR into the more simple settlement of damages.





liability and insurance in railway undertakings. Those who have worked on the wording for the transport liability insurance part are Peter Kollatz, Jürgen Temme, Jürgen Raab, Harald Brenken and Bernd Supp. In the transport liability conditions dealt with, the current insurance for road hauliers, forwarders and warehouse keepers is at the forefront, but these conditions can serve railway undertakings as a model and sample when insuring their liability to freight transport customers and particularly when they wish to limit the risks for themselves when acting as forwarder or when providing additional logistics services. As is well known, it is particularly in the case of additional logistics services that there can be no reference to the limit of liability under railway law for loss of or damage to goods or damage caused by delay, in accordance with CIM for example. It must also be remembered that in Directive 95/18 of 19 June 1995 on the licensing of railway undertakings, European Community law prescribes that railway undertakings must be sufficiently insured or must have taken equivalent precautions to cover liability for accidents, particularly for passengers, luggage, freight, post and third parties in accordance with national and international law. So here too, transport liability insurance is also envisaged.

Another subject that might be of interest to railway undertakings is dealt with in Part 8 of the commentary, which looks at travel insurance for passenger transport and special insurance services in this area. In addition to general insurance conditions for travel insurance, special conditions for travel cancellation insurance, travel curtailment insurance and luggage insurance are described on pages 862 to 904. These sections were written by Yvonne Gebert and René Steinbeck.

In view of the fact that insurance obligations and issues are also becoming increasingly important in the rail sector, the comprehensively updated commentary on transport insurance law by Thume, de la Motte and Ehlers can also be thoroughly recommended to the

### Application to international rail transport

(Remarks by the Secretariat)

The rules of the CMR referred to concerning the strict liability of care (in the sense of custody) and the extended liability in the event of wilful misconduct are largely comparable to the CIM. The grounds for the ruling are also likely to be broadly applicable in rail transport. (Rainer Freise, in the Münchener Kommentar zum Handelsgesetzbuch (MünchKommHGB) (Munich Commentary on the Commercial Code), Verlag C.H.Beck/Verlag Vahlen, Munich 2009, 2nd edition, marginal 1 on Article 36 of CIM, urges caution as to whether and to what extent rulings made in connection with other modes of transport are transferable to rail transport.)

The material question in the context of Article 29 of CMR discussed by the Supreme Court as to what degree of negligence according to the law of the court seized of the matter is equivalent to intent does not arise at all for rail transport: at this point, Article 36 of CIM requires intent to cause such loss or damage, or recklessly and with knowledge “that such loss or damage would probably result”. In this respect therefore, it is independent of national law. (See also comments on Article 36 of CIM, Kurt Spera, Bulletin 3/2009, p. 38 et seq.)

The conclusion of this ruling, that both types of liability and calculation of damages represent self-contained regimes that must be kept strictly separate on the one hand, and on the other, that it still remains possible for the injured party alternatively to have recourse to strict liability of care, even if subjective liability is established – but in that case including the limitations – can be transferred to the CIM regime because of the rules being entirely comparable in this respect.

The CIM Uniform Rules are in any case to be considered as a uniform liability and liability limitation system, which is not modified even in the case of wilful misconduct, but is only an option in addition to the fault-based liability in accordance with general compensation law.

So to this extent, there do not appear to be any reasons to differentiate. (Also according to R. Freise in MünchKommHGB, marginal 6 on Article 36, which cites in evidence a similar ruling on the CMR: BGH NJW-RR 2005, 908.) Just as Article 29, para. 1 of CMR denies the carrier the possibility of invoking certain provisions under liability of care, but in contrast continues to offer the injured party this basis for making a claim, Article 36 of CIM does not exclude Article 30 of CIM in its entirety, only the limitations of liability it lays down. The result of this, also *argumentum e contrario*, is that in any event, the abstract and flat-rate compensation according to Article 30 § 1 and 2 of CIM is available to the injured party. The injured party is likely to invoke this if, in the





legal and insurance departments of railway undertakings to draw upon when preparing insurance contracts and in dealing with insurance-related cases in practice.

(only available in German language: ISBN 3 406 59721 3, € 218,00, C.H. Beck)

Rainer Freise ■

### Publications & interesting links

*Bulletin des transports et de la logistique*, Paris, n° 3366/2011, p. 308/-309 - Aérien voyageurs. Coup dur pour le transporteur (B. Colette)

*CIT-Info* (Comité international des transports ferroviaires / Internationales Eisenbahntransportkomitee / International Rail Transport Committee, CIT) www.cit-rail.org, édition/Ausgabe/edition 2/2011

*European Transport Law / Droit européen des transports / Europäisches Transportrecht*, Antwerpen, No. 1/2011, p.3-28 - The Himalaya Clause (B. Jerman)

*Idem*, No. 2/2011, p. 133-142 - The unclear relations between CMR and European Union law in respect of jurisdiction and enforcement of foreign judgements (K. Wesołowski)

*Transportrecht*, Hamburg, Nr. 4/2011, S. 129-134 - Flugannullierungen wegen Sperrung des Luftraumes - die Rechte der Fluggäste und der Absender von Luftfracht (W. Müller-Rostin)

Eva Hammerschmiedová ■

specific case, this method of calculation enables him to obtain greater compensation than calculating the subjective loss or damage in accordance with general compensation law might achieve.

#### Conclusion :

because the decisive points of breaking through objective liability in rail transport (Article 36 of CIM) are dealt with in the same way as in CMR, this ruling would be transferable to the loss of goods in rail transport.

Eva Hammerschmiedová ■