

## **Legal consequences of the entry into force of COTIF 1999 if not ratified by all States in due time**

### **1. International law**

#### **1.1 General**

- 1.1.1 COTIF 1980 does not provide for the possibility of amending its institutional provisions by means of the simplified procedure by majority decision of the Member States, but a more or less classical procedure with ratification, acceptance and approval of General Assembly decisions for amendments by all Member States. The 1999 revision undertaken by the 5<sup>th</sup> General Assembly in Vilnius was therefore carried out ensuring legal continuity on the basis of Article 20 of COTIF 1980. Article 4 of the 1999 Vilnius Protocol concerning the entry into force refers specifically to this Article.
- 1.1.2 In order to speed up the entry into force of the new version of COTIF as much as possible, the decades long practice of determining the date of entry into force by an special conference on the entry into force (1933, 1952, 1960, 1970 Conventions), was not used, and automatic entry into force after a relatively short period was provided for, i.e. the first day of the third month following the month in which the Provisional Depositary notifies the Member States of the deposition of the instrument with which the conditions of Article 20 § 2 of COTIF 1980 have been fulfilled.
- 1.1.3 According to Article 20 of COTIF 1980<sup>1</sup>, a single legal consequence is provided for in the Convention itself in the event that not all States have ratified, accepted or approved the decisions for amendment in due time before entry into force. In the interest of ensuring legal unity, application of the CIV and CIM Uniform Rules is suspended in respect of traffic with and between those Member States which, one month before the date fixed for such entry into force, have not yet deposited their instruments of ratification, acceptance or approval. Such suspension does not apply to Member States which notify the Central Office in accordance with Article 20 § 3, paragraph 2 of COTIF 1980 that, without having deposited their instruments of ratification, acceptance or approval, they will apply the amendments decided upon by the General Assembly.
- 1.1.4 In contrast, no particular legal consequence is provided for questions of an institutional nature. In particular, in contrast to CIM 1970 for example, COTIF 1980 does not prescribe that entry into force of the new Convention, or more precisely the new version of the Convention, brings with it the revocation of the old texts for the Contracting States which have not ratified, accepted or approved it in due time. As it would be counter to the common interest, COTIF 1980 does not provide for the

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1 Hereafter, COTIF 1980 means the 1990 Protocol version of COTIF 1980.

possibility of such States being excluded, as in the case, for example, in accordance with Article 94 paragraph b of the 1944 Chicago Convention. According to Article 34 § 6 of COTIF 1999, the General Assembly may specify, at the time of adoption of a modification, that it is such that any Member State which will have made a declaration pursuant to § 2 or § 3 and which will not have approved the modification within the period of eighteen months running from its entry into force will cease, on the expiration of this period, to be a Member State of the Organisation. However, this provision did not yet exist at the time of the decisions in Vilnius.

- 1.1.5 States which have not ratified, accepted or approved the 1999 version in due time (or which have not acceded to the 1999 Vilnius Protocol<sup>2</sup>) **therefore remain Members of OTIF**. The general rules of international law apply. These include in particular the principle expressed in Article 34 of the Vienna Convention on the Law of Treaties, according to which a Treaty, in this case the 1999 Vilnius Protocol, does not create either obligations or rights for a third State without its consent. In the sense of this principle, States which have not ratified, accepted or approved the 1999 Vilnius Protocol are third States in relation to the 1999 Vilnius Protocol.
- 1.1.6 Moreover, the principle of Article 30 of the Vienna Convention on the Law of Treaties also applies, according to which between a State party to both treaties and a State party to only one of the treaties, i.e. in this case COTIF 1980, the treaty to which both States are parties governs their mutual rights and obligations. However, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty, when the parties to the later treaty do not include all the parties to the earlier one.
- 1.1.7 In exercising the rights and obligations according to COTIF 1980, the parties to the treaty must observe the general principle under international law of utmost good faith (*bona fides*). In addition, they must take into account the "pre-effect" of their signature. A signature obliges a State to refrain from acts which would defeat the object and purpose of a treaty (Article 18 of the Vienna Convention on the Law of Treaties). For contracting parties to COTIF 1980 only, this means that they must behave in such a way that the contracting parties of COTIF 1999 are not prevented from applying the provisions of the latter in full.

## 1.2 General Assembly

- 1.2.1 Under the conditions referred to above, all current Member States of OTIF which remain Members of this intergovernmental Organisation may not only take part in the next General Assembly, but may also exercise their rights, in particular their right to vote, provided they have not lost such rights for other reasons, e.g. outstanding financial contributions.
- 1.2.2 However, in the specific case in point, the question of the extent to which States which have not ratified, accepted or approved the 1999 Vilnius Protocol can take part in a vote can be difficult to answer and the right to take part in a vote can be denied. This would for example be the case for decision on the conditions of accession to COTIF for a regional economic integration organisation, since Article 38 of COTIF

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2 This special case concerns the Ukraine, which had already submitted its application for accession to COTIF 1980 before the 5th General Assembly in 1997, but whose accession had not yet occurred in 1999 and which therefore had first to accede to the 1999 Vilnius Protocol in accordance with its Article 3 § 3.

1999 is not valid for such States. This would also be the case for decisions on fixing the transitional contribution in accordance with Article 6 § 7 of the 1999 Protocol. Here too, it could be argued that States which have not ratified this text should not have the right to a say in decisions based on these provisions.

### 1.3 Committees

1.3.1 In principle, what has been said above also applies to the exercising of rights and obligations in other organs of OTIF, such as the Administrative Committee or other Committees which already exist on the basis of COTIF 1980, such as the Revision Committee.

1.3.2 Of course the question must be judged in a differentiated way, to the extent that it is a matter of

1.3.2.1 the Administrative Committee, which is a representative organ comprised according to COTIF 1980 of 12 Members and according to COTIF 1999 of a third of the Member States, and

1.3.2.2 the Revision Committee and the RID Committee of Experts, which are comprised of all Member States and which can legislate for the Member States.

1.3.3 For all Committees, the question arises as to how far, in view of the new situation, they are a **single** organ or, if need be, two different organs. In this respect, according to the principles under international law of the relationship between States which are only party to the 1999 version of COTIF, COTIF 1999 would apply, and in the relationship between States which are party to COTIF 1999 and those which are party to COTIF 1980, COTIF 1980 would still apply.

1.3.4 For the **Administrative Committee**, COTIF 1999 gives rise essentially to the following changes as compared with COTIF 1980:

- number of Members
- election of deputy Members
- quorum and majority required
- no permanent seat for Switzerland
- cycle of meetings
- effects of amendments on the funding system
- election of the Chairman

1.3.5 A situation assuming the acceptance of the existence of different organs would not be compatible with the basic concept behind the revision ensuring legal continuity on the basis of Article 20 of COTIF 1980, nor would it be manageable from a practical point of view<sup>3</sup>.

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3 The following circumstances may serve as a further argument for the need for a single organ in which States which are not party to COTIF 1999 can be represented: for COTIF 1999 to enter into force, acceptance by 27 States is sufficient, but with the current status of Members in accordance with COTIF 1999, the General Assembly would have to appoint 14 Members and 14 Deputy Members, and moreover, two or even three Member States would be excluded from membership on the Committee on the basis of Article 15 § 4.

- 1.3.6 Thus only a pragmatic solution based on the principle of *bona fides* and on the pre-effect of adoption of the 1999 Protocol by the 5<sup>th</sup> General Assembly can be considered. This solution would have to come from the Administrative Committee as a **single** organ consisting of one third of the Member States and which would have to be mandated to take into account in its decisions, particularly on financial issues, the interests of the Member States which have not (yet) ratified, accepted or approved the 1999 Vilnius Protocol, in accordance with the principles under international law which have been referred to. If the General Assembly takes such a decision unanimously, insuperable difficulties can probably be avoided to a large extent on the basis of the Estoppel principle under international law.
- 1.3.7 With regard to the Revision Committee and the RID Committee of Experts, other problems arise in addition to the question of whether they are single organs or not (see paragraph 1.3.3): this is because these Committees can legislate for the Member States, and this legislation then becomes binding upon the Member States, even if they voted against it or have lodged an objection against it. Provisions such as these are exceptional rules under international law, which must in any case be interpreted restrictively.
- 1.3.8 If the **Revision Committee** undertakes any developments in the law, such developments will not just be in respect of transport law itself, but also amendments to institutional provisions using the simplified procedure. For example, the Auditor wishes paragraph 5 of the Additional Mandate for the Auditing of Accounts to be amended. According to COTIF 1999, this provision is replaced by Article 27 § 6 of COTIF. Firstly, the question arises as to whether there are two different "Revision Committee" organs, one in accordance with COTIF 1980 and one in accordance with COTIF 1999, each with different competencies, or whether there is a single "Revision Committee" organ in which the contracting parties of COTIF 1980 decide on the one hand on amending the Additional Mandate and the contracting parties to COTIF 1999 decide on the other hand on amending Article 27 § 6. This question cannot be answered unambiguously using the general principles of international law. However, it would have to be resolved in the sense of the principles set out in 1.3.6. In so doing, one would have to assume that States which have not ratified the 1999 Vilnius Protocol can at most have the right to vote to the extent that these are provisions which it has already been possible to amend on the basis of the enabling power in accordance with COTIF 1980.
- 1.3.9 These considerations are valid *mutatis mutandis* for the **RID Committee of Experts**. To the extent that COTIF 1999 has accorded the RID Committee of Experts, for example, more wide-ranging powers in connection with the restructuring of RID than was previously the case under COTIF 1980, it cannot be assumed that such powers are also available to the Member States of OTIF which have not ratified, accepted or approved the 1999 Vilnius Protocol. This certainly applies to the extent that it is a matter of amendments to Appendix C of COTIF 1999.
- 1.3.10 With regard to amendments to the "technical" Annex of RID, it could perhaps be argued that even States which have in fact signed the 1999 Vilnius Protocol, but which have not ratified, accepted or approved it, may take part in decisions on developing the law contained in this Annex. However, the problem also exists of the different date of entry into force of such decisions, which as a rule are taken on the basis of UN recommendations: Article 21 of COTIF 1980 prescribes a period of twelve months, whereas Article 35 of COTIF 1999 prescribes a period of six months.

This amendment in Article 35 § 3 of COTIF 1999 was provided in the interest of harmonizing the provisions on the carriage of dangerous goods applicable to the railways and to road transport. It enables future decisions concerning RID and decisions concerning ADR to enter into force at the same time. This is of great significance for the industry.

- 1.3.11 The question of the quorum required and the majorities for future decisions of the Committee of Experts on amending the technical Annex to RID and hence the question of the validity of these decisions cannot therefore be answered unambiguously.
- 1.3.12 Binding statements in respect of all the questions referred to are *in abstracto* **not possible**, and could only be made in a specific case by the competent courts or administrative authorities of each of the Member States concerned.

#### **1.4. The European Community's right to vote**

- 1.4.1 The European Community can exercise the rights accorded to its Members on the basis of the Convention, provided they concern matters which come within the competence of regional organisations. To the extent that individual Member States of the Community have not yet ratified, accepted or approved the 1999 Vilnius Protocol and thus do not have the right to vote in respect of individual decisions, the Community may not exercise such rights either.
- 1.4.2 It is more difficult to answer the question as to whether the Community may, in cases where such States could be accorded the right to vote, exercise this right for them, even though they have not ratified, accepted or approved the 1999 Vilnius Protocol, although Article 38 of COTIF does not apply to such States, and to what extent, if necessary, the other contracting parties would have to recognize the transferral of these rights to the European Community. Here too, it is not possible to provide an unambiguous answer on the basis of the general principles applicable under international law. However, the principle of *bona fides* and the pre-effect of signature could serve as an argument for adopting a right of representation such as this.

## **2. Transport law**

- 2.1 As already mentioned in 1.1.3 above, according to Article 20 of COTIF 1980, a single legal consequence is laid down in the Convention itself in the event that not all States have ratified, accepted or approved the decisions for amendments in due time before they enter into force. In the interest of ensuring legal continuity, application of the CIV and CIM Uniform Rules is suspended in respect of traffic with and between those Member States which, one month before the date fixed for such entry into force, have not yet deposited their instruments of ratification, acceptance or approval or have not made a declaration in accordance with Article 20 § 3 paragraph 2 of COTIF 1980, although these States remain Member States of OTIF.
- 2.2.1 However, Article 1 § 2 of CIM 1999 provides the possibility of applying the 1999 CIM UR to international carriage by rail when the place of taking over of the goods for carriage and the place designated for delivery are situated in two different States, of which only *one* is a Member State (in the sense of a contracting party to the 1999 CIM UR), provided the parties to the contract of carriage so agree. This makes it possible also to apply the 1999 CIM UR to traffic between States which have

ratified, accepted or approved the 1999 Vilnius Protocol and those States which have not done so, by allowing the choice of law. Choice of law such as this means legal unity can be ensured.

- 2.2.2 For contracts on the international carriage of passengers by rail, the legal situation is different: application of both the CIM UR and the CIV UR is suspended in accordance with Article 20 of COTIF 1980. According to Article 1 § 1 of the 1999 CIV UR, these Uniform Provisions apply to every contract of carriage of passengers by rail for reward or free of charge, when the place of departure and the place of destination are situated in two different Member States. Application of the CIV UR on the basis of an agreement between the parties to the contract of carriage is not foreseen in the 1999 CIV UR in contrast to the 1999 CIM UR. Thus neither the 1980 CIV UR nor the 1999 CIV UR would be valid as statute law. However, they could be applied as a law of contract on the basis of the international private law of each of these States.

### **3. The law on the carriage of dangerous goods**

- 3.1 In the OTIF Secretariat's view, suspension of the 1980 CIM Uniform Rules also means suspension of Annex I, i.e. of RID, as RID is indeed published separately, but constitutes the rules for carrying out Article 4 (d) and Article 5 § 1 (a) of the 1980 CIM UR. Its application therefore depends on the applicability of these UR.
- 3.2 Suspension of the application of the 1980 CIM UR and hence of RID gives rise to various other questions which cannot be resolved or cannot be resolved unambiguously. Firstly, a legal basis for the carriage of dangerous goods other than the suspended RID has to be found for Member States which have not ratified, accepted or approved the 1999 Protocol in due time.
- 3.3 For the EC Member States, the RID Framework Directive applies in any case, so that in essence, the provisions of RID are binding upon these States.
- 3.4 The extent to which there is a suitable legal basis for Member States of OTIF, which are not Member States of the EC, to apply the provisions of RID to the carriage of dangerous goods by rail in international traffic would have to be judged in accordance with their respective national law. It is recommended to make particular reference to this legal situation at the meetings of the RID Committee of Experts and to emphasise the need to undertake an appropriate examination of the situation under national law.
- 3.5 Moreover, the question arises as to what extent such States must be taken into account in decisions to amend the technical Annex to RID for the quorum or for the conditions pertaining to majorities or to what extent they may influence the outcome through their vote (see comments under 1.3, particularly 1.3.9).
- 3.6 However, the contractual agreement to apply the 1999 CIM UR as statutory law for international carriage by rail does not lead to the application of RID, Annex C to COTIF 1999. Unlike RID under COTIF 1980, RID under COTIF 1999 is an independent Annex C to COTIF 1999, whose provisions are of the nature of public law and are not subject to the arrangements of the parties, but in the States which have not ratified, accepted or approved COTIF 1999, do not enter into force either.

3.7 However, it can be assumed that the rules of RID (which version?) reflect the current state of science and technology, so that if a participant in the carriage of dangerous goods does not observe them, it would probably have to lead to the assumption of gross breach of the duty of care, i.e. gross negligence.

3.8 See also the comments in 1.3.9.

## **4. Wagon law**

4.1 In the Secretariat's view, suspension of the application of the 1980 CIM Uniform Rules also means suspension of Annex II, i.e. RIP. This means that for these States, application of the basis under international law which has hitherto applied to the international approval of P wagons is also suspended (Article 2 of RIP: "To be accepted for international traffic, wagons shall be registered ... and..."). The extent to which a suitable legal basis exists, e.g. agreements between rail transport undertakings, i.e. agreements at non-State level, for using such wagons in traffic in and between the States concerned, would have to be judged in accordance with national law or Community law.

4.2 The 1938 version of the Convention on Technical Unity in the Rail Sector, signed in Berne on 21 October 1882, is only rescinded once the Annexes adopted by the Committee of Technical Experts in accordance with Article 8 § 3 enter into force in all the contracting States to this Convention.

4.3 Equally, the APTU and ATMF Uniform Rules, as well as the technical standards and uniform technical provisions contained in their Annexes, only take precedence over the technical provisions of the Regulations governing the reciprocal use of carriages and brake vans in international traffic (RIC) and of the Regulations concerning the reciprocal use of wagons in international traffic (RIV) in the contracting States once the Annexes adopted by the Committee of Technical Experts in accordance with Article 8 § 3 have entered into force. RIC and RIV are still valid as a law of contract, but only for the participating rail transport undertakings and only for as long as they maintain them and EU law permits them.