



Bulletin

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OTIF

Organisation intergouvernementale pour les transports internationaux ferroviaires
Zwischenstaatliche Organisation für den internationalen Eisenbahnverkehr
Intergovernmental Organisation for International Carriage by Rail

Unified railway law to connect Europe, Asia and Africa



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Picture by

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Since 2013, the Secretariat of OTIF has emphasised the concept of a network to define railways: network in the sense of an IT or telecommunications network. This concept is not restricted to the geographical networking of a territory by railway lines. It applies firstly to the entire set of rules necessary for rail services to function internally. Of course, by definition, these rules exist and are effective for national networks. OTIF's task is to make this become a reality for international traffic as well. The concept of interoperability beyond the European Union, which OTIF has supported since 2016, is one possible response; the interest in our work now being shown by China and Japan is an illustration of this. We were pleased to have the opportunity of welcoming delegations from both these countries at the beginning of the year.

However, there is still a great deal to be done to achieve this aim. Our active partnership with the Gulf Cooperation Council in connection with its regional project shows that what we offer makes it possible to develop tangible solutions. Nevertheless, there are still some issues that need

improvement, including at European level, such as the allocation of international train paths. In this Bulletin, you will find an innovative proposal to improve the situation, which has been written in partnership with Nicolas Czernecki, Chairman of the UIC wagon users group and Co-Chairman of the JC-GCU.

A network is also defined by its ability to interface with other types of network. In this respect, intermodality is one of our major concerns. In order to play its key role in transport, the railways must learn how establish the best possible interfaces with its environment. This question of interfaces has become pivotal in a world in which digitalisation sometimes has a disruptive effect on how transport services evolve. This year, this is an aspect which will become more evident in OTIF's Bulletin.

The concept of interfacing also applies in the case of customs matters. One of the articles in Bulletin 1/2017 therefore deals with the facilitation of border crossing for passengers.

François Davenne

A MEMORANDUM OF UNDERSTANDING FOR A MAJOR RAILWAY PROJECT

On 19 March 2014, the Secretariat of OTIF received the Secretary General, Mr Al Shibli, and a delegation from the Gulf Cooperation Council (GCC), whose members are Saudi Arabia, Bahrain, the United Arab Emirates, Kuwait, Oman and Qatar. The GCC's visit was the culmination of the frequent contact there has been with it since 2013. The visit concluded with the signing of a Memorandum of Understanding. The GCC and OTIF agreed to exchange information, consult each other and cooperate with each other.

Two years on, this Memorandum is a living reality. OTIF and the GCC have extensive exchanges of information and the OTIF Secretariat takes part in the work of the GCC with a view to the implementation of COTIF. The GCC's railway project is now being carried



out and the Gulf States are beginning to put their international railway legislation into place.

On 7 and 8 March 2017, OTIF's Secretary General, Mr Davenne, and the head of the technical interoperability department, Mr Leermakers, were in

Dubai for the "Middle East Rail" event for discussions with the GCC representatives.

The Secretariat of OTIF welcomes the quality of its relations with the GCC.

ENTRY INTO FORCE AT ISSUE

The Administrative Committee decided to mandate the Secretary General of OTIF to convene a new working group in spring 2017.

The new working group will be looking at Article 34 of COTIF, which defines the procedure for revising COTIF if there are amendments adopted by the General Assembly. In its application, Article 34 affects the entry into force of amendments to the Convention and its Appendices.

In 2016, the Secretariat of OTIF surveyed¹ a number of Member States on the national procedures they use to approve amendments to COTIF adopted at the 12th General Assembly. It emerged that in each Member State, the approval procedure is identical, irrespective of the type of amendments

made to COTIF. For example, a purely editorial amendment is subject to the same national approval procedure as an amendment of substance to the Convention.

In addition, under the existing procedure, the date of entry into force of an amendment adopted by the General Assembly is not certain. However, experience has shown that the entry into force of amendments that are necessary is delayed by four to six years, as they have been negotiated over several years, then discussed at the Revision Committee and approved a year later by the General Assembly.

The legal environment evolves constantly and with increasing speed. The rail sector needs to be able to adapt rapidly as well, so it is vital that the pro-

cedure for revising COTIF be simplified.

The new working group will therefore examine several solutions to simplify the process. In so doing, it will be able to take as a basis a study carried out by Mrs Brölmann, an associate professor of international public law at the University of Amsterdam.



¹ For a preliminary analysis prior to the survey, see Bulletin 2/2016, page 10.

ITF CONSULTATION DAY

On 15 December 2016, the Secretary General of OTIF, Mr Davenne, was in Paris to attend the consultation day organised by OECD's International Transport Forum (ITF). As ever, the Secretary General was pleased to accept the ITF's invitation.

The day was spent discussing future topics for the 2017 and 2018 summits of the International Transport Forum.

Mr Davenne had the opportunity of explaining OTIF's position on the topic of

regulations. With its task of harmonising the rules for international rail transport, OTIF assumes the role of an interface and bridge between technical and legal regulations that are simultaneously different, complementary and interconnected.

DEVELOPING RELATIONS WITH UNESCAP

From 5 to 9 December 2016, the United Nations Economic and Social Council and its Economic and Social Commission for Asia and the Pacific (UNESCAP) organised the third session of the Ministerial Conference on Transport in Moscow.

The Conference was held in two sections:

- Firstly, a section for senior officials from 5 to 7 December 2016;
- Secondly, a section for ministers from 7 to 9 December.

Mrs Hammerschmiedová, OTIF's legal expert, was invited to attend the section for senior officials.

Mr Nikolay Asaul, the Deputy Minister of Transport of the Russian Federation, chaired the senior officials' section, which adopted an agenda with eight major transport topics, including regional transport infrastructure connectivity, regional transport operational connectivity and strengthening transport connectivity between Asia and Europe.

Mrs Hammerschmiedová made an ini-



tial statement in which she presented OTIF as a forum to enable harmonisation of the rules for international rail transport and to seek neutral and balanced solutions that take account of the different stages of development and different legal cultures of the Member States. On behalf of the Organisation, she expressed the desire to work together with other international organisations.

Later, under agenda item 6, Mrs Hammerschmiedová presented the Organ-

isation's work, emphasising that it was useful in terms of strengthening connectivity between Asia and Europe. She also provided senior officials with details on the Convention concerning International Carriage by Rail (COTIF).

The third session of the Ministerial Conference on Transport concluded with the adoption of a Ministerial declaration on sustainable transport connectivity in Asia and the Pacific, phase I (2017-2021).

EXCHANGE OF KNOWLEDGE

OTIF's legal department was honoured and pleased to receive Professor Chia-Jui Cheng in Berne on 23 January 2017.

Mr Cheng is a professor of international law at the University of Suzhou and Secretary General of the Scientific Council of the Academy of Comparative Law for Asia in Beijing.

He asked for a discussion with OTIF's legal experts in connection with his research on international rail transport law. One of the main subjects during the discussion was the future of unified railway law.

The results of his work will be published in English and Chinese.



A THINK TANK AT OTIF

On 24 January 2017, the Secretary General of OTIF, Mr François Davenne, had the great pleasure of receiving in Berne two consultants from the independent Japanese think tank, the Mitsubishi Research

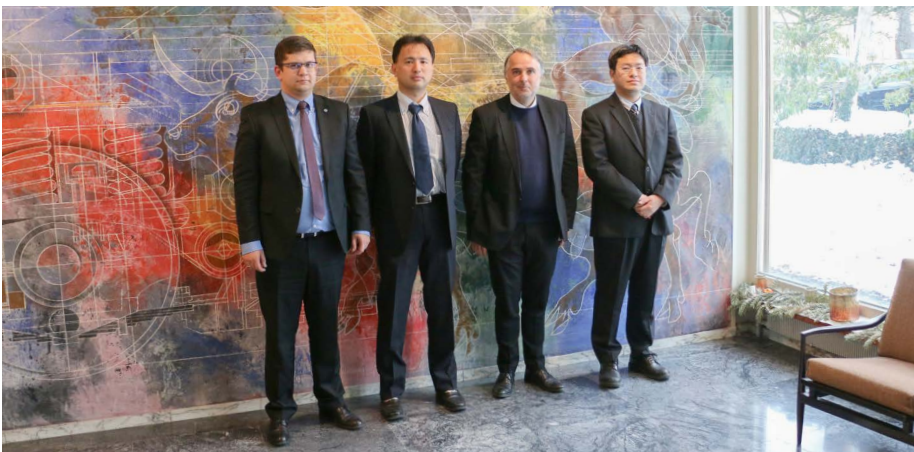
Institute, who were accompanied by an interpreter.

Mr Yoshikazu Ishihara and Mr Ryosuke Mino asked to meet the Secretary General in connection with a research

project entitled "Legal Framework and Cross Acceptance for Rolling Stock" that has been commissioned by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT).

The meeting focused on the ATMF and APTU Uniform Rules and the conditions of accession to OTIF. The Secretary General presented OTIF and the concept of interoperability beyond the EU. He had the opportunity to clarify the roles of the Organisation and of COTIF.

The Secretariat of OTIF is pleased to have hosted the visit by the representatives of the Mitsubishi Research Institute and would like to thank Mr Ishihara and Mr Mino for their interest.



PRINCIPLES FOR THE NOTIFICATION AND PUBLICATION OF UTPs FOLLOWING ADOPTION BY THE CTE

Uniform Technical Prescriptions (UTPs) are legal COTIF provisions which set out technical, operational or functional requirements applicable to subsystems such as vehicles. UTPs are the OTIF equivalent of the European Union's TSIs. Following adoption by the Committee of Technical Experts, what are the principles for the publication or modification of UTPs²?

UTPs are essential for harmonising requirements at intergovernmental level so as to ensure that a railway vehicle approved by one State can also be used in other States without repeating the (full) approval process.

The process for the development of UTPs and the decisions concerning their adoption are governed by Appendix F to the Convention (APTU). In order to keep pace with technical and scientific progress and legal developments, UTPs may be subject to regular amendments.

Preparation

The preparation, or drafting, of UTPs and their amendments is the task of the Committee of Technical Experts (CTE) and in particular its working groups. To this end, the standing working group Technology (WG TECH) convenes three times a year to discuss and draft UTPs.

In accordance with Article 21 § 4 COTIF, "the Secretary General may, on his own initiative, present proposals aiming to modify the Convention". This includes initiatives relating to UTPs. In addition, Article 6 § 2 APTU stipulates that an application for adoption of a UTP or a provision to amend it according to § 1 may be made by:

- any Contracting State;
- any regional organisation that has acceded to COTIF as defined in Article 2 x) of ATMF (at the time of writing only the European Union

meets these criteria);

- any representative international association for whose members the existence of UTPs relating to railway material is indispensable for reasons of safety and economy in the exercise of their activity.

Decision

In accordance with Article 20 § 1 b) COTIF and Articles 6 and 8a APTU, the CTE is competent to take decisions about the adoption of a UTP or a provision amending a UTP. In practical terms, such a decision may concern:

1. **The adoption of a new UTP** covering a subsystem, part of a subsystem, or another subject, as set out in Article 8 § 8 APTU, that was not previously covered by a UTP.
2. **The adoption of a UTP to replace an existing UTP:** in this case, the decision of the CTE repeals the original UTP and a new, modified UTP replaces the existing one. Such a decision is taken if the existing provisions must undergo major modifications, thus affecting a significant part of the UTP.
3. **Amendment of an existing UTP:** the original instrument remains in force, albeit modified in accordance with the CTE decision. The amendments may improve some parts of the original provisions, or add new provisions, or delete them. The parts of the existing UTP not subject to the amendments remain unaffected. The de-

At the time of writing 11 UTPs are in force, which must be amended regularly to ensure that they remain in line with technical progress and to preserve their equivalence with EU TSIs. UTPs are publicly accessible on the Organisation's website. (http://otif.org/en/?page_id=194)

cision amending the UTP should be read in conjunction with the existing UTP and, from the date of entry into force of the decision, the UTP should be read in conjunction with all the amendments.

Within the meaning of Article 35 COTIF, any of these three cases are deemed 'modifications'.

Notification

Following the CTE's decision to adopt or amend the UTP, the Secretary General is required to notify these modifications to the Member States in accordance with Article 35 § 1 COTIF. This is done by means of a circular letter. In the first two cases described above, the notification will concern the entire UTP, while in the third case, it will concern the amendments only.

Notification is the action that formally initiates the process for entry into force of the modification. Article 35 §§ 3 and 4 COTIF set out the conditions for the modifications to enter into force following their notification. In the case of modifications decided

² The same principles apply to rules other than UTPs developed under APTU and ATMF, such as, for example, annexes to ATMF.

by the CTE, a modification enters into force³ on the first day of the sixth month following the notification.

Publication

APTU Article 8 § 1 stipulates that UTPs must be published on the Organisation's website. § 3 of the same Article further specifies that publication must take place at least one month before entry into force and that the website should also indicate the date of entry into force of the UTPs.

For the adoption of a new UTP: publication is straightforward. The Secretariat makes the UTP available in three languages in .pdf format.

For the adoption of a UTP to replace an existing UTP: publication is identical to the first case. In addition, although it is not formally required by the Convention, the Secretariat ensures that

the previous version of the UTP remains accessible on the website. On the one hand, this may be important because the previous version might in some cases continue to apply during a transitional period. On the other hand, this may be useful e.g. in terms of traceability, as it provides access to the requirements on the basis of which a vehicle was approved in the past. The status of the former UTP will be changed in accordance with the CTE decision; in most cases, this will mean that the previous version of the UTP is repealed.

For the amendment of an existing UTP: the CTE's decision amending the UTP will be published on the same website page in addition to the existing UTP that has already been published. If a UTP is amended more than once, all amendment decisions will be published.

For information and documentation

purposes the Secretariat will also publish consolidated versions of amended UTPs. A consolidated version includes all the amendments to date. As the original instrument and the amendments do not usually enter into force on the same date, it follows that the provisions in the consolidated version did not all enter into force on the same date. A consolidated version should therefore be for information only and contain a disclaimer which clarifies its status. A table on the opening pages of the consolidated UTP will list all the applicable amendments. A consolidated version is intended for use as a documentation tool and has no legal value; the legally binding provisions are those which are notified by the Secretary General in accordance with Article 35 COTIF.

Bas Leermakers

REDUCING THE PASS-BY NOISE OF EXISTING FREIGHT WAGONS

Urbanisation has intensified traffic. More freight - more noise. What are the causes of rail freight noise problems? What are the possible solutions?

Recent research shows that excessive railway noise can affect people's health and for this reason the railway sector and the legislator are aiming to reduce railway noise. The extent of railway noise problems depends on many factors, such as traffic density, population density, landscape, etc. For these reasons, railway noise abatement is accorded a different priority in different States.

Description of the problem

The major contributor to railway noise is rolling noise caused by freight

trains. The vast majority of freight wagons in Europe are equipped with so called wheel-tread brakes that act by pushing friction elements (brake blocks) onto the running surface of the wheel. The friction results in a braking action. Traditionally, cast iron is used for the production of brake blocks. Cast iron is a cheap and easy to use material but has a down side in that it roughens the wheel's running surface. The rough wheels running on the rails cause vibrations that result in pass-by noise. This problem does not exist if the vehicles are equipped with disc brakes, but unfortunately only a very small number of freight wagons are equipped with this kind

of braking system.

Due to its international character, measures imposed on rail freight at national level have little effect. As an example, Switzerland has subsidised the retrofitting of old wagons, resulting in 84% of all Swiss wagons being equipped with composite brake blocks and thus being considered as 'silent'. However, 60% of all freight wagons running on the Swiss network⁴ were equipped with cast-iron brake blocks and are thus noisy. It does not really help that a train with mostly silent wagons and only a few noisy wagons is still a noisy train.

³ Provided that objections from Member States do not prevent entry into force in accordance with Article 35 § 4 COTIF.

⁴ From January to June 2016, data from the Swiss Federal Office of Transport

A simple technical solution

The roughness of the wheel's running surface can be influenced by the type of brake blocks used. Instead of using traditional cast-iron brake blocks, alternative braking friction elements in the form of composite brake blocks smoothen rather than roughen the wheels, leading to significant reduction of pass-by noise. This means that if all wagons currently equipped with cast-iron brake blocks were to be equipped with composite brake blocks, railway noise would be significantly reduced. There are currently two types of composite brake blocks: K and LL brake blocks. While in the case of LL blocks it is sufficient just to exchange the cast iron elements for composites, fitting K brake blocks requires additional modification of the vehicle's braking system.

Since 1 December 2012, all new freight wagons approved for international use in accordance with ATMF or EU law must comply with the UTP Noise or TSI Noise respectively. This means that all new wagons are considered 'silent' and are equipped with

the composite brake blocks, or have other 'silent' brake systems, such as disk brakes. The UTP NOI regulates not only pass-by noise, but also stationary noise, starting noise and noise inside the driver's cab.

Implementation is not so easy

Although the technical solution to the pass-by noise problem caused by freight wagons is relatively simple, its implementation is more difficult. One aspect is that the maintenance costs of wagons increase when they are equipped with composite brake blocks. This will make the transport of goods by rail more expensive, potentially diminishing the competitiveness of rail transport compared with other modes, such as road transport.

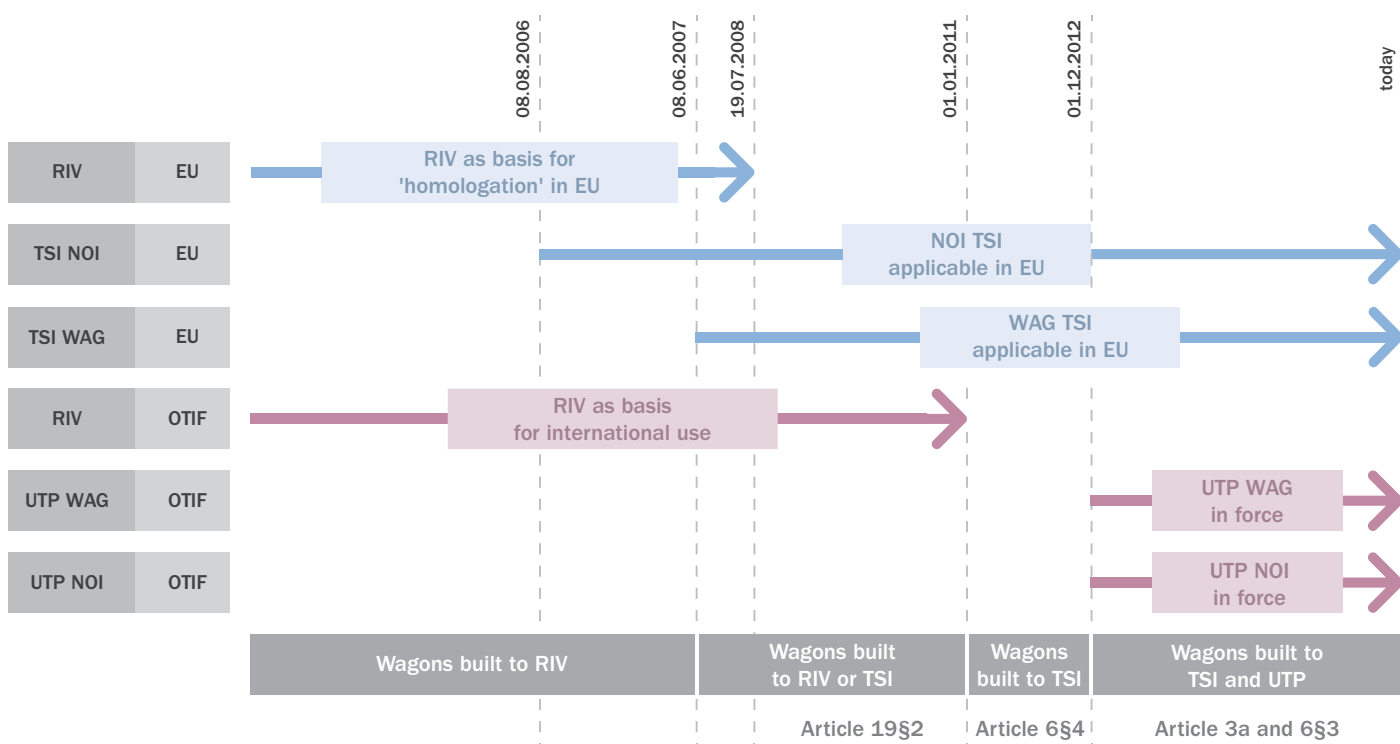
Following the request of some of its Member States to reduce rail freight noise, the European Commission (COM) requested the EU Agency for Railways (ERA) to analyse the possibility of applying the TSI Noise to existing noisy wagons. In practice, this

would mean that old wagons which are equipped with cast iron brake blocks would have to be equipped (retrofitted) with composite brake blocks, e.g. before a certain deadline. As the planned revision of the TSI NOI could affect international traffic under COTIF and the existing equivalence between COTIF and EU law, the OTIF Secretariat has been actively involved in the discussions on this matter from the beginning.

There are some legal hurdles to be overcome before a TSI or UTP can be applied to existing vehicles. The basic principle of ATMF and of EU railway law is that the TSI and UTP provisions apply only when a vehicle is being authorised or admitted to operation. In general, new requirements have no retroactive effect and do not apply to existing vehicles.

The right to continue using old vehicles, which might not comply with all current requirements, is sometimes referred to as "grandfather rights". Article 19 § 2 ATMF regulates grandfather rights for (old) RIV wagons⁵,

Different legal basis of COTIF and EU provisions of relevance to vehicle admission



⁵ "Regolamento Internazionale Veicoli" (RIV); the Agreement between the railway companies based on which freight wagons were used internationally. The RIV has been superseded by the TSIs/UTPs and (multilateral) contracts, such as The General Contract of Use for Wagons (GCU - www.gcubureau.org).

meaning that they are not directly affected by new noise provisions. This provision (on grandfather rights) has an equivalent in Article 54.2 of the recast EU Interoperability Directive.

The basis on which a vehicle was first put into operation is important when analysing the applicability of grandfather rights and the possibilities for imposed retrofitting.

The COTIF provisions for vehicle admission have been developed in recent years. In order to obtain an overview and distinguish the various legal bases for admission, it is important not only to analyse the COTIF provisions, but also the EU provisions applicable to freight wagons.

A basic and simplified overview of the various provisions that are relevant to vehicle admission is shown in diagram page 9. It also illustrates that existing vehicles may have been approved in accordance with different regimes. A more detailed analysis is available on the OTIF website as a working document for the standing working group Technology (WG TECH).

Since 2007 the EU has had a full set of TSIs in force for freight wagons (WAG TSI + NOI TSI). This means that basically, all wagons authorised in the EU since 2007 are deemed to be silent and will not be affected by retroactive noise provisions.

From 1 December 2012, equivalence between EU and OTIF provisions was established with the entry into force of the UTP WAG and UTP NOI. As a result, it can be concluded that all wagons admitted to international operation since that date can be also considered as silent and will not be affected by retroactive requirements.

The remaining legal question would then be whether and how retrofitting could be enforced on vehicles predating the UTP and TSI?

Based on the accession agreement between OTIF and the EU and Article 3a § 3 ATMF, vehicles intended to be

used only in Member States of the EU are governed by the applicable EU and national legislation. This means that for vehicles intended to be used only in the EU, the EU can impose rules which do not necessarily have to be compatible with ATMF. However, such rules should not hinder vehicles in international traffic coming from non-EU Contracting States when travelling through the EU, even if they do not comply with these EU rules. In other words, if EU rules were to require the retrofitting of wagons with composite brake blocks, these rules would not automatically apply to wagons coming from non-EU States. The conclusion is that only a joint EU/OTIF approach could have the desired effect.

At the same time, Article 19 § 5 ATMF gives the OTIF Committee of Technical Experts (CTE) the competence to decide that for duly justified interoperability or safety reasons, provisions introduced into the UTP must be complied with within a certain deadline. This means that grandfather rights are not absolute and retroactive requirements can be imposed on existing wagons predating the UTP. It would then be in the competence of the CTE to answer the question as to whether or not noise requirements are covered under 'duly justified safety or interoperability reasons' and if so, whether wagons should be retrofitted with composite brake blocks before a certain deadline. Before taking a decision, Article 7a APTU requires the CTE to consider the impact of the proposed measures for all Contracting States, operators and other relevant actors concerned. This should include the economic impact of increased maintenance costs for retrofitted wagons.

Silent freight corridors

As illustrated in this article, imposing mandatory brake-block retrofitting of old freight wagons is not universally seen as the best way forward and it comes with some legal challenges. At the same time, rail freight noise is a very serious subject in a number of

OTIF Contracting States, so it should be dealt with appropriately.

Instead of requiring all wagons to become silent, other possibilities for reducing rail freight noise could be explored, in particular those which have an effect at places where the noise problem occurs. In this respect the OTIF Secretariat presented the concept of 'silent freight corridors' as a possible way forward. The idea is that pass-by noise could be defined as a parameter of compatibility between the network and the vehicle. It would then be the responsibility of the railway undertaking to ensure that it only runs 'silent' wagons on these defined corridors. The concept is not very different from the railway undertaking's duty to ensure that, for example, the operating speed, the axle load and the gauge of the vehicles and the infrastructure are compatible.

Article 6 § 2 ATMF would support such a concept without the need to change existing legal provisions: "An admission to operation allows the rail transport undertakings to operate a vehicle only on infrastructures compatible with the vehicle according to its specifications and other conditions of the admission; it is the responsibility of the rail transport undertaking to ensure this". In addition, Article 15a ATMF clarifies that the railway undertaking, the infrastructure manager and the keeper must exchange information that will enable the railway undertaking to ascertain that his trains are compatible with the requirements of the infrastructure.

The advantage of making pass-by noise a train-infrastructure compatibility parameter is that it allows pass-by noise requirements to be imposed where they matter most, without imposing retroactive rules on entire fleets. Presumably, this would particularly concern heavily used corridors, such as the Rotterdam - Genoa corridor running through NL, DE, CH and IT. As this kind of corridor is heavily used, the relative costs per km for retrofitting wagons running on it might be limited.

Final remarks

Rail freight noise is a sensitive subject, not only for the States for which noise is a serious problem, but for other States as well. These reservations are due to the potential economic impact of noise mitigating measures, caused on one hand by the initial investment, but even more so by the increased running costs during the remaining life of the vehicle. Reducing rail freight noise comes with costs and legal challenges because

of grandfather rights for older wagons. Finding a solution to the problem which is acceptable to all parties concerned is essential for the rail sector. The right balance must be found - a balance which mitigates the noise problems where they occur, complies with the legal provisions and does not unduly harm the economic interest of the rail sector.

In this context, the OTIF Secretariat sees potential in the creation of silent freight corridors, or silent sections

of networks. Although this approach would have its downsides, such as an increased administrative burden, possible lack of clarity in terms of local rules and limitation of interoperability, there would be a clear economic benefit in preventing the retrofitting of entire fleets and implementation would not seem to imply major legal hurdles.

*Dragan Nešić
Bas Leermakers*

DEVELOPMENT OF RAILWAY LAW | DANGEROUS GOODS

7th SESSION OF THE RID COMMITTEE OF EXPERTS' STANDING WORKING GROUP (PRAGUE, 22 TO 24 NOVEMBER 2016)

The 7th session of the standing working group was the first in the new biennium and dealt mainly with proposals to amend RID, which will be reflected in the 2019 edition of RID, and with accident reports, which might lead to the regulations being changed. In addition, various questions of interpretation were discussed and answered.

Interpretation of RID

Entering the owner of the dangerous goods in transport documents

On 2 September 2016, a new law entered into force in Poland stipulating that the participant in the carriage of dangerous goods is required to enter in the transport documents prescribed in RID Chapter 5.4 the name and address of the undertaking in whose possession the dangerous goods are when they are handed over to the carrier.

UIC raised a question of interpretation as to whether, bearing in mind the provisions of Article 3 RID and Article 1, paragraph 5 of Directive 2008/68/EC, this law also applied to international transport to or through Poland. The question was also raised as to whether, in view of the provisions of Directive 2008/68/EC, it was permissible to make carriers in Polish rail freight transport responsible for information on the owner of the dangerous goods not being in-

cluded in the transport document.

Several delegations criticised the disproportionate nature of this law, which, according to Poland, was supposed to help combat the black market in a few UN numbers (liquid fuels), but affected all dangerous goods and hence all UN numbers.

Industry representatives referred to difficulties in the practical implementation of this law. The International

This was the first session of the standing working group chaired by Mrs Caroline Bailleux (Belgium). 20 States, the European Union, the European Union Agency for Railways (ERA), the Committee of the Organization for Cooperation of Railways (OSJD) and four non-governmental international organisations were represented at this meeting.



Photo by Stanislav Hájek

Commercial Terms (Incoterms), which govern buyers' and sellers' rights in international goods trading, said nothing about the transfer of ownership. It might be the case that the information in the transport document at the time the dangerous goods are handed over for carriage no longer reflects the reality during transport because the seller has received payment in the meantime.

The standing working group was of the view that in principle, Article 3 of Appendix C and Article 1 § 5 of Directive 2008/68/EC gave Member States the right to pass laws for reasons other than safety, but pointed out that such a measure led to the practical problems referred to and was hence an obstacle to the free movement of goods.

The European Commission pointed out that it had not been notified of this Polish law and that it would carry out an analysis, including an examination of possible obstacles to the free movement of goods.

Obligations of freight terminal operators

The standing working group dealt with a question raised by Spain concerning the obligations of rail freight terminal operators that are incumbent upon them as participants in the carriage of dangerous goods in accordance with RID.

In principle, three areas of the law were concerned in this case: general railway law, environmental law (Seveso Directive 2012/18/EU) and dangerous

goods law (Directive 2008/68/EC). The latter was applicable in the case of a publicly accessible terminal. In this case, the terminal operator's contractual arrangements would have to specify who the carrier was and who had to carry out the carrier's obligations. However, Directive 2008/68/EC did not apply within closed-off areas. Instead, the Seveso Directive has to be applied, so in this case, from the perspective of dangerous goods law, only the interface between the public transport network and the terminal has to be considered.

However, a general interpretation is difficult, because it also depends on whether a terminal has been excluded from the scope of application of the Railway Safety Directive (2004/49/EC) when it is transposed into each country's national law.

Proposals to amend RID

Nitrogen, compressed (UN 1066) as a protective agent

In the 2013 edition of RID, provisions were for the first time included in 5.5.3 for wagons and containers containing substances presenting a risk of asphyxiation when used for cooling or conditioning purposes. Examples listed in 5.5.3 are dry ice (UN 1845), nitrogen, refrigerated liquid (UN 1977) and argon, refrigerated liquid (UN 1951).

The Russian Federation submitted a proposal to the standing working group to extend the scope of 5.5.3 to substances which present a risk of asphyxiation and which are used as protective agents. As an example, the

representative of the Russian Federation referred to compressed nitrogen (UN 1066), which is used as a protective agent in the carriage of terephthalic acid in the Russian Federation and the CIS countries.

The standing working group saw no need to refer explicitly to the substances used as protective agents, because use as a protective agent could be subsumed under use for conditioning purposes. However, including compressed nitrogen (UN 1066) in the heading of 5.5.3 would perhaps make matters clearer.

As any amendment to 5.5.3 would first have to be decided at UN level, the Russian Federation was asked to submit a revised proposal to the UN Sub-Committee of Experts on the Transport of Dangerous Goods.

Harmonisation of RID and SMGS Annex 2

Decisions of the OSJD Commission for Transport Law

On 6 and 7 October 2016, the annual meeting of the OSJD Commission for Transport Law in the area of requirements for the carriage of dangerous goods was held in Warsaw. The original aim of the meeting had been formally to approve the proposals to amend the 2015 edition of SMGS Annex 2, which were harmonised with RID, so that they could enter into force for the OSJD Member States on 1 July 2017. At the previous session of the Group of Experts, the Russian Federation had already entered a reservation against including references to EU directives and EN standards in SMGS Annex 2, and it had maintained this rejection at the meeting of the OSJD Commission. As the proposed amendments to SMGS Annex 2 formed a unit, it had been decided to vote on all the amendments en bloc. This vote did not achieve the unanimity which is necessary for the OSJD organs.

At the annual meeting between OSJD and OTIF on 21 October 2016 in Warsaw, the negative consequences of not adopting the 2017 amendments



Container terminal in the Port of Hamburg

to SMGS Annex 2 were discussed. In rail transport, the version of SMGS Annex 2 that entered into force on 1 July 2015 would still have to be applied, while in road transport in those SMGS Member States that are also Contracting Parties to ADR, ADR 2017 applies. This would lead to major problems in intermodal transport, particularly for the dangerous goods that had been newly included in the regulations in 2017.

It was proposed that one possible solution to this unwelcome situation might be to replace the meeting of OSJD's temporary working group on SMGS Annex 2 in February 2017 by a meeting of the Group of Experts on SMGS Annex 2 and a subsequent meeting of the OSJD Commission for Transport Law. At that meeting, the OSJD Commission could take a new decision on adopting the 2017 amendments to SMGS Annex 2 and ensure that the amendments enter into force on time on 1 July 2017.

Information from ERA

Guidelines concerning the use of derailment detectors

At the last session of the working group on derailment detection (Berne, 19 and 20 April 2016), a final report was drafted for the RID Committee of Experts' standing working group. Among other things, the report requested ERA to issue, as soon as possible, guidelines or best practices that may help the sector deal with derailment detection devices until the new technical

specifications become available.

ERA submitted the guidelines it had developed to the standing working group. ERA emphasised that this document was urgent, as the development, adoption and implementation of appropriate technical specifications would take some time. As participants thought these guidelines could potentially be improved, they were asked to send their comments to ERA.

Any other business

Derailment of a freight train in Dailens (Switzerland)

On 25 April 2015, a freight train derailed in Dailens in Switzerland. The train was composed of 22 freight wagons, 14 of which contained dangerous goods. Five of these wagons containing dangerous goods derailed, overturned and were damaged, leaking the contents of two tank-wagons (sulphuric acid and caustic soda) onto the area alongside the tracks. The direct cause of the derailment was the loss of an axle box on one of the subsequently overturned wagons.

In its investigation report, the Swiss

Safety Investigation Service made several safety recommendations, the majority of which should be discussed in the bodies responsible for railway technology.

At the request of Switzerland, the standing working group dealt with one of the report recommendations concerning the railway infrastructure manager's responsibility to check his network for any protruding elements situated near the tracks (track measuring points in this case) that might damage a tank in the event of an accident, and, if necessary, to remove them. The standing working group did not support an addition to the infrastructure manager's obligations listed in RID 1.4.3.6, because in this respect, it did not consider that it was the right forum for this problem. ERA drew attention to the European legislation, which, in the event of problems relating to the railway infrastructure, envisaged a risk analysis by the infrastructure manager. Only the latter could then decide, based on the findings of the risk analysis, which measures might be necessary.



Railway accident in Tilburg (Netherlands)

On 6 March 2015, a railway accident occurred in Tilburg in the Netherlands in which a passenger train passed a signal at red and collided with the last tank-wagon containing dangerous goods of a stabled freight train. The tank-wagon, which was not fitted with any devices to prevent the overriding of buffers or to limit damage in the event of the overriding of buffers, was damaged and there was a dangerous goods leak (butadiene of UN number 1010).

The representatives of the Netherlands informed the standing working group of the recommendations the Dutch Safety Board had issued following the accident investigation. Among other things, these recommendations included extending the scope of special provision TE 25 (protection against the overriding of buffers or limitation of damage when buffers override) to all tank-wagons for the carriage of dangerous goods and the requirement that the last wagon of a freight train may not contain any dangerous goods.

The standing working group drew attention to the negative consequences of the proposed measures. Measures to protect against the overriding of buffers would inevitably lead either to a lower quantity of dangerous goods being carried in each wagon, or longer trains. This would then result in higher costs and an economic disadvantage for rail transport compared with road transport. Implementing the proposed train composition measure would lead to an increase in shunting manoeuvres and hence increase the potential risks.

It was also recalled that the standing working group had already considered the risks of train composition following the accident in Godinne in Belgium (11 May 2012). When the accident investigation report was being prepared, the Belgian infrastructure manager had analysed the available statistics and classified the measures relating to train composition as inexpedient.

When following up the measures recommended by its Safety Board, the

Dutch delegation was asked to take account of the economic efficiency, additional risks and relevant discussions that had already taken place in the RID Committee of Experts and its standing working group.

Carriage of chlorine in Switzerland

As chlorine is no longer produced in Switzerland, it must be imported from abroad. Bulk consumers in the Canton of Valais currently import chlorine mainly from France (from around Lyons/Grenoble) and transport it by rail along the side of Lake Geneva.

Switzerland pointed out that, owing to the population growth and housing developments in this region, without suitable safety measures the risks here would increase too much in future. For this reason, a national working group established a “Common Declaration” setting out clear aims for the risk reduction to be achieved and defined a corresponding package of measures. Among others, these measures include:

- importing chlorine from Italy, rather than France, in order to reduce the distances travelled and avoid built-up areas;
- minimum requirements for tank-wagons, some of which go beyond RID and apply in addition to RID;
- carrying chlorine in train-load consignments (short, special trains with chlorine wagons only);
- a general speed reduction to 40 km/h for train-load consignments of chlorine;
- the removal by the rail infrastruc-

ture manager of protruding elements in the vicinity of tracks (e.g. track measuring points, see above).

Participants at the standing working group called the international compatibility of these measures into question, particularly with regard to interoperability. In reply, Switzerland explained that based on the current risk assessment, transit transport through Switzerland was not affected by these measures. Moreover, all these measures were only mandatory for the signatories to the Common Declaration. If it were found that the proposed measures should also be established generally for the international carriage of chlorine, Switzerland would submit appropriate proposals to the standing working group.

Farewells

The standing working group said goodbye to Mr Stanislav Hájek (Czech Republic), Mr Steen Riis Thomsen (Denmark) and Bo Zetterström (Sweden), all of whom were retiring. It thanked them for their many years of active participation in its work and in the work of the RID Committee of Experts.

Next session

The eighth session of the RID Committee of Experts’ standing working group will be held in the Netherlands in the week from 20 to 24 November 2017.

Katarina Guricová

50th SESSION OF THE UN SUB-COMMITTEE OF EXPERTS ON THE TRANSPORT OF DANGEROUS GOODS (GENEVA, 28 NOVEMBER TO 6 DECEMBER 2016)

The 50th session of the UN Sub-Committee of Experts was the last session in the 2015/2016 biennium. Its decisions will form the common basis for all the mode-specific dangerous goods regulations. In the context of harmonising RID/ADR/ADN with the UN Recommendations on the Transport of Dangerous Goods, these decisions will also be carried over into the 2019 editions of RID, ADR and ADN.

The 50th session of the UN Sub-Committee of Experts on the Transport of Dangerous Goods was held from 28 November to 6 December 2016 under the chairmanship of Mr Duane Pfund (United States of America). 22 States entitled to vote, 2 observer States, 6 governmental organisations and 34 non-governmental organisations were represented at the session. As all the decisions of the UN Sub-Committee of Experts have repercussions for the dangerous goods provisions of the various modes, the Intergovernmental Organisation for International Carriage by Rail (OTIF) was represented as a modal organisation.

Classification issues

New classification provisions for Class 8
The UN Sub-Committee of Experts again examined the new classification provisions for corrosive substances of Class 8 and responded to the questions that had remained open from the last session (see also *Bulletin 4/2016*, page 8). For the assignment of packing groups on the basis of a calculation method, examples of calculations were included.

With regard to the reference to the 2015 edition of OECD Guidelines 404, 430, 431 and 435 in the new 2.2.8.3.2, the UN Sub-Committee of Experts was of the view that in practice, for classifications assigned before the entry into force of these new provisions, the principles established by the OECD should be maintained. According to these principles, test results obtained on the basis of a deleted guideline or an earlier edition of an updated guideline are acceptable,

as long as the test was started before the effective date of deletion of the guideline or deletion of the earlier edition of an updated guideline. The deletion takes effect 18 months after the decision of the OECD Council.

The UN Sub-Committee of Experts again emphasised that the revised classification provisions for Class 8 were harmonised as closely as possible with the provisions of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) in the field of transport.

Dangerous goods in machinery, apparatus or articles

Since 2013, at the request of the United Kingdom, the UN Sub-Committee of Experts has been dealing with the issue of dangerous goods in machinery, apparatus or articles. The discussion started because it was ascertained that in the past, an increasing number of dangerous goods were being carried under the entry UN 3363 Dangerous goods in machinery or dangerous goods in apparatus, and this entry is exempt from the dangerous goods regulations in European land transport. Also in the past, the competent authorities received a number of proposals to exempt various articles containing a variety of dangerous goods in different quantities from the regulations. In most cases, these requests led to the articles, machinery or apparatus having to be assigned to UN number 3363 or to an entry corresponding to the dangerous substance contained in the device. However, according to special provision 301 of the UN Model Regulations, UN number

At this session, in addition to the adoption of new amendments, the amendments adopted for the UN Model Regulations at the last three sessions of the UN Sub-Committee of Experts were examined again so that they could be submitted to the UN Committee of Experts on the Transport of Dangerous Goods and the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) (Geneva, 9 December 2016) for a final decision.

The main points discussed were the classification provisions for corrosive substances, the inclusion of new provisions for the carriage of articles containing dangerous goods and, as in the last biennium, the carriage of lithium batteries.

3363 could only be used if the dangerous goods contained in the device did not exceed the quantity limits for limited quantities. In addition, it was not always possible to assign the article to a suitable substance entry or to pack the article in accordance with packing instructions resulting from a substance entry.

In many cases, assignment to UN number 3363 was also questionable, as the restrictions that apply to this UN number were not complied with. In most cases, assignment to the entry for the dangerous substance contained in the article was not considered, because carriage as an article seemed more obvious. In many

cases, it was also large, expensive machines or apparatus that were only being sent once. Entry UN 3363 therefore became a catch-all entry for articles where it was difficult to decide what the correct assignment was.

Following lengthy discussions over the last four years, the UN Sub-Committee of Experts has now agreed to keep UN number 3363 for those articles which only contain dangerous goods within the thresholds for limited quantities permitted in Table A, column (7a) of Chapter 3.2. It was also decided to include 12 new UN numbers for articles containing dangerous substances of the individual classes of dangerous goods. The new UN numbers may not be used for articles for which there are already more precise proper shipping names. In addition, the new UN numbers cannot be used for articles containing substances of classes 1, 6.2 or 7.

Articles containing toxic gases of Class 2, dangerous goods of classes 4.2, 4.3, 5.1 or 5.2 or substances of Class 6.1 with a toxicity upon inhalation requiring packing group I must be carried under conditions authorised by the competent authority.

Packing instructions for packagings and large packagings have been included in Chapter 4.1, although carriage without packaging is also allowed under certain circumstances. Packagings and articles without packaging must bear danger labels indicating the hazards of the dangerous goods contained in the articles. If necessary, the mark or danger label for lithium batteries must also be affixed.



Gas container built into a car

Packing

Transport of gas tanks for motor vehicles

In recent years, the number of vehicles operated by flammable gases has increased drastically. In the context of servicing and maintenance work, quality assurance activities for vehicles and components and environmentally friendly disposal, used gas containment systems filled to various levels have to be carried (see Bulletin 3/2015, page 23).

Whereas in European land transport, a new special provision 660 was included in the 2013 editions of RID, ADR and ADN to deal with the carriage of gas containment systems, the UN Model Regulations, the IMDG Code and the ICAO Technical Instructions do not cater for the possibility of carrying such gas containment systems on a regular basis and in accordance with the law.

In order to enable such carriage globally, the UN Sub-Committee of Experts adopted a special provision developed on the basis of special provision 660 in RID/ADR. In addition to references to ECE regulations, this new special provision includes additional references to ISO standards. Unlike in RID/ADR, gas containment systems for liquefied natural gas (LNG) are not covered by this new special provision at present, in particular because on long sea journeys, the insulation of the LNG tank is not sufficient to ensure safe carriage.

Maximum permissible capacity of composite packagings

Packing instruction P 001 limits the maximum permissible capacity of plastics drums (1H1) for packing group I to 250 litres. The same maximum limit is found for composite packagings made up of a plastics receptacle with outer steel or aluminium drum (6HA1, 6HB1). However, for composite packagings made up of a plastics receptacle with outer plastics drum, the maximum permissible capacity is limited to 120 litres.

This inconsistency has probably remained undetected up to now because there has not previously been any economic interest in 6HH1 composite packagings with a capacity of more than 120 litres, as they are considerably more expensive than normal plastics drums. However, there is now a demand for such packagings, particularly in order to pack high purity substances of packing group I.

Now it has been demonstrated in a test report that 6HH1 composite packagings with a capacity of 250 litres meet the design type requirements for packing group I, the UN Sub-Committee of Experts has given its approval to increasing the maximum permissible capacity.

Packing instructions P 902 and LP 902

Packing instruction P 902 governs the packing of UN 3268 Safety devices, electrically initiated. Among other things, air bag gas generators, air bag modules and seatbelt pretensioners come under this UN number. The packing instruction says that the articles may also be carried unpackaged in dedicated handling devices or cargo transport units when moved from where they are manufactured to an assembly plant. In order to include stopovers in the course of the distribution chain, it was decided to adapt the provisions for unpackaged carriage in packing instructions P 902 and LP 902.

Large packagings for small production runs and prototypes of lithium batteries Packing instruction P 910 was included in the 19th edition of the UN Model Regulations and the 2017 edition of RID/ADR; it applies to production runs of no more than 100 cells and batteries of UN numbers 3090, 3091, 3480 and 3481 and to pre-production prototypes of cells and batteries of these UN numbers.

However, a lot of batteries and equipment containing batteries are so big that they do not fit into the packagings allowed in accordance with packing instruction P 910. At the moment therefore, they have to be carried unpackaged under the conditions approved by the competent authority.

The UN Sub-Committee of Experts decided to include a packing instruction for large packagings based on the text of packing instruction P 910. However, this packing instruction only applies to individual batteries or individual pieces of equipment containing cells or batteries. It was decided not to have a provision concerning transport without a packaging, because this can already be derived from paragraph (3) of packing instruction P 910.

It was also recalled that in the past, the UN Sub-Committee of Experts had already reached an agreement that in those cases in which a packing instruction permits carriage without a packaging, there are no limits in terms of the mass. However, this interpretation should be included in a future edition of the UN Model Regulations.

Damaged or defective lithium batteries
At present, the carriage of damaged or defective lithium batteries is dealt with in special provision 376 and packing instructions P 908 and LP 904. Cells and batteries which, under normal conditions of carriage, might react dangerously, must be carried in accordance with the conditions approved by the competent authority.

The International Organization of Motor Vehicle Manufacturers (OICA) has analysed the conditions laid down by the various competent authorities and has ascertained that there are some similarities that should make it possible to draft standardised packing instructions. Owing to the rapid developments in electromobility and the growing need to find solutions for batteries damaged in accidents, it seemed a matter of some urgency to use standardised procedures for the carriage of damaged or defective batteries, in order to restrict individual competent authority approvals to fewer types of transport.

In the future though, innovative and practicable transport solutions applicable to all types of damaged or defective lithium batteries could be considered. For such packagings, the actual damage would have to be taken into account, using measures to mitigate and/or avoid damage. However, it would still take some time to work out the necessary details, such as establishing a generally applicable test procedure for various cells and batteries.

After a lengthy discussion, the UN Sub-Committee of Experts adopted an amendment to special provision 376 and included two new packing in-

structions for the carriage of damaged or defective lithium cells or batteries which, under normal conditions of carriage, are liable to disassemble rapidly, dangerously react, produce a flame or a dangerous evolution of heat or a dangerous emission of toxic, corrosive or flammable gases or vapours. Packagings for such batteries must satisfy additional performance requirements, which must be checked in a test laid down by the competent authority. The packing instructions also contain criteria that can be called upon for this test.

Documentation

Test report for lithium batteries

Section 38.3 of the Manual of Tests and Criteria prescribes various tests to be carried out for the assignment of lithium batteries to UN numbers 3090, 3091, 3480 and 3481. The UN Sub-Committee of Experts decided to include the requirement in the dangerous goods provisions that the manufacturers and suppliers of lithium batteries must make a test report available. Section 38.3 of the Manual of Tests and Criteria sets out the minimum information that must be given in this test report, such as the manufacturer's details, testing laboratory, description of the batteries and tests carried out.

Next session

The 51st session will be held from 3 to 7 July 2017 in Geneva and will start the work on the 21st revised edition of the UN Model Regulations.

Jochen Conrad

TOWARDS A UNIFORM CONTRACT FOR INTERNATIONAL TRAIN PATHS

Since it was developed in 1999, the Contract of Use of Infrastructure (CUI) has anticipated European Union law with a simple idea: a uniform framework for contracts for the allocation of international train paths. Today, with the vote on the fourth railway package heralding the implementation of a single European railway area, this issue is more relevant than ever. In this article, the Secretary General of OTIF and the Co-Chairman of the Joint Committee of the General Contract of Use of Wagons outline a contractual solution to enable the sector to organise the management of international train paths by capitalising on the successful experience with the GCU.

Since it came into being, the CUI has pursued a dual objective:

- To define a contract of use of international train paths;
- To create a framework for uniform liability.

Paradoxically, the second aim has met with a certain amount of success, without really being able to define an international train path from the legal point of view. With the support of the Community of European Railway and Infrastructure Companies (CER) and the European Rail Infrastructure Managers (EIM), RailNetEurope (RNE) and the International Rail Transport Committee (CIT) have developed the European General Terms and Conditions of use of railway infrastructure (E-GTC-I). This contractual instrument enables the actors to share a common vision of the liability regime.

On the other hand, the concept of an international train path has remained vague. Neither Directive 2012/34/EU, nor CUI itself, provide a clear definition of international train path. As it is, opening the rail transport market has favoured access to the internal market rather than the regulation of international traffic. CUI has therefore broadly anticipated the sector's requirements and questions in connection with access to international train paths and how they are managed have only really arisen in recent years. However, the emergence of a European railway area has been achieved as a result of increased efficiency over long distances. In the European context, increasing the modal share of freight is inconceiv-

able unless there is real fluidity in international traffic and, in particular, a simple mechanism for allocating train paths.

To meet this need, the revision of CUI carried out by an OTIF Secretariat working group in 2015 and 2016 sought to clarify what an international train path is. The sector now just lacks a shared instrument to manage these train paths. This article looks at how the positive experience with the General Contract of Use for Wagons can be transposed into the coordinated management of international train paths.

The revision of CUI will create a well-defined framework of liability for international train paths

The scope of the current CUI UR is ambiguous. They only apply to international rail transport, whereas infrastructure capacity is allocated at national level. From the legal point of view therefore, there are no international train paths. What needed to be done was to define international railway traffic precisely so as to be able to apply liability rules to it.

The draft text resulting from the working group's work defines international railway traffic as follows:

“ ‘International railway traffic’ means traffic which requires the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned (Article 3 aa).”

Thus, in terms of the draft Article one, the following three conditions should be met in order for the CUI UR to apply:

- Existence of a contract of use of railway infrastructure in a Member State;
- Performance of this contract in the context of international railway traffic;
- Carriage must be performed for the purposes of the CIV or CIM UR.

The Secretariat of OTIF is now waiting for confirmation of the working group's conclusions by its members and can then submit its draft to the Revision Committee at the beginning of 2018. Given that the revision of the scope of application is only really a question of clarification, the CUI UR can be brought into effect independently of the date of entry into force of the amendments to be adopted by the General Assembly.

While the European context has been important in the revision process, the possibility of applying CUI beyond the EU should also be strengthened. Currently, 41 OTIF Member States have approved the CUI UR and could therefore use the revision to unify their practices.

An overall contractual framework still has to be defined for the allocation of international train paths

Directive 2012/34/EU focuses on market access rules, in the sense that it gives precise definitions of:

- The conditions for opening the market in rail transport;

- Infrastructure charging rules to ensure that this opening is effective;

Directive 2012/34 also provides a broad vision of infrastructure, which includes access to essential facilities to enable railway services to be put in place: passenger and freight stations, maintenance workshops, etc. Moreover, in order to put in place a European railway area, the framework has been supplemented by:

- Technical directives (Interoperability 2008/57/EC and Safety 2004/49/EC), which enable the existence of genuinely European trains;
- The definition by Regulation (EU) 913/2010 of 9 freight corridors, for which “one-stop shops” have been set up.

However, the directives have to be transposed into national legislation, so they lead to solutions that may differ, with a lack of harmonisation for international traffic. This makes it impossible to benefit from the economies of scale that a single framework can provide. While it is directly applicable, the European Regulation on the corridors only provides for internal coordination for each corridor, but no overall harmonisation.

However, there is nothing to prevent the actors from working on a common framework. The “Freight CEAO initiative” in the framework of UIC and CER and ERFA’s “boosting international rail freight” initiative at the TEN-T days in June 2016 are part of this logic, as they identify 12 points of improvement for better integration of the European freight network. Some of the points listed by ERFA, such as the investment plans and the generalisation of quality indicators, are outside the scope of this document, but the initiative shows that the legislative framework does not prevent the sector from organising itself.

Experience with the GCU: self-regulation based on the CUV

The reform of the European markets

has left the sector an orphan of the integrated regulations on the use of wagons that it had during the period in which there were monopolies. The RIV, which was backed by UIC, had become incompatible with the new legal situation, so the international freight sector had to be reformed when the markets were opened, because European law had not resolved the question of the coordinated management of wagon fleets.

The European Union had not intended to regulate the post-RIV question in detail. The sector therefore took advantage of this contractual freedom available to it under the European Union’s public law. The existence of the CUV UR provided a solid starting point for international law to define the liabilities of the actors.

On this basis, those who drafted the GCU put in place a multilateral contract setting out the mutual rights and obligations of wagon keepers and railway undertakings in Europe and beyond. did this in a uniform manner simply on the basis of accession. The success of this framework since 2006 is undeniable. It also succeeds in integrating successive developments in European law, such as the creation of entities in charge of maintenance.

The GCU therefore deals not only with

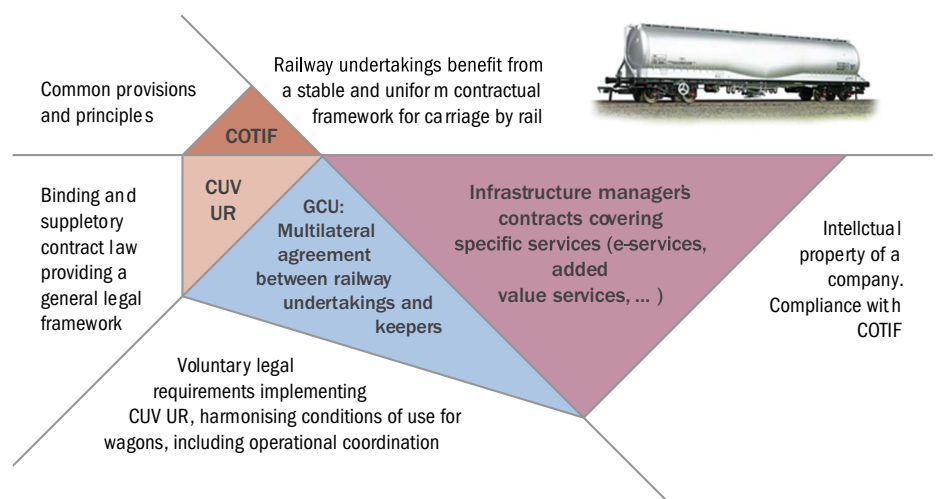
issues of liability, which are the core of the CUV UR, but also with all the technical and operational issues of the complex world of wagons, such as:

- Practical implementation of the use of wagons, conditions for dealing with damage that occurs in the custody of the railway undertaking and repairing them so that they can be operated;
- The exchange of information between user railway undertakings and keepers;
- Implementation of marking;
- Procedures for handing over and accepting vehicles by/between railway undertakings.

In this respect, the GCU constitutes a complete “ecosystem” at contractual level for using wagons in international traffic, as shown in figure 1.

The wagon sector is not regulated solely by the GCU. It is obvious that a general public law framework applies to the sector, whether for technical approval, or for the exchange of information under the TAF TSI. The aim of the GCU is not to create new rules, but to make the existing rules applicable at the lowest cost and in a coordinated and uniform manner for all the actors involved.

Figure 1: How the GCU functions



The dynamic of the GCU could be an experience to transpose in order to manage international train paths

The priority that Directive 2012/34/EU accords to access to the internal market still makes it impossible to distinguish a common framework for managing train paths for international trains. In fact, opening freight and passenger services to competition does not remove the requirement to define a uniform framework. By its very nature, the latter is more complex for rail transport than for road transport. The railways are an integrated network, whose management methods require a high level of integration. One only has to see the complexity of the reference documents for each infrastructure manager's network.

Of course the procedures for allocating train paths are dealt with under national law in most EU Member States. Therefore, Directive 2012/34/EU only sets out obligations in terms of cooperation, which are limited to infrastructure managers (for example Article 37 for charges and Article 40 for the allocation of train paths). This allocation of roles is usual in an instrument which deals primarily with opening the rail transport market.

However, Article 5 of CUI requires that the relationship between managers and carriers be governed by a contract of use, which deals with the details necessary to determine the administrative, technical and financial conditions of use⁶. This contract must of course be concluded in accordance with the laws and provisions in force in the State in which the infrastructure is situated.

Nevertheless, it would be possible to seek framework conditions to simplify the administrative burden for international transport, as the GCU has done. The conditions of application of European law could be the subject of a common position in terms of their implementation, including between actors in a competitive market, which is what infrastructure managers and railway undertakings are.

Paving the way for a multilateral contract

The revision of CUI now provides the necessary basis in international public law to set up a multilateral contract along the lines of the GCU. Here, the difficulty is greater, as there are no pre-existing regulations to rely on, such as the RIV. The actors concerned will therefore need to be brought together to identify the common points that are necessary. The subjects covered by such a multilateral contract might be as follows (non-exhaustive list):

- The framework conditions for liability of the RUs on the one hand and the IMs on the other, based on the E-GTC-I;
- The coordination of operational management;
- Setting up a shared information system that could be based on the collective numbering of international trains;
- The definition of uniform allocation procedures identifying the international train paths precisely as such, at least for the corridors;
- Taking into account marshalling for freight;
- The question of allocating train paths at the last minute.

Figure 2 gives details on how such an instrument might be arranged

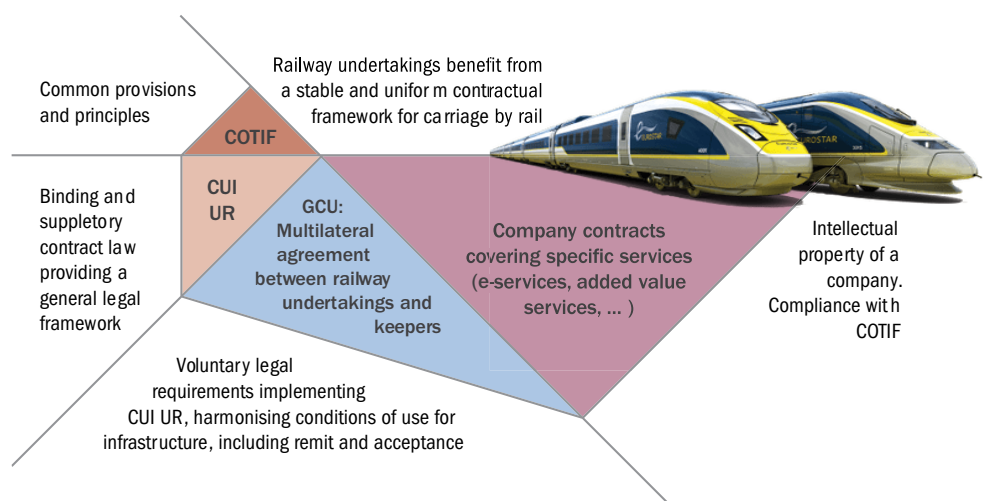
At present, the GCU is administered by UIC, ERFA and UIP. It would seem logical to involve at least RNE, CER, UIC and ERFA in this new project. EIM and CIT would also be relevant in terms of the expertise they could provide. However, there are two conditions that are necessary if this approach is to succeed:

- This must be enshrined in an instrument under international law; the revised CUI could fulfil this role;
- The question of competition law must be taken into account, as this is essential to the creation of a multilateral instrument on such a sensitive subject.

For both these reasons OTIF could be a legitimate forum to discuss setting up a project team to prefigure what could be a "Train path GCU". This would guarantee neutrality and non-discrimination. The Secretariat of OTIF could therefore hold a seminar to consider this subject. The seminar could be jointly organised with volunteer stakeholders, with OTIF's legal expertise and neutrality.

Nicolas Czernecki
François Davenne

Figure 2: possible framework for a harmonised contract of use of infrastructure



⁶ However, this contractual freedom is limited by the obligations of public law that are incumbent upon infrastructure managers, owing to the diversity of the solutions the States have chosen to implement the provisions of European law.

FACILITATION OF BORDER CROSSING PROCEDURES FOR PASSENGERS: NEW APPROACH

States, regional international organisations and international intergovernmental organisations active in the field of rail transport have been discussing the need to facilitate border crossing procedures for passengers in international rail traffic and measures to achieve this for over a decade. It is a cross-cutting task for the whole international community, which requires finding the right balance between the individual freedom of movement, the public interest and seamless international transport. Taking into account the importance of this issue and the difficulties in finding an agreement, the OTIF Secretariat proposes considering a new approach to this complex issue - i.e. soft law.

OTIF and the historical development of facilitation of border crossing procedures for passengers

The aim of OTIF is to promote, improve and facilitate, in all respects, international traffic by rail, in particular, inter alia, by contributing to the removal, in the shortest time possible, of obstacles to the crossing of frontiers in international rail traffic, while taking into account special public interests, to the extent that the causes of these obstacles are within the responsibility of States (Article 2 § 1 of COTIF).

The predecessor of OTIF, the Central Office for International Carriage by Rail (OCTI), already previously offered its support and expertise on the development of other international instruments dealing with diverse aspects of international railway traffic, including the facilitation of border crossing for goods, passengers and baggage. For instance, articles dating back to 1951 and 1952 regarding this issue can be found in the Bulletin for International Carriage by Rail, which OCTI started publishing in 1893.

On 10 January 1952, the International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage carried by Rail was adopted and entered into force on 1 April 1953. This international instrument was initiated by UIC. Currently, only 10 states are parties to this Convention: Albania, Austria, Belgium, France, Italy, Luxembourg, Netherlands, Norway,

Portugal and Switzerland. In practice, between most of these states there are no border controls, or else they are very limited.

At its 66th session in 2004, the UN-ECE Inland Transport Committee supported the establishment of an international working group composed of representatives of interested member countries and international organisations to consider in detail all relevant border crossing issues. In order to have a broadly applied international instrument facilitating international traffic, there has since then been debate and negotiations on whether the existing 1952 Convention should be modified or whether a new convention on this subject should be adopted. The OTIF Secretariat participated in these discussions, although with a different level of involvement. For instance, in 2007 OTIF and OSJD jointly submitted a draft new international convention to facilitate the crossing of frontiers for passengers and baggage carried by rail.

After a decade of debate and negotiation, there are still no concrete results. The current negotiations are based on the first new draft convention submitted by OSJD in August 2015. The most recent version of the draft convention was transmitted to the UNECE Working Party on Rail Transport (ECE/TRANS/SC.2/2016/3) by the Russian Federation and OSJD on 21 October 2016. The OTIF Secretariat will submit its considerations and proposals based on this draft convention.

Draft convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail

The objective of the draft Convention may be deduced from the preamble: to facilitate and expedite the crossing of borders in the international carriage by rail of passengers, luggage, and load-luggage. However, a question of fundamental importance is whether the proposed international instrument and its form are appropriate to meet the objective pursued by States. In order to answer this question the content of the draft convention has to be analysed.

As defined in the draft convention, States and regional economic integration organisations may become parties to this convention.

The sphere of application, as defined in Article 2, aims to frame cooperation in legal terms and simply define the range of possible actions, rather than setting out specific, binding rules:

- a) Organising cooperation between the parties and coordinating the work done by State control authorities to facilitate border crossing in international carriage by rail;
- b) Defining a range of measures to agree conditions for implementing State control and harmonising documentation requirements for State control procedures;
- c) Improving the efficiency of rail-

way checkpoints and reducing the time needed for State border controls;

- d) Organising coordination of the work of representatives of the parties' border, customs and other State authorities who implement State border controls, and of the parties' carriers.

Article 3 provides that the provisions of this convention shall not prevent the conclusion of bilateral agreements with the aim of achieving the convention's objectives and developing practical mechanisms for its application. In fact, the conclusion of bilateral (multilateral) agreements is not an option, but an indispensable condition for effective implementation of the draft convention. This conclusion is illustrated by the following provisions:

- State control authorities [...] shall **carry out agreed upon** actions for the control of passengers' documents and their hand luggage, luggage and load-luggage (Article 6, paragraph 1);
- The State control checkpoints, the manner, type, procedures and timing standards for the handling of State controls and the passenger data to be transferred to State control authorities shall be established by the legislation of the Parties **and separate bilateral or multilateral agreements** (Article 6, paragraph 2);
- The Parties [...] **may agree** that international passenger trains may travel through railway checkpoints without stopping (Article 6, paragraph 3);
- The Parties **may agree**, through separate agreements, that a passenger train may run without stopping and without border, customs and other types of State control established by the national legislation of the Parties if the passenger train is transiting from the territory of one Party through the territory of another (Article 6, paragraph 4);
- The Parties **shall agree** on the place(s) where such State control

shall be carried out by concluding separate bilateral or multilateral agreements. When the Parties **so agree**, State control may be carried out jointly by their State control authorities. (Article 14, paragraphs 1 and 2)

- etc.

The language of the text of the convention, particularly expressions such as "shall make every effort", "seeks to reduce", "shall seek", "shall endeavour", shows that the provisions of the draft convention are largely non-committal. The legal effect of such provisions is "soft"; they do not define specific rights and obligations, but prescribe the obligation to "endeavour" [to do something].

With regard to the types of state control and possible places and methods for carrying these measures out, the draft convention merely defines types and the range of possible measures and their execution. The consequence is obviously that the types of State control will be defined exclusively by States or regional organisations to which they have transferred competence for these matters. Furthermore, the specific arrangements for implementing them depend on a range of factors: geographical, technological and financial. It therefore seems difficult even to give simply a "political" priority to certain ways of carrying out State controls related to border crossing.

There are only a few provisions in the whole text that define specific obligations. However, some of them are quite controversial. For instance, Article 7 paragraph 2 stipulates that infrastructure managers shall promptly exchange information on the train schedule and changes thereto, the composition of international passenger trains and the cancellation and/or designation of new trains, for subsequent notification to the State control authorities. In fact, the management of railway traffic and infrastructure capacities are outside the defined sphere of application of this draft convention. The question arises as

to whether the above-mentioned notification to the authorities should not be transmitted by railway undertakings, which organise and perform the international transport of passengers. Moreover, the information necessary for the authorities and requirements concerning the content of such information must be clearly defined, as only the information required should be transmitted, and in a secure and appropriate manner. Therefore, the legal effect of the provision is doubtful.

Article 9 and Article 10, paragraph 2, deal with the authorisation to cross the border and exemption from passport and visa formalities for authorised officials of State control bodies. However, it is doubtful whether such a general rule could be established without being subject to specific conditions agreed between neighbouring countries.

Taking all the above into account, in most cases the provisions aim to frame cooperation by defining a range of optional measures, without creating precise duties and rights of the parties. Therefore, the convention will not have a direct and immediate legal effect, but will only serve as a basis (guideline) for specific bilateral agreements and legal measures. In other words, further legal acts implementing these provisions are indispensable to achieve the objective of this convention.

However, to a certain extent the text of this draft convention may be a valuable basis for binding bilateral agreements and could be an authoritative and flexible guide for the parties in terms of specific measures to be taken on the facilitation of border crossing procedures.

New approach - "Soft law"

The draft convention formulates a range of very general principles and possible measures to be taken, rather than rigid and obligatory rules.

Based on the above analysis, the

question of the choice of an appropriate legal form arises: hard law (binding treaty) or soft law (non-binding instrument). The decision on the legal form should be based on the substance of the proposed regulations. However, procedural aspects concerning adoption and entry into force must also be taken seriously into account. In fact, many adopted treaties have never entered into force. This problem also occurs even if a very limited number of ratifications is required, for instance in the case of the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), the 2006 Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes or the 1993 Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

As it shares the general objective of facilitating international rail traffic, the OTIF Secretariat would like to propose considering the option of applying a “soft law” technique with regard to the valuable guiding measures proposed by the draft convention.

It might be useful to cast some light on the concept of “soft law”. Four

aspects seem to be appropriate to describe the concept of soft law [...]. Firstly, soft law generally expresses a common expectation concerning the conduct of international relations, as it is often shaped by or arises within the framework of international organisations. Secondly, soft law is created by subjects of international law [...]. Thirdly, soft law rules have not – or not entirely – passed through all stages of procedures prescribed for international law-making; they do not stem from a formal source of law and thus lack binding force. Fourthly, soft law – despite its legally noncommittal quality – is characterized by a certain proximity to the law and above all by its capacity to produce certain legal effects.⁷

In recent years soft law has begun to play an increasingly important role in international relations.⁸ Moreover, the role of soft law as an element in international law-making is now widely appreciated, and its influence throughout international law is evident.⁹ The examples of such a soft law approach are resolutions, recommendations, declarations, codes of conduct, and guidelines etc. issues by international intergovernmental organisations (e.g. UN, OECD, WCO etc.).

One of the most recent and relevant examples is the Ministerial Declara-

tion on Sustainable Transport Connectivity in Asia and the Pacific (E/ESCAP/MCT(3)/11) adopted by ministers of transport and representatives of the members and associate members of the Economic and Social Commission for Asia and the Pacific (UNESCAP) attending the Ministerial Conference on Transport held in Moscow from 5 to 9 December 2016. As a result of this declaration, the “Model Subregional Agreement on Transport Facilitation” was adopted. This model agreement is intended to serve as a common framework for subregional agreements on road transport facilitation. The model can be used to draft and negotiate new subregional agreements, as well as to make amendments to existing agreements.

Taking into account the non-committal substance of the draft convention and possible difficulties with adoption and entry into force, the soft law approach would be likely to increase support for the adoption of such rules/guidelines in due time and make it possible to put in place immediately a flexible international instrument to guide States.

Aleksandr Kuzmenko

⁷ D. Thürer, Soft Law, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Volume IV (2000), p. 454.

⁸ D. Thürer, Soft Law, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Volume IV (2000), p. 460

⁹ A. E. Boyle, Some Reflections on the Relationship of Treaties and Soft Law, *International and Comparative Law Quarterly* (1999), vol 48, pp. 901

FORUM: RULING OF THE COUR DE CASSATION (FRENCH COURT OF CASSATION) OF 29 NOVEMBER 2016 (NO. 14-20172)¹⁰

On 23 June 2011, the European Union and OTIF concluded an agreement setting out the arrangements for applying the law of the Convention concerning International Carriage by Rail (COTIF) and EU law in the rail sector. The highest court in France has issued a ruling confirming a particular interpretation of Article 2 of this agreement.

An article was published in Bulletin 1/2015 (p. 19-23) relating to the ruling by the lower court on the same legal matter (ruling of the Paris Court of Appeal of 6.3.2014).

Summary

The subject of the legal dispute before the French courts was compensation for damage that had occurred during the international carriage of goods (brand new cars) from Romania to France. The damage occurred on Austrian territory following the derailment of the train. An action in warranty was taken against the Austrian infrastructure manager, ÖBB Infrastruktur, which objected on the grounds that French courts were not competent, and referred to Articles 46 and 51 § 4 CIM, which contain specific rules concerning the forum, and to Article 51 § 6 CIM, which prohibits recourse proceedings from being joined with proceedings for compensation taken by the person entitled under the contract of carriage. After the Court of Appeal (Paris Court of Appeal) had confirmed the competence of the French courts by reference to Regulation (EC) No 44/2001 and Article 2 of the Agreement on the EU's accession to COTIF, ÖBB Infrastruktur submitted an appeal in cassation. ÖBB Produktion (traction provider) and Rail Cargo Austria (substitute carrier) likewise submitted appeals in cassation. The Court of Cassation dismissed all these appeals.

Extract from the Court of Cassation's reasons for the ruling

“Given that the ruling says that Article 2 of the agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail concerning the accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 stipulates that, without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned; that, on these grounds alone, irrespective of those criticised in the appeal, the Court of Appeal, which gave precedence to the rules concerning international competence set out in Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters over those contained in COTIF, by an interpretation not dealt with in the Agreement on the European Union's accession to this Convention, has legally justified its decision.”

Comment

In general, it should be noted that publications of rulings that refer to the CIM UR/COTIF are not as numerous as publications concerning rulings in which the CMR is applied and interpreted. This is the case for specialist publications, such as the “Bulletin des Transports et de la Logistique” (France), “Transportrecht” (Germany) or “European Transport Law” (Belgium), as well as for electronic media. In view of the fact that there are certain parallels between the CMR and the CIM UR and the fact that over time, each of these regulations have drawn upon each other (the CMR when it came into being, the CIM UR in the 1999 revision), the question that arises each time is whether a principle a court applies to road transport should also be applied to rail transport in the same way. The question arises all the more when the rulings are those of the highest national courts or the Court of Justice of the EU. With regard to the rules concerning jurisdiction, the provisions of the CMR (Art. 31) and the CIM UR (Art. 46) are genuinely comparable.¹¹ Are there any grounds not to apply similar principles?

In the past, in terms of road transport the question concerned application of the CMR provision concerning (international) jurisdiction (Art. 31) or Regulation (EC) No 44/2001 on jurisdiction and the enforcement of judge-

¹⁰ Published on <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000033530478>, together with all appeals in cassation.

¹¹ See Explanatory Report, Article 46 CIM, para. 2: The criteria concerning the applicable law, of letters a) and b), have been taken from Article 31, paragraph 1 of the CMR. The terms used for “branch or agency” (“*succursale ou agence*”) correspond to the criteria concerning applicable law used in Article 5, No. 5 of the European Convention on jurisdiction and the enforcement of judgements in civil or commercial matters. With regard to interpretation, the jurisprudence of the CJEC can be considered as *ratio legis*. (http://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/03_erlaeut/05_CIM_e_Consolidated_Explanatory_report.pdf)

ments in civil or commercial matters (hereinafter “the Regulation”) in relation to legal disputes in cases involving damage during international transport by road. Two rulings by the Court of Justice of the EU – with certain limitations in favour of the particular CMR rule – have been handed down on this issue (in case C-533/08 on 4.5.2010¹² and case C-157/13 on 4.9.2014¹³). In the interests of the rail transport mode, the principles laid down by the European Court of Justice for road transport should likewise be applied to rail transport, irrespective of the fact that the EU has acceded to COTIF/CIM, whilst in the case of CMR, it is not one of the contracting parties.

With its ruling of 29 November 2016, the highest judicial authority in France has now given a clear opinion on this question – in favour of the Regulation

– in a case of damage that occurred during international transport by rail. However, in so doing, it did not rely on Article 71 of the Regulation (which both CMR rulings relate to), but only on Article 2 of the Agreement on the EU’s accession to COTIF. In this case, it endorsed the interpretation given by the lower court (Paris Court of Appeal).

All the Appendices to COTIF that govern contracts contain rules on the forum, i.e. Appendices A, B, D and E. In view of the arguments of the Court of Appeal and the Court of Cassation, should the same principle be applied to all these provisions? In EU territory, will they be entirely superseded by the provisions of Regulation (EC) No 44/2001 on jurisdiction and the enforcement of judgements in civil or commercial matters (or by the successor regulation (EU) 1215/2012)?

The ruling by the Court of Cassation was discussed critically in the “Bulletin des Transports et de la Logistique” No. 3624 (19.12.2016, pp. 731-732). (Author: Marie Tilche). Other authors may perhaps follow.

We share the position published in the Bulletin des Transports et de la Logistique to the extent that “we regret a solution which leads to the distributive application of rules concerning competence: countries outside the EU will still be subject to the CIM (or to another convention that designates fora), while the EU Member States will come under the Regulation.”.

OTIF’s legal department will monitor the literature and further developments in the case law on this subject.

Eva Hammerschmiedová

¹² Published on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0533&from=FR> (EN)

¹³ Published on http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d2dc30d59ca5344caab542bf9a4fdf5906e5fa09.e34KaxiLc3qMb40Rch0SaxyKc350?doclang=DE&text=&pageIndex=0&part=1&mode=DOC&docid=157352&occ=first&dir=&cid=736141

CALENDAR OF OTIF'S MEETINGS IN 2017

DATE	EVENT	LOCATION
13 - 17 March	RID/ADR/ADN Joint Meeting	Berne - Switzerland
3 - 4 May	Working group "Modification of the COTIF revision procedure"	Berne - Switzerland
13 - 14 June	Committee of Technical Experts, 10 th session	Berne - Switzerland

EVENTS WITH OTIF PARTICIPATION IN 2017

DATE	EVENT	ORG	LOCATION
8 - 9 March	Task Force for the application of TSI Noise to existing wagons	ERA	Lille - France
21 March	ERA Working Party on European Vehicle Register	ERA	Valenciennes - France
23 March	CIM Committee	CIT	Berne - Switzerland
24 March	Multimodality Working Group	CIT	Berne - Switzerland
27 - 29 March	OSJD International Conference	OSJD	Warsaw - Poland
25 April	ERA Working Party on European Vehicle Register	ERA	Valenciennes - France
25 - 27 April	Ad hoc Working Group on the Harmonization of RID/ADR/ADN with the UN Recommendations on the Transport of Dangerous Goods	UNECE	Geneva - Switzerland
8 - 12 May	Working Party on the Transport of Dangerous Goods (102 nd session)	UNECE	Geneva - Switzerland
16 May	CUI Committee	CIT	Berne - Switzerland
17 May	CIV/SMPS Working Group	CIT	Berne - Switzerland
17 May	ERA Working Party on European Vehicle Register	ERA	Lille - France
22 - 24 May	Group of Experts towards Unified Railway Law- 15 th session- (SC.2/GEURL)	UNECE	Geneva - Switzerland
23 - 25 May	Temporary Working Group on Annex 2 to SMGS "Provisions for the Carriage of Dangerous Goods"	OSJD	Warsaw - Poland
30 May	ERA Working Party on European Vehicle Register	ERA	Lille - France
31 May - 2 June	International Transport Forum	OECD	Leipzig - Germany
6 June	ERA Working Party on European Vehicle Register	ERA	Lille - France
6 - 9 June	OSJD Ministerial Conference, XLV th session	OSJD	Russia
22 June	CIV Committee	CIT	Berne - Switzerland

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