

Rail Transport 2020

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Published by

Law Business Research Ltd

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Fax: +44 20 7229 6910

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First published 2018

Second edition

ISBN 978-1-83862-156-8

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Rail Transport

2020

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Lexology Getting The Deal Through is delighted to publish the second edition of *Rail Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Matthew J Warren of Sidley Austin LLP, for his continued assistance with this volume.



London

August 2019

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This article was first published in September 2019

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Global overview

Matthew J Warren

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From the very outset, railways have been a global phenomenon. When the Liverpool and Manchester Railway, the world's first intercity rail service, premiered in 1830, construction had already started across the Atlantic on the United States' first railway, the Baltimore and Ohio Railroad. As detailed by railway historian Christian Wolmar in *Blood, Iron and Gold*, within a decade of the Liverpool and Manchester Railway's successful debut, railways were spreading across Europe to nations such as France, Belgium and Italy. By the 1840s the new technology was being introduced in Asia and South America, and was well on its way to revolutionising transport around the globe. This rapid expansion is not surprising. While for centuries (and indeed millennia), waterways provided the only avenues for low-cost, high-volume transport, the advent of the iron road opened up new opportunities for transporting people and goods across virtually any terrain.

But as this unique new technology was adopted around the world, the burgeoning rail industries in different nations often took divergent paths. Geography, political circumstances and economic needs have led to significantly different approaches in the structure of the industry and the laws that govern it. Many of these distinctions endure to the present day.

Nearly two centuries after railways were established internationally, they remain a key part of the global transport network. The chapters in this volume illustrate the significant jurisdictional differences in the laws regulating the rail transport industry. But all jurisdictions face some of the same issues related to technology and economics, which permits some observations about the legal frameworks governing the industry and what the future may hold.

The first observation that the reader will note is that the basic structure of the rail industry and the regulations governing it varies significantly from jurisdiction to jurisdiction. Systems dominated by privately run, vertically integrated railways (such as in the United States and Canada) have starkly different rules for licensing and economic regulation than systems where infrastructure management and rail operations are conducted by different entities (such as those in Europe). And both types of systems are themselves quite different from those where a single state entity has responsibility for conducting rail operations and managing infrastructure.

In general, rail legal systems fall into one of the following basic models: vertically integrated railways; separated infrastructure and operating railways; and centralised state operations. Each of these models has distinct approaches to licensing and to economic regulation, but there are significant commonalities in how most jurisdictions approach safety regulation.

Vertically integrated railways

The rail systems of Canada and the United States feature vertically integrated railways, in which the same entity owns rail infrastructure and operates over that infrastructure. In general, US and Canadian railways are privately owned and focus on freight operations. (Passenger rail receives public support in both Canada and the United States, through Amtrak in the US and VIA Rail in Canada.)

Canada and the United States do not currently provide substantial government financial support to freight railways; instead, railways are expected to recover the funds necessary to fully fund their operations through the rates they charge to rail customers. This is no small matter: railways have intensive infrastructure needs, flowing from the need to construct and maintain track over every mile of the transport route. This distinguishes rail transport from other modes, such as motor carriers (which can take advantage of publicly available roads), and air and water transport (which can traverse the seas and the skies between ports and terminals). The high infrastructure costs inherent in rail transport thus require a revenue stream that both covers the incremental operating costs of running individual trains and provides sufficient additional funds to support that infrastructure.

Railways' need for adequate revenue to support both operations and infrastructure has often been at odds with political pressure for railways to charge lower rates or to maintain unprofitable routes deemed to be in the public interest. Both the United States and Canada have undergone significant changes to their legal regimes in an effort to strike the right balance. In the United States, the most significant reforms were made in the late 1970s and early 1980s in response to serious financial difficulties in the railway industry, including multiple bankruptcies. In a series of legislation culminating in the Staggers Rail Act of 1980, railways were given general freedom to price their services without government approval, the ability to more easily abandon unprofitable lines and the option to transfer unprofitable passenger service to the government-supported passenger provider Amtrak. Shippers retained the ability to challenge the quality of a railway's services or the level of rates in certain circumstances, but it was generally recognised that railways had the right to set rates at a level sufficient to support their infrastructure costs. The result of these successful reforms was the financial recovery of the US freight rail system, which continues to flourish today.

Canada's regulatory system also underwent significant changes in recent decades, reflected in legislation such as the National Transportation Act of 1987 and the Canada Transportation Act of 1996, and in the 1995 privatisation of the Canadian National Railway. While Canadian and US practitioners can identify myriad differences in the details of the two regulatory systems, from a wider perspective there are many parallels: each system features large privately owned freight railways that each control their own infrastructure (supplemented by a number of short-line carriers); each country generally gives railways the freedom to price their services as they deem appropriate, but provides a mechanism for shippers to challenge rates that they believe to be unreasonable (through final offer arbitration in Canada and Surface Transportation Board rate complaints in the United States); each system provides mechanisms for shippers to challenge the quality of service they receive; and each country has separate state-supported national passenger railways.

In both nations, freight railways are expected to operate largely without public support and are permitted to charge rates allowing them

to recover the costs of infrastructure. Further, the regulatory system has rejected 'open access' regimes requiring railways to grant network access to other operators in all circumstances. In part, this may be because of arguments that open access could drive railway rates below a level that would require them to adequately support their infrastructure without public subsidy.

Separated infrastructure and operating companies

A second type of rail regulatory regime (the 'separated model') is more common in Europe. In this model, an entity is charged with maintaining infrastructure and providing access to that infrastructure to rail operators. Operators are given licences to operate over the tracks maintained by the central infrastructure entity. In some jurisdictions, the infrastructure entity is entirely separate from operating entities. Examples of this arrangement include Network Rail in the United Kingdom and ProRail in the Netherlands. Other jurisdictions have hybrid models, where the infrastructure entity is part of a holding company that also controls operating entities. For example, in Germany, separate subsidiaries of Deutsche Bahn AG manage infrastructure and operations. Distinctions also arise among jurisdictions that have different mixes of operating entities. In some countries the market continues to be dominated by a single operating entity (often the historic state-owned incumbent), while in others market shares are more evenly distributed among several operating competitors.

As described in the European country chapters, to some degree these separated models have been implemented to comply with European Union rail laws. A series of EU railway packages have been enacted over the past two decades to support the ultimate goal of a single European railway area. In the interest of creating a level marketplace for operators to compete across borders, successive EU railway packages have required members to separate infrastructure and operating entities; to permit open access to rail operators; and to eliminate state aid that could distort rail competition. Some level of government support of the rail industry remains common, particularly support of the infrastructure entity.

As discussed above, in vertically integrated systems the focus of economic regulation is on the rates charged by integrated railways to rail customers. In separated regimes, by contrast, the focus is on the terms of network access and the charges payable by passenger and freight operators to infrastructure managers for network access. There is relatively little direct regulation limiting the rates charged by rail operators to freight shippers, although some jurisdictions limit fare increases for passengers.

Nationalised control

The third model, which has been tried historically in many jurisdictions and persists in some today, is nationalised control of both the rail system and rail operations. The general trend has been towards privatisation of nationalised railways, although different countries are at different stages of that process. Japan, for example, has privatised all but three of its railway companies, and it has plans to privatise the remaining companies in the future. India, by contrast, continues to have a nationalised system through Indian Railways, but it is exploring opportunities for private sector participation. Mexico is a good example of a country that has made substantial progress towards privatising its system; however, the government continues to maintain control over rail infrastructure, and private rail entities conduct their operations pursuant to concessions that eventually will expire.

Future trends

As the twenty-first century unfolds, the railway industry will face new challenges and opportunities, and the legal frameworks governing the industry will have to adjust to meet these new realities.

One critical issue in the coming years will be how best to structure regulation to allow for smoother cross-border operations. Eliminating technical and legal obstacles to operating trains across national borders is essential to maximise the efficiencies of rail transport. One of the key successes of the US system was the centralisation of rail regulation in the national government, so that railways could comply with national standards for rail equipment and safety rules rather than facing different regimes from state to state. Agreeing on equipment and safety standards across national borders is certainly more challenging than it was for the United States to do so internally, but efforts to streamline international rail transport are critical to enhancing its usefulness and sustainability. In particular, the European Union's progress in developing unified interoperability standards is a key trend to watch.

Even where rail lines do not cross borders, rail technologies increasingly do. For example, proposals are under way in multiple countries to use Japanese Shinkansen technology to develop high-speed train routes. China's Belt and Road Initiative is developing major rail infrastructure projects in a number of countries. Indeed, the markets for locomotives, rolling stock, and the increasingly sophisticated signalling and communications technologies that underlie rail operations are all increasingly global. Consequently, it will be particularly important for manufacturers to keep abreast of developing equipment and safety standards in different jurisdictions.

One final trend that may soon have to be addressed by all jurisdictions is the promise of autonomous train operations. While autonomous vehicle technology may be more prominent in the news and may ultimately have a greater impact on transport worldwide, autonomous train technology is also on the horizon. In fact, trains operating on fixed rails in relatively controlled environments are likely to face fewer technological barriers than vehicles operating on public roads. Indeed, a mining company in Australia recently debuted what appears to be the world's first autonomous heavy freight rail operation. Perhaps this could be a harbinger of the future, just as the Liverpool and Manchester Railway was in 1830.

Despite significant jurisdictional differences, international understanding and cooperation is key for the rail transport industry: from the physical movement of freight or passengers across country lines, to the marketing of rail technology equipment and the capital funding for cross-border investments. It is our hope that this guide will both assist legal practitioners in the industry and provide a starting point for businesses thinking about ways of 'getting the deal through' in the field of rail transport.

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