Tom Winsor, Partner
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British Rail Franchising: Experience in Choppy Seas

ECMT – Paris – 12 January 2006
White & Case

- Global law firm, headquartered in New York
- 1900 lawyers in 38 offices in 25 countries
- Largest European network of any law firm; significant London practice
- Major transport, infrastructure and finance practices
- Attractive because of reputation, global reach and freedom to build practice based on experience as Rail Regulator and International Rail Regulator:
  - economics
  - corporate finance & business admin
  - asset stewardship & management
  - law
  - politics
  - dealings with Government, Parliament, the civil service and European institutions
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Mumbai
Shanghai
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Tokyo
Ankara Subway
Representation the Turkish Government in connection with the financing, construction and operation of a subway system for Ankara
Turkey

Perpignon-Figueras
Representation of mandated lead arrangers in the financing of the Perpignon-Figuras high-speed rail link
Spain/France

US$42.2 billion - Network Rail
Decision on 2004-09 income of Network Rail for operation, maintenance and renewal of the national rail network
UK

Ankara Metro
Representation of the Government of Turkey in connection with the financing, construction and operation on a BOT basis of the Ankara metro system (US$520 million)
Turkey

Berlin-Prague-Vienna Connection Project
Representation of the financial advisors and the Czech Railways in restructuring the financing for the high speed Berlin-Prague-Vienna route
Europe

Ferrocariles Nacionales de Mexico
Representation of Morgan Stanley in connection with the provision of US$500m of senior debt bank financing for the US$1.3bn privatisation of the Northeastern railway system
Mexico

São Paulo Line 4 Project
Representation of the IFC in connection with the São Paulo Line 4 Mass Transit Project, a proposed new subway line in São Paulo with a total project of US$2billion
Mexico

Arlanda Airport Connection
Representation of the Swedish Government in connection with the financing, construction and operation of a rail connection from Arlanda airport
Sweden

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Florida High Speed Rail
Representation of the consortium composed in a US$6 billion PPP with the Florida for the high speed rail transportation system

Regulatory reform
Structural reform of the regulatory, contractual and financial regime for freight and passenger services in Great Britain

Polish State Railway Loan
Representation of the Polish State Railway in connection with a loan from the EBRD

Jerusalem Light Railway
Representation of the Israeli Government in connection with the Jerusalem light railway BOT project

Vienna, Ostrava and Warsaw Corridor
Representation of Czech Railways, in the negotiation of the US$850 million financing of the high-speed railway corridor, linking Vienna, Ostrava and Warsaw

Tel Aviv Metro
Representation of the Ministry of Finance and the Tel Aviv Municipality in the construction and financing of the Tel Aviv Metro

Slovak Rail
Representation of the arranger of a SK 6.1 billion syndicated financing for Slovak Railways for infrastructure improvement and the development of part of a new corridor project

JFK Airport Light Rail Bid
Representation of a consortium in the preparation and submission of bid for a light rail system from Jamaica, New York to John F. Kennedy International Airport
ATAC (Rome Metro)
Representation of the lenders in a lease-to-service contract for rolling stock for the Rome Metro

Capacity allocation
Consensual and compulsory access to networks and stations for passenger and freight services

HBOS
Representation of the collateral support provider in connection with a US$145 million lease financing of rail cars

Metropolitan Transit Authority (New York)
Representation of lender and collateral support provider in a US$295 million lease financing of rail transportation equipment

MTR
Representation of MTR Corporation as lessee in a US$226 million lease-to-service contract financing of passenger rolling stock

SNCF
Representation of the lender, collateral support provider and LC issuer in a US$2 billion lease financing of rail passenger information and ticketing equipment

Network code
Reform of the industry-wide network code for timetabling, network and vehicle change, local accountability and changes to access rights

SNCB
Representation of the equity payment undertaker and guarantor in connection with a US$230.3 million lease financing of railroad transportation assets
Kowloon Canton Railway Corporation
Representation of the equity investor in connection with a US$246 million lease-to-service contract transaction for electric railcars, locomotives and passenger coaches

OBB Lease
Representation of the equity support provider in connection with a US$27 million lease financing of railroad transportation assets

SNCF
Representation of the equity payment undertaking in connection with a US$122 million lease financing of transportation equipment

Osterreichische Bundesbahnen
Representation of the equity defeasance party in a US$146.9 million lease financing of railcars in Austria

Metropolitan Transit Authority (City of New York)
Representation of the MTA in connection with a US$295 million lease financing of rail transportation equipment

Czech Railways Tilt Trains
Representation of ČKD Holding, in the financing of the first Pendolinos tilt trains

City of Cologne
Representation of the equity payment undertaking in connection with the lease financings of rail cars in Germany (2002).

Competition
Major cases in the enforcement of domestic competition law in cases of alleged monopoly abuse and anti-competitive behaviour
Arbitration

Major arbitral appeals under network code for freight and passenger services in Great Britain

ČKD Vagonka, a.s.
Representing ČKD Vagonka, a Czech wagon producer, in the review of a supply agreement with a Finnish railway company and the evaluation of sanctions from a breach of contract

Russian Loss of Goods
Representation of a private Swedish company re the liability of a Russian railroad for damages from the loss of goods

Swedish Rail Tunnel
Serving as arbitrator in a dispute between a Swedish company and a Swedish government agency re failure to complete a railroad tunnel project

City of Dresden
Representation of the lender and debt payment undertaker in a lease financing of rail transportation equipment

RATP
Representation of the equity support provider in connection with a US$595.4 million lease financing of transportation equipment in France (2000)

Rolling stock acceptance
Major reform to the regime for the vehicle and route acceptance of new rolling stock for the British railway network

Santa Clara Valley
Representation of the lenders, in a US$203 million lease financing of rail transportation equipment
Credentials

- Rail Regulator and International Rail Regulator, Great Britain 1999-2004
- Senior member of group of nine economic regulators of the UK (railways, energy, telecommunications, broadcasting, postal services, water, competition + Scotland and N Ireland)
- Senior member of the convention of European rail regulators
- Thirteen years in the UK railway industry – before that in energy and infrastructure generally
- From 5 July 2004, partner in White & Case, London
- Now practicing in transport, infrastructure and regulation in UK, Europe and in other countries
Jurisdiction of British Rail Regulator

- Issue and enforcement of operating licences
  - register of condition, capacity and capability of assets + controls on disposal of land
  - sound and competent stewardship of network
  - independent reporters to check sufficiency + efficiency of activities
  - fair dealings with dependent persons
- Establishing and reviewing structure and levels of charges for use of infrastructure – setting the financial framework, including how much money infrastructure provider will receive for network OMR & E
- Control of the allocation of capacity of track, stations and depots
- Enforcement of competition law
- Certain functions as appeal tribunal – cases of timetabling, network & vehicle change and establishment, change & abolition of mandatory technical standards, veto overrides
- BUT franchising done by central government (formerly through agent called Strategic Rail Authority, now the Ministry of Transport)
Independence of Rail Regulator

- Statutory officer under Railways Act 1993
- Appointed by the Secretary of State for Transport for five years
- Can only be removed from office on grounds of incapacity or misbehaviour
- Operates according to criteria (statutory duties) set down in Railways Act 1993 – non-political and require Regulator to take a long-term view of the railway
- Avoids arbitrary decisions according to short-term considerations
- Secretary of State cannot give orders to the Regulator
- Single-person Rail Regulator now replaced (from July 2004) with a seven-member board (part-time chairman, full-time chief executive + five non-executive directors) – follows all the other economic regulators – but jurisdiction and independence mainly undiminished
Themes

- Expectations of franchising of passenger services in 1994
- High degrees of prescription in contracts
- Faults in the foundations of the franchising system
- Political intolerance
- Need for realism

Broader brush strokes than my colleagues
Context

- Privatisation of British Rail not an unmitigated disaster
- Agendas of different forces, political and pseudo-political
- Media who love trouble on the railways, especially policy punch-ups
- Major successes in:
  - passenger traffic
  - freight traffic
  - rolling stock replacement
  - infrastructure investment
  - generally putting right the accumulated problems of the years of nationalisation
BUT …

- When governments decide on industry restructuring, corporatisation, privatisation, competitive tendering etc they must:
  - be clear about what they want to achieve
  - be honest about what can be achieved
  - grant the necessary resources – in time, expertise and money
  - establish sound & sustainable relationships
  - respect and facilitate the roles of the public and private sector organisations involved

- This did not happen in the case of Great Britain
Expectations & assumptions

- Declining railway
- No appreciable new capacity (except CTRL)
- Competent and efficient network provider
- Empowered, efficient passenger train operators
- Declining need for public subsidy
  - franchise bids accepted at some ludicrous prices
  - no proper appreciation of network asset condition
- On-rail competition to thrive
Politicians would not let go

- Two Governments – very different philosophies
  - Conservative Government
    - 1992-97
    - restructure & privatise at breakneck speed
    - many flaws in the matrix as a result – see later
    - convinced on-rail competition would work
  - Labour Government
    - 1997-2009 (at least)
    - opposed rail privatisation
    - lacked the will to reverse it
    - strong inclination towards high degrees of control
    - failed to work with the established matrix & how it had been improved
Essentials of success

Sound, sustainable framework of regulatory, economic and legal rights and obligations; so—

- Stability
- Predictability
- Sound incentives
- Sound, clear and sustainable risk allocation
- Protections from abuse of monopoly power and unwarranted political intervention
- Fair processes and fair treatment
- Clarity of responsibilities
Matrix flaws

- Restructure and franchise in haste, repent at leisure
- Major flaws in matrix of:
  - financial regime – access charges: led to two major reforms (Oct 2000 and Dec 2003)
  - track-train interface design: required complete rewrite of access contracts and network code (2000-2004)
  - franchises: the most restrictive contract imaginable – stifled most innovative flair TOCs might have had; now little more than complex management contracts
Results of these flaws

- Paralysing incompetence of Railtrack
- Monopoly abuse on a grand scale
  - attitude that network access a privilege, not a right
  - neglect of core assets, concentrating on big projects; doing them all badly
  - hostility to customers
- TOCs uncertain, unempowered, unprotected
- Hatfield crash 17 Oct 2000: led to massive disruption and financial pain for franchisees
- Government bail-outs mainly because of severity of network problem, lack of empowerment, interface design flaws
- Firestorm of pressure and unwarranted intervention from several sources
Interface relations ...
Franchising - success

- Successful in the face of these major external and internal shocks
- Government takes its share of the responsibility
- Review and reform – a perpetual cycle?
- Major improvements now being seen:
  - track quality
  - efficiency
  - cost control
  - performance
  - interface
  - virtual integration
GB railway industry – from storm clouds …
… to bright new dawn
The British lion should not be ashamed
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