

Case C-500/20**Request for a preliminary ruling****Date lodged:**

6 October 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

6 August 2020

Applicant and respondent in the appeal on a point of law:

Lokomotion Gesellschaft für Schienentraktion mbH

Defendant and appellant in the appeal on a point of law:

ÖBB-Infrastruktur Aktiengesellschaft

In the case of the applicant, Lokomotion Gesellschaft für Schienentraktion mbH, ... Munich, Germany ... versus the defendant, ÖBB-Infrastruktur Aktiengesellschaft, ... Vienna ..., for the amount of EUR 639,110 plus interest and costs, in the appeal proceedings brought by the defendant against the order of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), acting in its capacity as the Court of Appeal, of 29 July 2019 ..., by which the partial judgment of the Handelsgericht Wien (Commercial Court, Vienna, Austria) of 1 April 2019 ... was set aside further to an appeal by the applicant, the Oberster Gerichtshof (Supreme Court, Austria) ... made the following

O R D E R

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

1. Is the Court of Justice of the European Union competent to interpret the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI; Appendix E to the Convention concerning International Carriage by Rail [COTIF])?

2. If the first question is answered in the affirmative:

Is Article 8(1)(b) CUI to be interpreted in such a way that the liability of the manager for loss of or damage to property as codified therein also includes the costs incurred by the carrier as a result of having to lease locomotives to replace his existing locomotives due to damage caused to them?

3. If the first question is answered in the affirmative and the second question in the negative:

Are Articles 4 and 19(1) CUI to be interpreted to the effect that the parties to the contract may effectively assume greater liability by means of a blanket reference to national law, if this means that, in derogation from strict liability in accordance with CUI, liability is conditional upon fault, even though the extent of liability is greater?

II. ... [Stay of proceedings]

G r o u n d s:

1. **A. Facts**

2. The applicant is a private railway firm with its registered office in Germany. It provides its customers, in particular, with locomotives for [Or. 3] the purpose of unaccompanied combined transport and other types of transport.
3. The defendant is an Austrian railway infrastructure firm, which operates, among other things, the rail infrastructure in the area around Kufstein railway station in Austria.
4. In December 2014, the parties in dispute concluded a contract on the use of the defendant's rail infrastructure for international transport, in accordance with which the applicant has the right to use the rail infrastructure made available by the defendant in return for a fee and in accordance with the relevant train paths agreement. That contract includes the defendant's General Terms and Conditions of Business relating to the Infrastructure Use Contract ('the GTCs').
5. The first paragraph in point 20 in those GTCs under the heading 'Liability' stipulates the following:

'The contractual partners shall accept liability in accordance with the statutory provisions and the provisions of international law, particularly those in the Allgemeines Bürgerliches Gesetzbuch (General Civil Code of Austria; ABGB), the Unternehmensgesetzbuch (Company Code; UGB), the Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (Austrian Law on railway and motor vehicle third-party liability; EKHG) and the CUI, unless these GTCs contain provisions to the contrary.'

6. Point 34 of the GTCs contains the agreement that the contract is subject to Austrian law to the exclusion of the referral rules of the Bundesgesetz über das

internationale Privatrecht (Austrian Federal Law on conflict of laws; IPRG) and the United Nations Convention on Contracts for the International Sale of Goods.

7. On 15 July 2015, a train consisting of six locomotives belonging to the applicant derailed in Kufstein station, causing damage to two of the applicant's locomotives. The damaged locomotives were unfit for use for the duration of the repair work, which meant that the applicant had to lease two [Or. 4] locomotives to replace them. The applicant thereby incurred costs.
8. **B. Arguments of the parties**
9. The **applicant** is claiming from the defendant, in so far as relevant in the appeal proceedings before the Oberster Gerichtshof (Supreme Court), EUR 629,110 (plus interest and costs) for the costs of leasing the replacement locomotives as a result of the accident. It claims that the accident was caused by a (specified) shortcoming in the rail infrastructure provided by the defendant. The defendant unlawfully and culpably breached its duties of proper manufacture, inspection, service, maintenance and repair of the rails as codified in the provisions of railway law. The costs of leasing the replacement locomotives are to be regarded as loss of or damage to property as referred to in Article 8(1)(b) CUI.
10. The **defendant** objects to the extent that it believes that the rail infrastructure was not defective. The accident was attributable to a loose coupling hook on the derailed locomotives that was already under excessive strain before derailment, and that the applicant is at fault. The defendant claims that mere pecuniary loss has been suffered, which is not eligible for compensation in accordance with the applicable legal provisions of the CUI.
11. **C. Proceedings to date**
12. The **Court of First Instance** dismissed the form of order sought by the applicant for EUR 629,110, plus interest and costs, by partial judgment. It held the legal opinion that the applicable Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI), as a sole liability system, in accordance with Article 19(1) therein, would displace all other national liability rules. The court stated that the definition of 'loss of or damage to property' in Article 8(1)(b) CUI is limited to the [Or. 5] destruction of or damage to moveable or immovable property. The lease costs claimed for are, however, mere pecuniary losses, which are not covered by Article 8(1)(b) or Article 8(1)(c) CUI and are therefore not eligible for compensation. Point 20 of the GTCs does not constitute any agreement in accordance with Article 8(4) CUI that would give rise to liability on the part of the defendant in accordance with national rules.
13. The **Court of Appeal** set aside the partial judgment by the Court of First Instance and ordered it to reach a new decision after additional proceedings. It held the view that the term 'loss of or damage to property' in the provision on liability in Article 8(1)(b) CUI could be understood to have a broad meaning and would also

cover ‘secondary loss of or damage to property’ such as the leasing costs being claimed here.

14. The Oberster Gerichtshof (Supreme Court) must decide on an appeal brought by the defendant against the decision by the Court of Appeal to set aside the judgment.
15. The Oberster Gerichtshof (Supreme Court) has ordered that the proceedings of the appeal on a point of law be stayed and the questions of EU law material to the decision in the case be referred to the Court of Justice of the European Union.
16. **D. Applicable international law**

The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 contains seven appendices, which form integral parts of the Convention, including the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI; Appendix E concerning International Carriage by Rail [**Or. 6**] (COTIF)). The provisions of the CUI that are relevant to the present case read as follows:

‘Article 4 – Mandatory law

Unless provided otherwise in these Uniform Rules, any stipulation which, directly or indirectly, would derogate from these Uniform Rules, shall be null and void. The nullity of such a stipulation shall not involve the nullity of other provisions of the contract. Nevertheless, the parties to the contract may assume a liability greater and obligations more burdensome than those provided for in these Uniform Rules or fix a maximum amount of compensation for loss of or damage to property.

...

Article 8 – Liability of the manager

Section 1 The manager shall be liable

a) for bodily loss or damage (death, injury or any other physical or mental harm),

b) for loss of or damage to property (destruction of, or damage to, movable or immovable property),

c) for pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules,

caused to the carrier or to his auxiliaries during the use of the infrastructure and having its origin in the infrastructure.

...

Section 4 The parties to the contract may agree whether and to what extent the manager shall be liable for the loss or damage caused to the carrier by delay or disruption to his operations.

...

Article 9 – Liability of the carrier

...

Article 19 – Other actions

Section 1 In all cases where these Uniform Rules shall apply, any action in respect of liability, on whatever grounds, may be brought against the manager or against the carrier [Or. 7] only subject to the conditions and limitations laid down in these Uniform Rules.

...'

17. E. National law

18. Paragraph 1293 et seq. ABGB codify the liability for compensation for losses on the basis of fault of the person who caused the loss or damage. In contractual relationships, as in the present case, the liable party is required to prove that it is not at fault with regard to non-compliance with its contractual obligations (Paragraph 1298 ABGB). The liable party must be responsible for the fault of its employees (Paragraph 1313a ABGB). Subject to the (as-yet un-established) condition of fault being attributable to the defendant, the lease costs being claimed for the replacement locomotives are eligible for compensation in accordance with national law.

19. F. Grounds for the questions referred

20. 1. Question 1:

21. In accordance with Article 1 of the Agreement of 3 June 1999 between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, in the version as amended by the Vilnius Protocol, the European Union acceded to that Convention under the conditions stated in the Agreement in accordance with Article 38 of the Convention (OJ 2013 L 51, p. 8).

22. That Agreement was approved in accordance with Article 1 of Council Decision of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International [Or. 8] Carriage by Rail on the Accession of the European Union to the Convention

concerning International Carriage by Rail (COTIF) of 9 May 1980, in the version as amended by the Vilnius Protocol of 3 June 1999 (OJ 2013 L 51, p. 1).

23. In accordance with Annex I (Declaration by the European Union concerning the exercise of competence) to this Council Decision, the European Union shares competence in the rail sector with the Member States of the Union pursuant to Articles 90 and 91, together with Article 100(1), and Articles 171 and 172 of the Treaty on the Functioning of the European Union (TFEU). Under Union law, the Union has acquired exclusive competence in matters of rail transport where the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, in the version as amended by the Vilnius Protocol of 3 June 1999 ('the Convention') or legal instruments adopted pursuant to it may affect or alter the scope of these existing Union rules. For subject matters governed by the Convention in relation to which the Union has exclusive competence, Member States have no competence. Where Union rules exist but are not affected by the Convention or legal instruments adopted pursuant to it, the Union shares competence on matters in relation to the Convention with Member States (OJ 2013 L 51, p. 3).
24. It therefore involves a mixed Convention, whereby the Declaration by the [Or. 9] European Union does not state with any absolute clarity the areas of COTIF in which the Union has exclusive competence and those in which it shares competence with the Member States.
25. Commentary in the literature has described the competence of the Court of Justice of the European Union for references for a preliminary ruling on mixed conventions as unclear It seems likely in this specific case that the Court has comprehensive competence, because the Union, at least according to its own declaration, is, in principle, competent in all areas of the Convention; there is only a lack of clarity with regard to the extent of exclusive competence. Nevertheless, in view of the doubt expressed in the literature, it is not entirely clear whether the Court of Justice of the European Union is actually competent in the present case. To this extent nothing can be inferred from its decision in the case C-261/15, *Demey*, since, in that case, although the Court of Justice interpreted the CIV (Appendix A to COTIF), its application was directed by Regulation (EC) No 1371/2007, so that there was no doubt as to the existence of a legal act under EU law and therefore the act of an institution as referred to in Article 267 TFEU. The same is not true in relation to the CUI.
26. 2. Question 2:
27. The leasing costs for the replacement locomotives leased as a result of damage to locomotives do not, by themselves, constitute 'loss of or damage to property' that exists in the 'destruction of, or damage to, movable or immovable property' (Article 8(1)(b) CUI). [Or. 10] However, these costs are so closely related to the damage caused to the applicant's locomotives that they could be regarded as 'secondary loss of or damage to property', as in the view of the Court of Appeal.

It is therefore unclear whether the leasing costs claimed for are eligible for compensation in accordance with the cited provision.

28. 3. Question 3:
29. Should the Court of Justice deem the leasing costs being claimed for as not covered by Article 8(1)(b) CUI, the third question arises. If it is answered in the affirmative, the liability for fault in accordance with ABGB will need to be examined. If it is answered in the negative, the claim is not justified. It is therefore of decisive importance whether
30. (a) the blanket reference to a national body of laws can be understood at all as constituting a derogating stipulation as referred to in Article 4 CUI, and
31. (b) if this body of laws is stricter than this Convention in relation to grounds for liability (due to the requirement of fault in the present case), but provides for further claims if the existing extent of liability applies, this could actually be regarded in this case as ‘assuming greater liability’ in the sense of Article 4 CUI.
32. In the view of the referring court, the second of these questions could well only be answered in the affirmative if, when assessing the ‘assumption of greater liability’, reference were not made to the body of laws as such, but rather the outcome of its application in the individual case. Article 4 CUI does not clearly indicate whether this is the case.
33. **G.** ... [national proceedings] [**Or. 11**]

Supreme Court,
Vienna, 6 August 2020

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