

Editorial

Technical problems do not constitute force majeure



At the end of last year, the European Court of Justice (ECJ) passed down a ground-breaking judgment, a judgment which may well also be of concern to railways (see page 3 of this edition of CIT Info).

In its judgment, the ECJ maintained that an airline could not simply assert force majeure as a ground for relief from liability when it had to cancel a flight because of a technical problem. Only those events which could not be controlled by the airline despite taking all the measures required by the circumstances could be considered to be a force majeure.

The CIT considers that that clarification is actually self-evident. Safety and reliability are not products of chance; rather they are the result of regular and careful maintenance. Given that relationship, force majeure should not be permitted to undermine consumer protection.

There is no doubt that this legal precedent for air traffic will also influence carriage by rail. As readers will be aware, the new EC Passengers' Rights Regulation comes into effect on 3 December 2009. This new statute imposes a whole range of new obligations on railways but it does also allow relief from liability in the event of force majeure. In the light of the precedent which has been laid down, railways will have to accept that they too will only be able to rely on force majeure within very restricted limits.

EU legislation and precedent regards protection of consumers (including the protection of consumers of transport services) as important. Accordingly, it has become even more important to make the way the railways implement the Passengers' Rights Regulation absolutely watertight. The CIT's work to implement the Regulation is on schedule, consultation on the new *General Terms and Conditions of Carriage (GTC-CIV/PRR)* (which bring COTIF and EU law together into a common contractual document) is largely complete. Now the railways are turning their attention to the documents for rail staff use – the AIV and the various manuals.

Passengers' awareness of their rights is increasing and specialist law firms are just waiting for the opportunity to pursue claims, if need be, via the courts. The railways must do everything possible to avoid the circumstances in which the airlines find themselves, overwhelmed with litigation and court judgments.

Thomas Leimgruber
Secretary General to the CIT

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CIT Diary of Events

Date	Event	Location
19 Febr.	Executive Committee 1/2009	Bern
11/12 March	Ad-hoc meeting of the CIM/SMGS Legal Group	Bern
17/18 March	CIV Working Group	Bern
31 March	CIM Committee	Bern
1 April	Drafting Group GTC-CIV/PRR	Bern
28/29 April	CIM/SMGS Group of experts	Warsaw
29/30 April	CIM/SMGS Legal Group	Warsaw
30 April	CIV Committee	Bern
19/20 May	CIV Working Group	Bern
28 May	Conference of Freight After-Sales Service Departments	Bern
10 June	Executive Committee 2/2009	Varna (BG)
17/18 June	CIM Working Group	Bern
30 June	Workshop on "New Passengers' Rights"	Paris

Transport Law and Policy

The EU's priorities for transport policy in 2009

Transport Commissioner Antonio Tajani said that the European Commission would make a statement in the first half of 2009 to explain how a barrier-free European Maritime Transport Area can be created. The objective is to create a true internal market for transport by sea; this in turn will require the complex and time-consuming formalities for sending traffic by sea within the Community to be abolished. The "road to sea" initiative should provide a significant stimulus for traffic by sea.

In addition, the Commission will draw up a comprehensive maritime transport strategy for the period to 2018. It will take account of numerous factors, the effects of globalisation, trends in world trade, climate change, security requirements, competition issues, etc.

The planned European maritime transport area and the long term maritime transport strategy are parts of the Commission's most recent action plan for an integrated EU maritime policy.

In so far as railways are concerned however, the EU authorities want to decide, and before the end of June 2009, by how much the first railway package for the liberalisation of freight traffic by rail needs to be rectified. The three Directives already in force are to be brought together and restructured to allow their statutory provisions to be simplified. This will thus make the regulations both more comprehensible and make it easier to implement them more consistently in all the Member States.

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The EU would like to see more consumer protection

By publishing a green paper *On Consumer Collective Redress* (COM/2008/794), the European Commission has opened a debate on strengthening consumer rights. The green paper sets down four options for debate:

- Binding or non-binding measures that would ensure that there was a judicial process in all EU Member States for collective redress. In this way, there would be a guarantee that in the event of substantial damage to consumer interests, the claims of every consumer would be satisfied by representative, group or test case actions. However, what powers consumer protection organisations and ombudsman organisations will have to take action, how these processes can be financed and opting in and opting out options, all still have to be clarified.
- A second option would be to open existing national procedures to aggrieved consumers from other Member States, something which has not always been possible up to now. At the same time, the green paper recommends that the fourteen states without a collective procedure should create one.

- A third option consists of a mix of various measures to strengthen the protection of consumer rights, inter alia by improving alternative non-judicial dispute resolution procedures and the extension of national simplified procedures for small claims.
- As the fourth option, the Commission does not exclude not taking any action at all at EU level for the time being, but rather simply continuing to collect more feedback from existing national and European measures, including those in course of being implemented.

First of all however, the Commission will wait for the results of the public consultation (which will remain open until 1 March 2009); it will then decide on the way forward.

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Passenger Traffic

New rights for passengers travelling by bus or by boat

The European Commission published two new proposals for Regulations on passengers' rights on 4 December 2008:

1. a proposal for a Regulation concerning the rights of passengers when travelling by sea and inland waterway (COM/2008/816)
2. a proposal for a Regulation on the rights of passengers in bus and coach transport (COM/2008/817).

These two proposals had been predicted for a long time. The European Commission had already stated its intention to create rights for passengers by all modes of transport (and thus to place users at the heart of transport policy) in the white paper of 2001 on transport policy. This has now been achieved: regulations

were imposed for the air mode in 2005, they will be imposed for rail at the end of 2009 and the two remaining modes, road and water, will be covered in the next two to three years.

The proposed two Regulations have the common objective of reinforcing the rights of persons with reduced mobility and those of passengers in general in the event of delay or an interruption to their journeys. In addition, a standard liability regime to cover the death of or injury to passengers will be introduced to the road transport mode; it will be based on the liability regime for air transport (Montreal Convention and Regulation (EC) No. 889/2002). The Commission has already (in 2005) proposed harmonisation of the liability regime for accidents during transport by sea and inland waterway (COM/2005/592). The legisla-

tive procedure for this 2005 proposal is already well advanced and the Council intends to give it a second reading at the beginning of this year.

The two proposals have somewhat different provisions for liability for delays however:

1. passengers travelling by water will have effectively the same rights as passengers travelling by rail:
 - in the event of delays exceeding an hour: immediate and standard assistance (meals, refreshments, accommodation, alternative transport services)
 - in the event of delays of more than two hours which can be foreseen on departure: refund or alternative transport using the same operator and information on other transport services
 - in the event of actual delay of more than one hour on arrival because of cancellation or delay on departure: compensation for the delay (25% of the fare after one hour, 50% after two hours) or compensation for the carrier not

fulfilling his obligations (100% of the fare if the carrier has not organised alternative transport services or provided information on other transport services)

2. passengers travelling by bus or coach on journeys of more than three hours will have the right to be offered alternative transport services provided by the same carrier and to be informed about other services offered by other undertakings if they are delayed by more than two hours on departure: if appropriate, their fare will be refunded.

Although the Commission's objective was to create fair conditions for all modes of transport, in fact the difference in the treatment of passengers travelling by road, by water, by train or by air is glaring. The rules for compensation for delay and cancellation are quite different and these differences could have significant consequences for the competitiveness of the various modes of transport. They might even seem unfair to some modes.

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Airline passengers' rights – Cancellation of a flight for technical reasons

In the last edition of CIT Info, we provided a resumé of the cases pending before the European Court of Justice on flight cancellations. One of the cases mentioned, in which an Austrian passenger sued Alitalia (C-549/07), was finally decided on 22 December 2008.

In its judgment, the court came to the conclusion that a technical problem on an aircraft did not of itself constitute an "extraordinary circumstance" which would free the airline from all liability for the cancellation of a flight. The court set down several conditions which would need to be satisfied for a technical problem really to be "extraordinary" and "unavoidable" within the meaning of *Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights*.

The court delivered a strict interpretation of the provisions of *Regulation (EC) No 261/2004*. It justified this position by quoting the objective of the Regulation, explicitly stated in the preamble, i.e. to provide "a high level of protection for passengers". Any rule derogating from that objective has to be interpreted strictly. In this context, we must expect that *Regulation (EC) No 1371/2007 on rail passengers' rights and obligations* will probably be interpreted in the same way because it also provides for "achieving a high level of consumer protection".

The court interpreted the concept of "extraordinary circumstances which could not have been avoided" as events:

- 1) which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control because of their nature or origin (for example, acts of sabotage, a hidden manufacturing defect, etc.)
- 2) which could not be avoided at the time they arose by action which was appropriate for the situation and technically and economically affordable for the carrier.

It is up to the carrier to prove that the circumstances really could not have been avoided; that is, to avoid cancellation of the flight, he had deployed all his resources in terms of staff or equipment and the financial means at his disposal without making intolerable sacrifices in the capacities of his undertaking.

This decision clarifies one of the less clear areas of *Regulation (EC) No 261/2004*. In future it will be more difficult for an airline to cite a technical problem to free itself from liability in the event of cancellation of a flight. In many ways this principle is aligned with carriage by rail: a carrier by rail can never cite a technical problem to free himself from liability in the event of the cancellation of a train or for delay. Article 32 § 2 CIV only frees the carrier from liability in the event of "circumstances not connected with the operation of the railway".

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Lack of maintenance is not a force majeure!

Freight Traffic

CIT/OSJD workshop on the handling of CIM/SMGS claims

A joint CIT/OSJD workshop on the handling of CIM/SMGS claims was held in the CIT's offices in Bern on 25 November 2008. Over sixty participants from claims departments, legal departments and sales departments of CIT and OSJD railways took part.

The workshop was one of the communication and training initiatives launched for the second phase of the joint CIT/OSJD project to make the CIM and SMGS legally interoperable. The priority for this second phase, which has been in progress since 1 January 2006, is to draw up harmonised CIM-SMGS provisions for liability. These provisions are intended to be implemented contractually, both for the external relationship between the customer and the carrier and the internal relationship between the carriers.

In the first part of the workshop, acknowledged experts and members of the CIM/SMGS legal group presented various legal documents and concepts with a relevance to CIM/SMGS traffic, which included the following topics:

- Guide to the Liability Clauses in the CIM & SMGS
- CIM/SMGS formal report
- Presumption on reconsignment
- Allocation of compensation between carriers
- CIM/SMGS claims handling

Subsequently, in the course of two sets of discussions, representatives of claims departments and customers were encouraged to comment on these documents and concepts with the objective of allowing this initial feedback to influence the development of the project.

All the participants were convinced that the creation of the common CIM/SMGS consignment note and the associated legal documentation was a step in the right direction. However, cus-



Committed participants from East and West.

tomers in particular pressed further for the creation of a body of standard transport law for freight traffic by rail between Europe and Asia as quickly as possible. Rail is the only mode of transport which has no such standard law.

Lastly, the CIT's Secretary General, Dr Thomas Leimgruber, gave his initial thoughts on this topic. Assuming that the creation of a body of standard transport law at intergovernmental level would take a relatively long time, he proposed the creation of general terms and conditions of carriage (working title: "GTC Eurasia") grounded in international private law.

The great interest shown in this workshop demonstrates that the project sponsors, the CIT and OSJD, are moving in the right direction. Nevertheless, the workshop also inspired the staff involved in the project to continue to make committed and effective contributions.

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Results of the eleventh meeting of the CIM/SMGS Steering Group

The steering group managing the project to make the CIM and SMGS legally interoperable took some important decisions at its most recent meeting, held in Warsaw on 8 December 2008.

The steering group approved the standard rules for handling claims on behalf of the project. The sponsoring organisations' committees overseeing the project – the CIT's CIM Committee and the SMGS' II Commission – now have to approve the consequent amendments to the CIM/SMGS Consignment Note Manual and Appendix 22 SMGS. This is expected to be in March and October 2009 respectively. The rules will then be incorporated into the CIM/SMGS Consignment Note; they will also be included in the AIM and in the SMGS staff instructions. That will allow the new regulations to come into force on 1 January 2010.

In addition, the CIM/SMGS Steering Group approved the functional and legal specifications for the electronic CIM/SMGS consignment note. The specifications will be issued jointly by the CIT and OSJD at the beginning of 2009 as recommendations.

Lastly, the following activities and action points to extend the scope of the common CIM/SMGS consignment note were agreed:

Short term (2009)

- Participation of Kazakhstan, Mongolia and China in the development of the project;
- Lobbying for the recognition of the CIM/SMGS consignment note as a customs transit document in these states;
- Inclusion of further traffic axes in Appendix 1 of the CIM/SMGS Consignment Note Manual;
- Support for the planning, organisation and execution of test movements;
- Training for various railways and customs authorities (e.g. KZH/customs authorities in Kazakhstan and in China) and regional seminars (for the central Asian republics and Azerbaijan).



The Steering Group as guests of the OSJD.

Medium term (2010-13)

- Creation of a CIM/SMGS interface between Turkey and Georgia and between Iran and Turkmenistan;
- To achieve this, active participation in appropriate events.

To implement these proposals in practice, introduction of Chinese as a language on the CIM/SMGS consignment note will be necessary. After preliminary discussions in the OSJD Committee, this important issue will be given further consideration in July 2009 at the next meeting of the CIM/SMGS Steering Group.

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OTIF Seminar in Baku

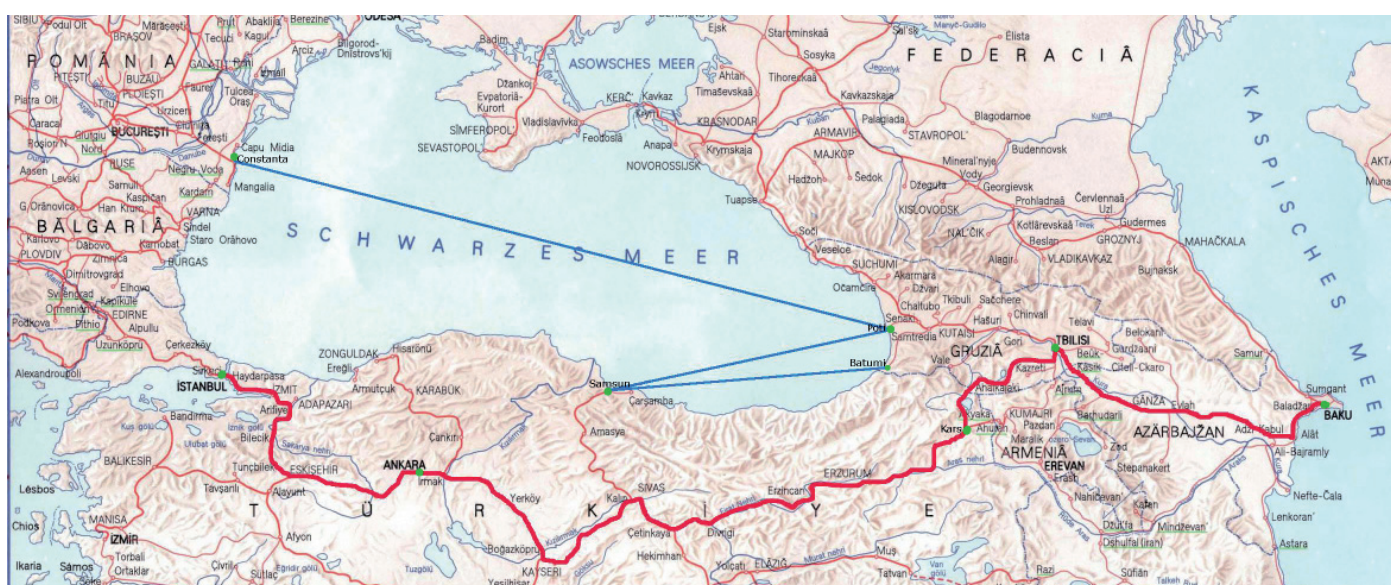
A seminar for senior staff was held in Baku on 16 & 17 December 2008 as guests of the Azerbaijani Ministry of Transport and the Railways of the Azerbaijani Republic (AZ). The seminar was entitled "Rail Conventions, OTIF membership and COTIF regimes". Over sixty senior staff took part, mainly from the Ministry of Transport and the railway administration but there was also representation from the Cabinet of Ministers, from the Ministry of Foreign Affairs, from the Ministry of Economic Development, the Ministry of Finance and from the national customs and frontier control organisations. Representatives from the Railways of Georgia (GR) were also present. The seminar was led by the Secretary General of OTIF, Stefan Schimming and the Deputy Minister of Transport of the Republic of Azerbaijan, Musa Panahov.

The CIT made several presentations, concentrating on the most relevant CIT documentation for international passenger and freight traffic.

The common CIM/SMGS consignment note and its pragmatic introduction on the various railway corridors gave rise to considerable interest. Two specific options for using the note were identified: firstly for traffic which will move over the rail link being constructed between Baku-Tbilisi-Kars (see CIT Info 2/07, page 5) and secondly for the ferry links between the Black Sea ports of Samsun in Turkey and Constanza in Romania and the Georgian ports of Poti and Batumi.

Both the seminar and the discussions were very fruitful and instructive. They could provide a starting point for Azerbaijan and Georgia to accede to OTIF and likewise a starting point for the railways of those countries to take up membership of the CIT.

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Rail ferry routes in the Black Sea.



e-RailFreight – a short update

The functional and legal specifications were updated at the end of 2008. The technical specifications were made available with effect from the same date.

Several issues still have to be considered in more detail, problems arising from some national requirements for the availability of dangerous goods data and problems arising from the electronic signature, in particular.

The next meeting of the project managers from those railway undertakings that intend to implement e-RailFreight will take place on 24 February 2009.

We will provide a further update after that meeting.

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New proposals from the European Commission to improve international railway corridors

Following from its *Action Plan for Freight Transport Logistics* of 2007, the European Commission has published a new proposed Regulation to create a European rail network for competitive freight traffic.¹ In essence, its objective is the creation of a true European transport internal market. The explanatory memorandum claims that much progress in this direction has already been made in the aviation and road transport sectors but rail transport has still some way to go. Coordination work and internal railway discussions are currently taking place within the CER.

The proposals in the Commission's green paper on the TEN-T Corridors² provide a further boost for the development of freight corridors as the main element of a future internal market for

transport. The Commission's policy guidance and the European Parliament's opinion of it are likewise being discussed within the CER.

The CIT is monitoring these developments and is supporting the CER as required on issues of transport law.

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Original: DE

- 1 Proposal for a Regulation of the European Parliament and of the Council concerning a European rail network for competitive freight of 11 December 2008, COM(2008) 852 final.
- 2 Green Paper, TEN-T: A policy review, toward a better integrated trans-European transport network at the service of the common transport policy.

Conference of freight after-sales service departments 2009



The next conference for freight after-sales service departments will take place on 28 May 2009 in the CIT offices. This event is intended for staff from after-sales service departments, from sales departments and from the legal services of CIT member undertakings.

The 2009 event will focus on how after-sales activities can be reinvigorated. With a view to continuing both to improve services to customers and to reduce costs, we shall consider options for improvements and the contributions which the CIT can make in this area.

As is now normal, the conference will also provide the opportunity to analyse problems of general interest which arise in practice. The conference will also offer the opportunity for participants to network, either to improve the working relationships between their various departments or to resolve specific outstanding issues.

Invitations to this event will be sent out at the end of February 2009. In the meantime, do not forget to block off Thursday, 28 May 2009 in your diaries.

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Original: FR

Use of the Infrastructure

High level meeting on the Eur GTC

Two points in the *European General Terms and Conditions of use of rail infrastructure (Eur GTC)* still remain unresolved:

- the financial consequences arising from the cancellation or limitation of allocated train paths
- the liability for delay and disruption of operations

A meeting held on 16 December 2008 between CIT and RNE technical working groups succeeded in bringing the positions of the two organisations closer together. The conclusions of that meeting were incorporated in a position paper which acted as the supporting document for a high level meeting held on 16 January 2009. The high level meeting took place in the CER offices in Brussels. Present were: on behalf of the CIT, the Chairman and Secretary General; on behalf of the RNE, Messrs Vansteenkiste (President), Kroll (Secretary General) and Ducoing (Leader of the RNE Legal Matters Working Group); on behalf of the EIM, Messrs Robson (Secretary General) and Wolff (Head Legal Advisor) and on behalf of the UIC, Madame Hénuset (Chairman of the UIC Legal Group). The meeting was chaired by Dr Ludewig (Executive Director of the CER) aided by Madame Brinckman-Salzedo (CER Legal Affairs Advisor).

The talks were constructive. They focussed on eliminating misunderstandings and clarifying positions. The following points were made or clarified:

- The EurGTC are general terms and conditions, from which there can be contractual derogations in individual cases.
- The allocation of a suitable alternative train path can be an acceptable substitute if a train path is cancelled, provided that there is no significant difference in performance and that the charge for the new train path is not higher than the charge agreed for the original path.
- The CIT is (only) looking for recourse for compensation which railway undertakings have to pay because of statutory obligations (e.g. CIV, CIM, EC Regulation 1371/2007, etc.) or because of other generally recognised regulations. The same rights are offered to the infrastructure manager (although that is not covered by the CUI). There is also to be mutual agreement not to take action to recover some pecuniary losses resulting from delays and disruption of operations.

RNE wanted further time to consider the issues and to consult its members. Both sides were nevertheless convinced that agreement was both possible and necessary. A further high-level meeting will take place on 20 March 2009.

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Events with CIT participation

Date	Event	Location	CIT contact
18/19 February	CER Customs Challenges Meeting	Turin	Nathalie Greinus
24 February	e-RailFreight Steering Group and Project Managers' Meeting	Paris	Henri Trolliet
24 February	Joint Conference "Impact of Globalisation on Transport, Logistics and Trade: The UNECE Work"	Geneva	Erik Evtimov
25/26 February	UIC Passenger Messages Management Group	Paris	Max Krieg
4-6 March	JERID Conference: "Railway Cargo Transports between Asia and Europe"	Prague	Erik Evtimov
9/10 March	Stakeholders' Conference on the Future of the Transport	Brussels	Rainer Feise
11 March	UIC Pricing/Commercial Issues and Distribution and Systems Study Groups	Paris	Max Krieg
11/12 March	UIC's Expert Group on the transport of dangerous goods	Interlaken	Max Krieg
16/17 March	OSCE/UNECE Workshop "Customs Issues"	Astana (KZ)	Erik Evtimov
19/20 March	UNECE Working Party on Intermodal Transport and Logistics (WP.24)	Geneva	Erik Evtimov
20 March	CER High level meeting "Eur GTC for use of infrastructure"	Brussels	Thomas Leimgruber
23-27 March	RID/ADR Joint Meeting	Geneva	Max Krieg
24/25 March	COLPOFER "Fraud-Ticket Forgery" Working Group	Vienna	Max Krieg
21 April	CER Support Group TAP-TSI	Paris	Max Krieg
27-29 April	UNECE/ECO Workshop "Transcontinental Corridors"	Tehran	Thomas Leimgruber
30 April	UIC Freight Steering Committee	Paris	Henri Trolliet

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