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Relationship between the European Union Railway Transport Law and the Railway Protocol

Sandie Calme*

The Railway Protocol, which aims at harmonizing the registration and recognition of security interests in railway mobile equipment crossing borders in the near future, and the European Railway Transport Law are rooted in a legal harmonization willingness. This concerns both railway transport legal systems on a continental scale, the Organization for Co-operation between Railways and the Intergovernmental Organization for International Carriage by Rail (OTIF), which cooperate and create international rules for railway transport at an intergovernmental level, and the European Union – with the important work of the European Commission, which is involved in terms of the law-making process, in particular due to its adhesion to the OTIF and to the future Railway Protocol. In this framework, where lawmakers participate in the development of specific international conventions and purport to ease railway transport activity, the OTIF, as the future Secretariat of the Supervisory Authority of the International Registry for the Railway Protocol, is ready for success.

1. Introduction

The first wish expressed for the development of Rail Transport Law may be the willingness to achieve a legal harmonization for this area of transport law on an international basis: this is a wish of ‘legal harmonisation’ in the rail transport area. The second wish may be to ensure that rail transport is regulated with harmony and effectivity in respect to other transport modes, not only in terms of competition but also as far as ‘multimodality’ is concerned. Rail transport law is influenced by other transport carriers laws such as sea transport regulations; as far as, for instance, the future Rotterdam Rules may apply to the railway sector in the frame of door-to-door transport contracts if the place of loss or damage is unknown, according to Article 17 of the

Rotterdam Rules.¹ The next step could be to create ‘optimodality’ between the modes for the global market.²

With respect to the European Union Railway Transport Law, let me present the international rail transport legal systems (I), the decisive European Union legal directives (II), the international railway transport rules dedicated to the transport of goods (III) and passengers (IV) and in particular the European Union Regulation for the transport of passengers. The analysis of the Rail Protocol (VII) will permit us to see the relationship between the European Union Railway Transport Law and the Railway Protocol, as far as both these international legal instruments closely involve the collaboration of the European Union.

¹ Thomas Leingruber, ‘The European Parliament supports the Rotterdam Rules’ [2010] CIT-Info 4/2010, 8.

² Erik Evtimov, ‘Russia would like to harmonise law’ [2010] CIT-Info 5/2010, 6.

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I. *International rail transport legal systems*

A. *General presentation*

There are two systems of international law based on a 'continental' scale. On the one hand, we find the legal system of the Intergovernmental Organization for International Carriage by Rail (OTIF) in the form of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 as modified by the Protocol of 3 June 1999 (Protocol of Vilnius), which entered into force on the 1 July 2006. As appendixes to the Convention, uniform rules (Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV – Appendix A to the Convention); Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to the Convention); Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV – Appendix D to the Convention); Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to the Convention); Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU – Appendix F to the Convention); Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF – Appendix G to the Convention) as well as the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID – Appendix C to the Convention) regulate the private law aspect of international carriage by rail. On the other hand, the legal system led by the Organization for Co-operation between Railways (OSJD) (Organization for Cooperation of Railways, also called OSShD) has conceived the SMGS Agreement for international carriage of goods and the SMPS Agreement for international carriage of passengers.

B. *OTIF and OSJD institutions and functions*

The Intergovernmental Organization for International Carriage by Rail (OTIF) body of

international legal rules has the character of an international treaty according to international law because it is subject to signatures, ratifications, acceptances, approvals and accessions from the Member States in order to enter into force. The first Convention giving rise to this legal system dates from 1893.

OTIF, which covers both the international carriage of passengers and of goods, exists since the entry into force on 1 May 1985 of the Convention concerning International Carriage by Rail of 9 May 1980 (COTIF) on 1 May 1985 and was created in order to promote international railway transportation. One of its major achievements is the Vilnius Protocol of 3 June 1999 (1999 Protocol), which modified the COTIF and entered into force on 1 July 2006.

The General Assembly of the OTIF, the highest governing body of the OTIF, is made up of representatives from all the Member States. It elects a Secretary General for the organization. There is a Revision Committee made up of representatives of the Member States as a force in charge of expertise for the revision of the COTIF and its appendices, a RID Expert Committee made up of representatives of the Member States and dealing with the revision's concerns about the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID), a Committee of Technical Experts dealing with the Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU) as well as a Rail Facilitation Committee which targets the facilitation of frontier crossing.

OTIF has a communication role as to its body of legal rules and it purports to promote rail transportation from a legal point of view. This information task includes the publication of the Bulletin of International Carriage by Rail dealing with the presentation of the work of the OTIF and also presenting juridical information concerning its field of activity.

The work of the International Committee for Railway Transport (CIT), which is affiliated to the *Union internationale des chemins de fer and*

works on the OTIF body of legal rules, is particularly important. For instance, this Committee is in charge of writing contractual rules regarding the OTIF legal framework. Most of them are adopted by railway undertakings on an international level.

The OSJD has its seat in Warsaw. The Conference of Ministers responsible for railways in the OSJD member states is its intergovernmental organ. The committee of OSJD, which publishes its own review, is the executive organ of the Conference of Ministers. Working teams, which comprise a working team for transportation law, share the various tasks of the committee.

A main difference between OTIF and OSJD seems to be that both States and railways are members of the OSJD, as opposed to the OTIF which comprises only Member States. The work of these organizations is important for railway companies, which do not hesitate to participate in the work of these organizations.

C. *Scope of the international conventions*

1) *Scope of the COTIF system*

a) Generalities. The following countries are parties to the COTIF system as modified by the Protocol of Vilnius:

Albania, Algeria, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Iran, Iraq, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Macedonia, Monaco, Montenegro, Morocco, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom. Jordan is an associate member from 10 August 2010.

As a regional economic cooperation organization, the European Union acceded to the OTIF from 1 July 2011, with the Agreement between the Intergovernmental Organization for International Carriage by Rail and the

European Union on the Accession of the European Union to the Convention Concerning International Carriage by Rail (COTIF) as amended by the Vilnius Protocol of 3 June 1999.

Pursuant to Article 2 of the Agreement:

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.

According to Article 3:

Subject to the provisions of this Agreement, provisions in the Convention shall be so interpreted as also to include the Union, within the framework of its competence, and the various terms used to designate the Parties to the Convention and their representatives are to be understood accordingly.

European Union law shall be included in the normative work of the OTIF, in particular concerning its Member States.³

The European Union is granted extensive voting rights, related to its exclusive competences and shared competences according to European Union law.⁴ The transport politics are a matter of shared competence.⁵ In fact, it is even more complicated: the exclusive competence of States is basically most of the CIM and CUV Conventions, the shared competence is more over the CIV and CUI Convention and the exclusive competence of EU covers RID, ATMF and APTU Convention.

In cases of a dispute between the Contracting Parties as to the interpretation, application or implementation of the Adhesion Agreement, including its existence, validity and termination, Article 8 foresees arbitration in order to resolve the dispute, in the terms of Article 8 of the COTIF.

The adhesion of the European Union is related to the adhesion of the European

³ Article 5 of the COTIF.

⁴ Articles 6 and 7 of the COTIF.

⁵ Article 4 of the COTIF and 2 (g) TFEU.

Union Member States: if all of these States denounce the COTIF, this means a denunciation from the European Union itself.⁶

More specially:⁷

Parties to the Convention other than Member States of the Union, which apply relevant Union legislation as a result of their international agreements with the Union, may, with the acknowledgement of the Depository of the Convention, enter individual declarations with regard to the preservation of their rights and obligations under their agreements with the Union, the Convention and related regulations.

Such adhesion⁸ makes the European Union a supranational force for proposals as to the international relationships within the framework of Transport Law above the frontiers of the European Union. Furthermore, this transnational involvement refers to the interpretative role of the Court of Justice of the European Union. The European Union as such adheres to all of the Transport Law norms of the OTIF. Nevertheless, it is not the case for all the COTIF Contracting Parties. In the framework of the European Union, the only remaining reservations are from the United Kingdom.

The OSShD also has implications at the level of the European Union.

2) *The scope of the OSShD.* The OSShD has 27 Member States: Albania, Azerbaijan, Belarus, Bulgaria, China, Cuba, Czech Republic, Estonia, Georgia, Hungary, Iran, Kazakhstan, Kirgizia, Latvia, Lithuania, Moldova, Mongolia, North Korea, Poland, Romania, Russia, Slovakia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. So, the scope of application of the OSShD overlaps with the scope of application of the COTIF system and partly covers the territories of the European Union.

⁶ Article 10 of the COTIF.

⁷ Article 11 of the COTIF.

⁸ Erik Evtimov, 'The European Union and its neighbouring regions: a renewed approach to transport Cooperation' [2011] CIT-Info 4-2011, 4.

II. *European liberalization directives*

European Union Member States are conscious of the need and duty to adapt their railway law to European law. It is also the case for OSJD Member States also belonging to the European Union. It is recognized that the European Railway Policy aims to revitalize railways by means of liberalization and interoperability.

Several European Union directives encourage liberalization, in particular with the concept of cabotage.

The directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure purport to modernize the railway sector through liberalization of this market. The European Union law foresees that Regulatory bodies must provide for non-discriminatory access to national infrastructures with due respect to the requirements of competition law. The European Commission has brought actions against Member States for the infringement of European Union Rail Transport Law.

The goals go further than the separation between transport and infrastructure desired by Directive 91/440/EEC which led to differences between the EU Member States systems by imposing only a countable separation and thus did not realize a legal harmonization.

Article 1 of Directive 2007/58/CE organizes the liberalization of the railway sector. As a general rule, by 1 January 2010 railway undertakings shall be granted the right to access the infrastructure in all Member States for the purpose of operating an international passenger service. They shall, in the course of an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State. This possibility, which is known as cabotage, targets the opening of the railway market through liberalization.

On the one hand, a Member State may restrict this liberalization by allowing some exceptions. They are allowed to limit this right of access on services between a place of departure and a destination which are covered by one or more public service contracts conforming to the Community legislation in force. Such limitation may not have the effect of restricting the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, except where the exercise of this right would compromise the economic equilibrium of a public service contract. Member States may also limit the right to pick up and set down passengers at stations within the same Member State on the route of an international passenger service where an exclusive right to convey passengers between those stations has been granted under a concession contract awarded before 4 December 2007 on the basis of a fair competitive tendering procedure and in accordance with the relevant principles of Community law.

On the other hand, a levy shall be imposed in accordance with Community law, and shall respect in particular the principles of fairness, transparency, non-discrimination and proportionality. It seems as a challenge to reconcile both objectives.

A fourth Railway Package is also at stake. In its statement of the 30 January 2013, Siim Kallas, Vice-President of the European Commission, presented it as such:

We need a European approach to make sure trains can easily cross the continent. We need rapid action on two fronts. We need to create joined up infrastructure – better linkages between national networks to create a truly European system. And we need a real internal market for rail services. Between them, they will bring greater efficiency and a greater degree of innovation.

To achieve that, we propose action in three areas:

- Standards and approvals that work. To save time and costs, trains and rolling stock should be built to a single standard

and certified once to run everywhere in Europe. For rail companies there should be a single safety certificate allowing them to operate Europe-wide.

- A structure that delivers – to provide fair access to the tracks, and pan-European routes that work, the two functions of managing the tracks and running the trains should be kept separate.
- Open markets that provide better quality and more choice. To encourage innovation and efficiency, domestic passenger railways should be opened up to new entrants and services.

III. International rules for the transport of goods

A. CIM 1980/CIM 1999

The new legal system of the Uniform Rules CIM 1999 purports to give the contracting parties significant freedom by determining the content of the contract of carriage by rail, as far as the CIM Uniform Rules are mandatory law. In this context, the concurrence of the road sector has been taken into account, with the CMR as a successful international convention ruling, with certain uniformity, carriage by road at a global level.

The broad opening of access to railway infrastructure is thus considered as a goal which should be achieved thanks to modern railway transportation regulation. It follows the concept of one railway carrier transporting goods across frontiers over infrastructure at an international level without legal obstacles. In particular, the international contract of carriage of goods by rail has become a contract which is no longer a real contract. In fact, according to Article 6 § 2 of the CIM Uniform Rules, the contract of carriage must be confirmed by a consignment note which accords with a uniform model and the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to the Uniform Rules. In particular,⁹ the international

associations of carriers are required to establish a uniform model consignment note in agreement with customers' international associations and bodies having competence for customs matters in the Member States as well as any intergovernmental regional economic integration organization having competence to adopt their own customs legislation. An electronic consignment note is taken into consideration by the CIM Uniform Rules as a consequence of technological modernization. The relationship between the carrier and the customer and between the carrier and the transported goods is linked by the consignment note as a matter of evidence which is also useful as a customs document.

As to subsequent carriers at an international level, there is a joint responsibility. In accordance with Article 26 of the CIM Uniform Rules 1999, if carriage governed by a single contract is performed by several successive carriers, each carrier, by the very act of taking over the goods with the consignment note, shall become a party to the contract of carriage in accordance with the terms of that document and shall assume the obligations arising therefrom. In such a case each carrier shall be responsible in respect of carriage over the entire route up to delivery.

In principle, the civil liability of the railway carrier is limited. There is no exoneration of responsibility for the railway carrier if either the railway carrier or the infrastructure manager has been at fault in causing damage to the customer. The limits of liability¹⁰ shall not apply if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.¹¹

B. CIM/SMGS consignment note

The application of two different international conventions in the form of the CIM and SMGS Agreement has been considered an obstacle for one through-carriage of goods in both international regulation areas. In fact, it has been argued that there was a lack of certainty as to the content of the international regulations applicable. In particular, the question of the language used as well as the reference to the application of some national legal rules in the international conventions has been considered to be a source of legal uncertainty. In such circumstances, legal experts have recognized the remarkable progress for international railway transportation law made with the conception of the CIM/SMGS consignment note.¹²

The CIM/SMGS consignment note is to be used also as a customs transit document. This note can be used in an electronic form. The consignment note is also a letter of credit. The willingness to conform the legal regulations for a through railway transportation legal system, including most of the geographical areas of the pan European railway network, is expressed in the CIM/SMGS consignment note.

The CIM Uniform Rules of 1999 foresee in Article 28 a presumption of damage in case of reconsignment which targets a convergence with international conventions such as the SMGS Agreement. According to Article 28 CIM 1999, when a consignment consigned in accordance with these Uniform Rules has been reconsigned subject to these same Rules and partial loss or damage has been ascertained after that reconsignment, it shall be presumed that it occurred under the latest contract of carriage if the consignment remained in the charge of the carrier and was reconsigned in the same condition as when it arrived at the place from which it was reconsigned.¹³ This presumption

⁹ Article 6 § 8 of the CIM Uniform Rules 1999.

¹⁰ Provided for in Article 15 § 3, Article 19 §§ 6 and 7, Article 30 and Articles 32 to 35.

¹¹ Article 36 of the CIM Uniform Rules 1999.

¹² Tetyana Payosova, 'The successful, practical implementation of the CIT/OSJD's 'CIM/SMGS legal interoperability' project continues' [2015] CIT-Info 5-2015, 6.

shall also apply when the contract of carriage prior to the reconsignment was not subject to these Uniform Rules, if these Rules would have applied in the case of a through consignment from the first place of consignment to the final place of destination.¹⁴ This presumption shall also apply when the contract of carriage prior to the reconsignment was subject to a convention concerning international through carriage of goods by rail comparable with these Uniform Rules, and when this convention contains the same presumption of law in favour of consignments consigned in accordance with these Uniform Rules.¹⁵ The renewed SMGS also includes a specific regulation for the CIM/SMGS consignment note. It is a matter of protecting the final consignee by regulating the burden of the proof.

In April 2011, representatives of the railways of the Republic of Belarus, Germany, the Republic of Kazakhstan, China, Mongolia, Poland, the Russian Federation, Ukraine, France and representatives of the United Nations Economic Commission for Europe (UNECE), OTIF, OSJD, CIT, UIC, of the Ministry for Transport and Communications of the Republic of Kazakhstan, of railway undertakings and forwarding agents and of some customers met together for a Seminar entitled 'Practical implementation of the CIM/SMGS single consignment note' in Astana, Kazakhstan. In this context, they draw up the 'Astana declaration' as a result of the debates during this international conference. They wanted to break legal barriers because they were conscious that rail transport is the only one carrier that lacks a uniform legal framework, although it is very important for international trade. There was a need for international legal standardization because of the pressures of globalization rail transport is subject to. In this declaration, the different conference participants expressed their willingness to extend the scope of the CIM/SMGS

consignment note. They agreed upon the implementation of the CIM/SMGS single consignment note in traffic with the Republic of Kazakhstan and the People's Republic of China; in traffic with the People's Republic of China, Uzbekistan, Tajikistan and Turkmenistan and in various international train ferry links, including shipping over the Black Sea in traffic with Turkey. They expressed the need to create the CIM/SMGS Special Conditions of liability as Annex 10 to the CIM/SMGS Consignment Note Manual, the need for further work on the CIM/SMGS electronic consignment note, to meet further training and communication measures and the need for cooperation between the CIT and the OSJD in order to set up a legal framework for the CIM/SMGS single consignment note. The Joint Declaration on the promotion of Euro Asian rail transport and activities towards unified railway law signed on 26 February 2013 on the occasion of the 75th Jubilee Session of the Inland Transport Committee of the UNECE in Geneva foresees the creation of common legal rules on the Eurasian Land Bridge, following the CIM/SMGS consignment note project.¹⁶ With this 'Prague Appeal', the participants from 31 countries:

- Express their support for the movement, started by the UNECE, for the creation of unified railway law;
- Approve the initiatives of the European Union on the switch from road transportation to railway transportation;
- Support initiatives for the development of Eurasian rail traffic corridors;
- Support levelling of the playing field in order to ensure competitiveness of rail transport in relation to other alternative means of transport;
- Turn attention to the need of facilitation of border crossings;
- Ask to facilitate the implementation of the new Annex 9 to the International

¹³ Article 28 § 1.

¹⁴ Article 28 § 2.

¹⁵ Article 28 § 3.

¹⁶ Erik Evtimov, 'International Rail Freight Conference on transport between Europe and Asia (IRFC 2013)' [2013] CIT-Info 2/2013, 7.

Convention on the Harmonization of Frontier Controls of Goods 1982;

- Urge to promote the development of railways in all possible ways and to invest in project related thereto.

It is a matter of creating a common legal basis between CIM and SMGS because a court will apply its national Private International Rules in order to resolve litigation within the framework of the international railway transportation of goods between the area of the CIM and that of the SMGS. A group of experts has been charged with dealing with these questions.

IV. International rules for the transport of passengers

A. CIV 1980/1999

According to Article 5 of the CIV Uniform Rules 1999, although the CIV 1999 is mandatory law, it is still possible for a carrier to assume greater liability and more burdensome obligations than those specified in the CIV 1999. This possible extension of liability can occur in a contract.

The contract of carriage of passengers by rail has become a consensual contract, following the change also applying to the carriage of goods in the CIM 1999. In consequence, pursuant to Article 6 § 2 CIV 1999, irregularity or the loss of a ticket shall not affect the existence or validity of the contract, and the ticket becomes a matter of proof as to the conclusion and the contents of the railway transportation contract for the carriage of passengers.¹⁷

Article 26 CIV 1999 on the basis of liability stipulates as a general rule that the carrier shall be liable for the loss or damage resulting from the death of, personal injury to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used. This leads to the result that the infrastructure manager is not the first defendant

¹⁷ Article 6 § 3 of CIV 1999.

for claims by the injured passenger or his successors.¹⁸

According to Article 26 § 2, the carrier shall be relieved of this liability: if the accident has been caused by circumstances not connected with the operation of the railway and which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;¹⁹ to the extent that the accident is due to the fault of the passenger; if the accident is due to the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected. If the exoneration of liability for the accident is not possible within Article 26 § 2(c) due to the behaviour of a third party, the carrier is liable in full up to the limits laid down in the Uniform Rules but without prejudice to any right of recourse which the carrier may have against the third party.²⁰

As mentioned in Article 26 § 4, it is still possible to foresee liability cases outside of the framework of Article 26 § 1. It is, for instance, the matter of national law or contracts, but it is still possible to think of liability cases stated, for an example, in a European Regulation. As for successive carriers, the need for an optimal solution on the sharing of responsibility is, in the field of international railway transportation of passengers, as strong as for the international railway transportation of goods. In this matter, Article 26 § 5 of CIV 1999 stipulates that in the case of a single contract of carriage performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened shall be liable in

¹⁸ Article 26 § 1.

¹⁹ Article 26 § 2.

²⁰ Article 26 § 3.

case of death of, or personal injuries to, passengers and when this service has not been provided by the carrier but by a substitute carrier, the two carriers shall be jointly and severally liable in accordance with CIV 1999.

As for the form and amount of damages in case of death and personal injury, Article 30 § 1 opens provides certain flexibility, by imposing the principle of damages being awarded in a lump sum but allowing payment of an annuity if national law permits it, on request of the injured passenger or persons whom he had, or would have had, a legal duty to maintain.²¹ It is very important to note that in this framework the amount of damages to be awarded shall be determined in accordance with national law, albeit the upper limit per passenger shall be set at 175,000 units of account as a lump sum or as an annual annuity corresponding to that sum, where national law provides for an upper limit of less than that amount.²² Of course, the reference to national law here causes practical difficulties, as far as the numerous national regulations on the amount of damages to be awarded regulate this matter differently. A forum shopping temptation may arise. A European Regulation or a similar legal construction is desirable in this regard: the solution may begin with a legal framework like Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.

As a principle, Article 33 § 1 CIV 1999 stipulates that in case of death of, or personal injury to, passengers the carrier shall also be liable for the loss or damage resulting from the total or partial loss of, or damage to, articles which the passenger had on him or with him as hand luggage, including animals. But the carrier shall not be liable for the total or partial loss of, or damage to, articles, hand luggage or animals the supervision of which is the responsibility of the passenger, unless this loss or damage is caused by the fault of the

carrier.²³ The CIV 1999 also foresees several limitations on the railway carrier's responsibility for economic damage such as the loss of goods or delay in their delivery. The SMPS also foresees a set of rules for the international railway transport law of passengers and raises questions of legal certainty.²⁴

V. *Transport of passengers: EC-regulation*

It has been said and regretted that the CIV 1999 would not achieve the level of legal standardization of the CIM 1999 because it has too many references to national legal orders. Now that the Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations entered into force in December 2009, a higher level of legal standardization may be achieved at least on an intra-community level. This Regulation refers for most of its purposes to the CIV 1999 and to the extracts of the text of CIV 1999 presented as annex I to this regulation. Furthermore, it also provides for specific rules which only concentrate on passengers' rights rather than passengers' obligations. The spirit of this new regulation, which also affects other modes of passenger transport on an international and intra-community scale, is that it grants 'more' rights to rail passengers considered as protection-worthy customers.

The implementation of the regulation on passengers' rights and obligations has been considered as particularly difficult in the legal systems of the European Union because of the high level of exigencies it contains. In fact, the few railway passengers' transport cases²⁵ heard by national courts are seriously hard to resolve and give rise to difficult legal issues. The fact that these transport cases can

²³ Article 33 § 2 CIV 1999.

²⁴ Tetyana Payosova, 'Legal Interoperability CIV/SMPS - The Quest for Legal Certainty' [2013] CIT-Info 1/2013, 6.

²⁵ For instance: Sandie Calme, 'Retour sur l'accident ferroviaire de Zoufftgen' [2010], *Revue de droit des transports*, page 9, no. 6.

²¹ Article 27 § 2.

²² Article 30 § 2.

have international aspects creates a challenge for legal harmonization, and at the same time the facts of these cases demonstrate how much it is necessary to find an internationally harmonized legal basis. Because of this, a group of experts was established in April 2011 by the CIT's CIV Committee in order to promote a standardized interpretation of Regulation 1371/2001 in the different States and in the different national legal orders of the European Union.²⁶

VI. International interests in railway mobile equipment

A. General introduction to the railway protocol

Railway mobile equipment is an important issue in the context of internationalization because this equipment is supposed to cross national frontiers. It is often very expensive, and this equipment needs to be used by persons who are not its legal owner. Furthermore, it is necessary for an international opening up of the railway transport market for this railway equipment to be acquired both through a credit contract and in an international context. That is why an international regulation concerning such equipment is foreseen and includes an international registration system.

Thus, the convention on international interests in mobile equipment²⁷ governs the international interests also for railway equipment. It provides for default remedies and foresees an international registration system, governs the effects of an international interest as against third parties, insolvency matters, assignments of associated rights and international interests, and rights of subrogation. The Luxembourg Protocol to the Convention on international interests in mobile equipment on matters specific to railway rolling stock applies

²⁶ Isabelle Oberson, 'Creation of a group of PRR experts' [2011] CIT-Info 3-2011, 5; Erik Evtimov, 'Preparing for a potential revision of the Rail PRR' [2016] CIT-Info 1-2016, 5.

²⁷ Cape Town, 16 November 2001.

to the railway sector. In this sector, the Intergovernmental Organization for International Carriage by Rail and UNIDROIT work together to establish an international register.

To date, the protocol has been signed only by Gabon, Germany, Italy, Luxembourg, Switzerland, United Kingdom, and by the European Union. Only Luxembourg and the European Union have ratified this legal instrument. In order to be able to enter into force, it must be ratified by at least four states. It is also necessary to have an operational international register, which is to be achieved by SITA NV, an organization that has shown its abilities in respect of the registry of security interests in aircraft equipment.²⁸

B. European Union adhesion to the rail protocol

In its adhesion Declaration ('Declaration to be made pursuant to Article XXII(2) concerning the competence of the European Union over matters governed by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock' (the 'Rail Protocol'), adopted in Luxembourg on 23 February 2007, in respect of which the Member States have transferred their competence to the Union'), the European Union declares:

- (1) Article XXII of the Rail Protocol provides that Regional Economic Integration Organizations which are constituted by sovereign States and which have competence over certain matters governed by that Protocol may sign, accept, approve or accede to it on condition that they make the declaration referred to in Article XXII(2). The Union has decided to approve the Rail Protocol and is accordingly making that declaration.

²⁸ Gustav Kafka, 'A new start on the path to the International Registry of Security Interests in Railway Rolling Stock' [2011] CIT-Info 3-2011, 3.

- (2) The Member States of the European Union are the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand-Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
- (3) However, this declaration does not apply to the Kingdom of Denmark, in accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.
- (4) This declaration is not applicable to the territories of the Member States to which the Treaty on the Functioning of the European Union does not apply (see Article 355 of that Treaty) and is without prejudice to such acts or positions as may be adopted under the Rail Protocol by the Member States concerned on behalf of and in the interests of those territories.
- (5) The Member States of the European Union have transferred competence to the Union as regards matters which may affect or alter the rules of Council Regulation (EC) No. 44/20011 , to be replaced as of 10 January 2015 by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council² , Council Regulation (EC) No. 1346/20003 , Regulation (EC) No. 593/2008 of the European Parliament and of the Council , Directive 2008/57/EC of the European Parliament and of the Council⁵ and Regulation (EC) No. 881/2004 of the European Parliament and of the Council⁶.
- (6) As far as the numbering system of vehicles is concerned, the Union has adopted, by way of Commission Decision 2006/920/EC⁷, amended on 14 November 2012 by Commission Decision 2012/757/EU⁸, a numbering system which is appropriate for the purpose of identification of railway rolling stock as referred to in Article XIV of the Rail Protocol.
Furthermore, as far as data exchange between Member States of the European Union and the International Registry is concerned, the Union has made considerable progress by way of Commission Decision 2007/756/EC⁹, amended on 14 November 2012 by Decision 2012/757/EU. Under that Decision, the Member States of the European Union have implemented National Vehicle Registers, and duplication of data with the International Registry should be avoided.
- (7) The Union does not make a declaration pursuant to Article XXVII(2) concerning the application of Article VIII, nor does it make any of the declarations pursuant to Article XXVII(1) and (3). The Member States keep their competence concerning the rules of substantive law as regards insolvency.
- (8) The exercise of the competence which the Member States have transferred to the Union pursuant to the Treaty on European Union and to the Treaty on the Functioning of the European Union is, by its nature, liable to continuous development. In the framework of those Treaties, the competent institutions may take decisions which

determine the extent of the competence of the Union. The latter therefore reserves the right to amend this declaration accordingly, without this constituting a prerequisite for the exercise of its competence with regard to matters governed by the Rail Protocol.

This adhesion means that the European Union has to be closely involved in the development of the Rail protocol, with possible competence of the European Union Court of Justice and a special way, for the European Union, to intervene in transnational legal relations. Consequently, there will be many challenges concerning the relationship between the European Union Transport Law and the Rail Protocol in the future.

Undoubtedly, the European Union is called to use its normative ability with respect to several international norms. In its Declarations, the eighth one, according to which,

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is particularly relevant.

There is currently a legal challenge to the Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which has been quoted by the European Union in its adhesion declaration. Pursuant to Article 6 of this Regulation 1215/2012,

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1),

Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

and

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

These special national norms are particularly relevant.

For instance, under German law, Article 23 of the Code of Civil Procedure (*Zivilprozessordnung*) on the special jurisdiction for capital and goods states that,

for lawsuits concerning pecuniary claims against a person who is not domiciled in the national territory, the tribunal where this person has a capital or where the claimed good is located, has jurisdiction. As for debts, the home domicile of the debtor and the location of the good used as a guarantee for a debt are considered as the location of the capital.

According to the French Civil Code,

An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be brought before the courts of France for obligations contracted by him in a foreign country towards French persons. (Article 14)

and

A French person may be brought before a court of France for obligations contracted by him in a foreign country, even with an alien. (Article 15)

In Ireland, the appendix to the Regulation describes the relevant national rules as 'the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland'.

Articles 3 and 4 of the Italian Act 218 of 31 May 1995 refer to the rules of Sections 2, 3 and 4 of the Regulation 1215/2012 on

special jurisdiction, jurisdiction in matters relating to insurance and jurisdiction over consumer contracts, and underline the contractual freedom as well as the possibility of arbitration, insisting on the necessity of written proof as to contractual freedom and on the necessity of assuming recourse to a judge.

The Luxembourg Civil Code foresees the same legal regulations as the French one:

An alien, even if not residing in Luxembourg, may be cited before Luxembourg courts for the performance of obligations contracted by him in Luxembourg with a Luxembourg person; he may be brought before the courts of Luxembourg for obligations contracted by him in a foreign country towards Luxembourg persons. (Article 14)

and

A Luxembourg person may be brought before a court of Luxembourg for obligations contracted by him in a foreign country, even with an alien. (Article 15)

Article 99 of the Austrian Court Jurisdiction Act (Jurisdiktionsnorm) foresees similar rules to the German ones: domicile is the equivalent of the habitual residence of the debtor and it requires that the value of capital located on its territory shall not be much less than the value of the litigation subject matter. For legal entities, it adds jurisdiction at the location of the permanent representative organ or similar organ of the legal entity. It specifies that for litigation related to ships or maritime transport, the Austrian port of registry of the concerned ship is considered as the location of the capital.

As for the United Kingdom, Regulation 1215/2012 relates to the rules which enable jurisdiction to be founded on:

- (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
- (b) the presence within the United Kingdom of property belonging to the defendant; or

- (c) the seizure by the plaintiff of property situated in the United Kingdom.

Observation of the scope of application of the respective transnational norms leads to the conclusion of that a coherent hierarchy between them is needed because they overlap. This is the case, for instance, in respect of Article 12 § 5 of the COTIF 1999, according to which:

Railway vehicles may only be seized on a territory other than that of the Member State in which the keeper has its registered office, under a judgment given by the judicial authority of that State. The term 'keeper' means the person who, being the owner or having the right to dispose of it, exploits the railway vehicle economically in a permanent manner as a means of transport

and Article 6.2 of the new Regulation 1215/2012, related to jurisdiction.

VII. Final considerations

Railway undertakings have expressed their own opinions as to the future of railways at the Berner Tage organized by the International Rail Transport Committee. In this context, they asserted that 'through traffic by rail which is not to be held up at frontiers requires continuous and standardized law'. They observed that railway transportation law is ruled by European law, OTIF legal system and SMPS/SMGS agreements for the Eurasian rail transport market. They compared this situation with that of the Convention on the Contract for the International Carriage of Goods by Road (CMR) extending right through into Asia. They affirmed, also on behalf of their customers, "that the railways' customers, passengers and shippers, increasingly press for a through rail offer based on a single contract and with standard terms and conditions from beginning to end'. They appealed the European Union, the Intergovernmental Organization for International Carriage by Rail (OTIF), the UNECE and the OSJD as international railway transportation law makers to 'coordinate and harmonize their legislative

activities in the areas of overlap' in the framework of their role as law-makers. The railway undertaking participating to this important conference insisted on the need for 'standardized law of carriage', 'standardized legal terminology', coordination between legal systems, simple, comprehensible, stable and practicable law. As far as the European Union legislation is concerned, they required the EU Commission to provide a maximum of transparency by preparing EU legislation.

Within this framework, the numerous participants to this conference seem to want to conciliate the qualitative advantage of both the uniform CMR for international railway carriage of goods and the Montreal Convention for the international transport by air, which has been signed by the European Union. The involvement of the UNECE,

which led to the CMR, as well as the willingness of the European Union to enter into the OTIF as a regional economic integration organization, which has been settled in the meantime, should provide both for legal harmonization and transparency in the European law-making process. The development of this legal framework should go together with economic and technical development. On this point, common rules on international interests in railway mobile equipment must take part in this progress. With economic world-wide development, it may be challenging, for instance, to build a world-wide international register for mobile equipment concerning railways. But we must keep in mind the 'Appeal of Bern' for the long term. It should extend to railway mobile equipment that crosses borders.