Organisation intergouvernementale pour les transports internationaux ferroviaires

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COTIF 1999

Explanatory Report

Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to the Convention)

version of 1.1.2011

Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI)

Explanatory Report [11]

General Points

1. In its analysis of the consequences of the Directive 91/440/EEC of 29 July 1991, the Central Office drew attention to the fact that the separation of infrastructure management from the provision of transport services would result in new legal relationships and new types of contracts. In such a case, the rail transport undertaking are a client and contractual partner of the infrastructure manager, whereas the passengers, freight consignors and keepers of private wagons are not in a direct contractual relationship with the infrastructure managers, but only with the rail transport undertakings as carriers or users of wagons (circular letter of 22.1.1993, No. 9).

2. In the list of questions concerning the revision of COTIF 1980 (circular letter of 3.1.1994), the Central Office posed the question, amongst others, of whether the carrier is to be liable for damages caused by the infrastructure and whether action for recourse between the carrier and the infrastructure manager is to be regulated in the Uniform Rules or whether this question should be regulated by the parties to the contract in accordance with the national law.

3. In their responses, almost all the Member States and all the international organisations and associations questioned (with the exception of Morocco and the International Rail Transport Committee - CIT) declared themselves to be in favour, in principle, of a liability on the part of the carrier towards the client with regard to damages caused by a defective infrastructure or by its operation, but with the carrier being granted a right of recourse against the infrastructure manager. On the other hand, the opinion of the large majority of the Member States was that such actions for recourse could not be regulated in the Uniform Rules as devised within the framework of OTIF, but should be regulated by the national law or should constitute the subject-matter of an agreement between the parties to the contract (summary of responses, 1994 Bulletin, pp, 124, 126).

4. In the positions expressed by the Member States and by the international organisations and associations concerning the Central Office draft for new CIM Uniform Rules of 5 May 1995, in the course of the debates of the 3rd General Assembly (14 - 16.11.1995) and of the third session of the Revision Committee (11 - 15.12.1995, Report, p. 2) and in the course of the experts § discussions, the view emerged that a uniform international regulation of relationships between the infrastructure manager and the carrier would be both useful and desirable.

5. On the occasion of the 4th session of the Revision Committee (25 - 29.3.1996), the carrier/client/infrastructure manager relationship was regulated in the CIM Uniform

11 The articles, paragraphs, etc. which are not specifically designated are those of the CUI Uniform Rules; unless otherwise evident from the context, the references to the reports on sessions not specifically identified relate to the sessions of the Revision Committee.

Rules to the effect that the infrastructure manager is declared *ex lege* an auxiliary of the carrier, the latter being consequently liable towards his clients for damages caused by a defect of the infrastructure. Clients can only enforce rights against the infrastructure manager within the conditions and limitations of the CIM Uniform Rules (Article 41, § 2 CIM).

6. The draft Uniform Rules concerning the contract of use of the railway infrastructure, including the explanatory report, drafted by the Central Office, was sent to the Member States and to the interested international organisations and associations by the circular letter of 1 July 1996 (draft published in the 1996 Bulletin, pp 181-187, explanatory report in the 1996 Bulletin, pp. 187-195). The draft was adopted on 1st reading in the 9th session of the Revision Committee (9 - 13.12.1996) and on the 2nd reading, in the 17th session (2nd meeting, 5.5.1998).

7. The Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI Uniform Rules) adopted by the Revision Committee are based on the fundamental idea that the parties to the contract be granted maximum freedom in the constitution of their contractual relationships, but with liability having to be regulated in a uniform and mandatory manner. This avoids, in particular, the problems which could result from nations having different systems of liability.

8. With the exception of Article 6, § 1, first and second sentences (see No. 3 of the remarks relating to Article 6), the CUI Uniform Rules regulate only the contractual relationships between the infrastructure manager and the carrier. They are intended to guarantee that this regulation is not circumvented by other competing actions (*ex delicto* or *quasi ex delicto*). Thus, competing actions, on whatever grounds, can only be brought within the conditions and limitations provided for in the CUI Uniform Rules (Article 19). In order to prevent these rules being circumvented, the Uniform Rules also include actions to be brought against auxiliaries for whom the infrastructure manager or the carrier is liable (cf. also Article 41, § 2 CIM).

9. On the other hand, the CUI Uniform Rules do not regulate other legal relationship such as, for example, the relationships between the infrastructure manager and his auxiliaries or those between the carrier and his auxiliaries. Moreover, nor do they regulate the relationship between the infrastructure manager or the carrier and third parties. This means, for example, that any actions on the part of the infrastructure manager against the contractual partners of the carrier (e.g., the consignor who has caused damage in respect of both the carrier and the infrastructure manager as a result of defective loading) are not regulated by the CUI Uniform Rules. These legal relationships are subject to the national law applicable in each individual case, in accordance with international private law.

10. Article 21 constitutes an exception to the principles set out in Nos. 7 and 8. Likewise, actions brought by auxiliaries of the infrastructure manager or of the carrier can only be brought against the other party to the contract of use within the conditions and limits of the CUI Uniform Rules. This “parallelism” is intended to prevent the liability on the part of the carrier or the infrastructure manager being changed through actions brought by auxiliaries.

11. In its 16th session, the Revision Committee decided, in principle, to introduce into the Basic Convention the identical provisions of the Appendices, in the form of common provisions (Report, pp. 7, 12 and 15). Consequently, the provisions concerning the applicable national law and unit of account are included in Articles 8 and 9 of COTIF (Report on the 17th session, 2nd meeting, p. 11/12 and Report on the 19th session, pp. 13-17).

12. In consideration of the place of jurisdiction as provided for in Article 46 of the CIM Uniform Rules and in Article 57 of the CIV Uniform Rules, as well the regulation provided for in Article 24, there remains the possibility that courts in different Member States are competent in respect of actions against the infrastructure manager. However, a definition of the national law, such as that provided for in Article 8 of COTIF, will probably not result in insurmountable legal difficulties. § 3 of this article includes a general remit, which means that the international private law of the State in which the person entitled asserts his rights is included in the remit. In view of the principle of "proper law" and of the unity of decision, which are valid in virtually all legal systems, and the fact that the basis of liability is regulated in a uniform manner, the scenario in which different rules would be applied by the courts is unlikely.

13. With regard to data protection (see the provisions set out in the Central Office draft of 1.7.1996), the Revision Committee considered that a regulation at international level was not necessary (see Report on the 9th session, p. 14).

14. The Revision Committee withdrew the provision, included in the Central Office draft, concerning the maximum amount of compensatory damages in the case of loss or damage of property. The parties to the contract consequently remain free to conclude agreements which share the risk between them (Report on the 9th session, p. 36).

15. With two amendments (see No. 3 of the remarks relating to Article 6 and No. 2 of the remarks relating to Article 8), the 5th General Assembly (26.5 - 3.6.1999) unanimously, with one abstention, adopted the texts decided by the Revision Committee.

16. In view of the development of European Union legislation in relation to the use of railway infrastructure, it was essential to adapt the CUI UR to ensure that they are compatible with EU law. At its 24th session (Berne, 23-25.6.2010), the Revision Committee adopted the necessary amendments. They entered into force on 1 December 2010. See the additional parts of the Explanatory Report below.

In particular

Title I

General Points

Article 1
Scope

1. § 1 does not limit the scope of application to contracts *for reward*. Contracts of use of railway infrastructure are not always necessarily contracts for reward. It is conceivable, in principle, that a railway infrastructure which is managed by, for example, a state authority, should be at the disposal of different carriers without a direct commercial consideration.

2. The CUI Uniform Rules are applicable only insofar as the purpose of the contract of use is international carriage by rail within the meaning of the CIM Uniform Rules and the CIV Uniform Rules. The Member States are nevertheless free to provide the same legal system for internal traffic.

3. The final sentence of § 1 states that the CUI Uniform Rules are also applicable to a railway infrastructuremanaged by a State or by governmental institutions. In the case of a "state" infrastructure, the contract of use is not necessarily a contract under civil law; it is also possible for it to be contract under public law. The latter, however, are also subject to the CUI Uniform Rules, particularly with regard to liability.

4. § 2 emphasises the fact that these Uniform Rules are concerned only with regulating the relationships of the parties to the contract with one another. As already stated in Nos. 7 to 9 of the General Points, a "parallelism" of competing actions against the auxiliaries of the parties to the contract is intended to exclude any possibility of circumventing the application of the CUI Uniform Rules. As one of the most important examples of the legal relationships which remain subject to the national law, § 2, letter a) states that the liability of employers or principals of auxiliaries towards the latter is not regulated by the CUI Uniform Rules, but by the national law.

5. See also the additional parts of the Explanatory Report below.

Article 2
Declaration concerning liability in case of bodily loss or damage

As in Article 2 of the CIV Uniform Rules, Article 2 provides that each State may declare non-application of the provisions concerning liability in case of death and injury when the accident has occurred on its territory and the victims are nationals of that State or persons whose usual residence is in that State (Report on the 17th session, 2nd meeting, p. 3; cf. also Article 3 CIV 1980). In keeping with Article 42, § 1, second sentence of COTIF, the declaration can be made at any time. Article 42, § 1, first sentence of COTIF provides for the possibility of also declaring at any time that a specified Appendix to the Convention will not be applied in its entirety.

Article 3
Definitions

1. These definitions serve to specify the material scope of application and to facilitate preparation of the texts.

2. The Revision Committee decided intentionally not to refer to Annex I, Part A of the (EEC) Commission Regulation No. 2598/70 of 18 December 1970 concerning the definition of the content of the different positions of the registration plans of Appendix I of the (EEC) Council Regulation No. 1108/70 of 4 June 1970 or to reinclude in letter a) the text of the definition of the term "railway infrastructure", as contained in the Directive 91/440/EEC. A more general definition is more appropriate since it allows account to be taken, as applicable, of any development in the subject and it prevents a European Community (EC) regulation from becoming law in all the Member States of OTIF through the CUI Uniform Rules, a law which would have to be amended if the regulation were amended (see Report on the 9th session, p. 6; Report on the 17th session, 2nd meeting, p. 4).

3. In French, there is no expression which is equivalent to the German legal term "Leute" ["people"], which includes both the servants and the other persons whose services one makes use of for accomplishment of one's tasks. The Central Office draft of 1 July 1996, in the interest of editorial simplification, consequently used the term "auxiliaries" (German: "Hilfspersonen") and defined the term (letter d) in accordance with the wording adopted for Article 40 of the CIM Uniform Rules in the 4th session of the Revision Committee (25 - 29.3.1996).

4. This term related only to persons in a dependent situation, in respect of whom the principal has a right of supervision and a right to issue instructions. According to the notion of the Central Office draft, any independent sub-contractors and suppliers were not to be included in this definition (Report on the 9th session, p. 26). In its 17th session, however, the Revision Committee enlarged this notion so that the term "auxiliaries" (German: "Hilfspersonen") encompasses the physical or moral persons to whom one has recourse for rendering of the service, irrespective of whether these auxiliaries are commercially dependent on the infrastructure manager or on the carrier (Report on the 17th session, 2nd meeting, p. 7/8).

5. A principal example which can be cited, as a third party within the meaning of the CUI Uniform Rules (letter e), are the contractual partners of the carrier, i.e., the consignor and the consignee (see also in No. 9 of the General Points). Actions brought by parties to the contract of carriage against the infrastructure manager are nevertheless subject to the conditions and limitations of the CIM Uniform Rules and the CIV Uniform Rule since, in future, the infrastructure manager is *declared ex lege* to be an auxiliary of the carrier (Article 40 CIM and Article 51 CIV).

6. In preparing all of the texts, the Revision Committee took care to avoid, as far as possible, the use of the term "person" (see Rev. Doc. 16/3 of 25.2.1998). For linguistic reasons, the Revision Committee nevertheless used this term [French: "personne"] in the French [and English] text to define the term "third party". It is evident that this term, in this context, includes moral persons.

7. The words “in which the carrier has the place of business of his principal activity”, used in letter f), correspond to the terminology of the Directive 91/440/EEC.

8. The definition in letter g) (“safety certificate”) clarifies that it is not a matter solely of the safety of vehicles, but that this certificate also relates to the internal organisation of the undertaking and to the personnel to be employed (cf. Directive 95/19/EC).

9. At its 24th session, the Revision Committee amended some of the definitions; see the additional parts of the Explanatory Report below.

Article 4
Mandatory law

1. As a rule, the CUI Uniform Rules are mandatory in nature and prevail over national law. The wording follows that of Article 5 of the CIM Uniform Rules.

2. There is contractual freedom with regard to the commercial conditions and the period of validity of the contract of use.

3. The final sentence, reincluded as it stands from Article 5 of the CIM Uniform Rules, allows the parties to the contract to extend their liability. The only provision made for limitation of liability is with regard to the maximum amount of compensation in case of loss or damages to property. A limitation of liability in case of bodily loss or damage would not be justified from the legal policy point of view.

4. See also the additional parts of the Explanatory Report below.

Title II

Contract of Use

Article 5
Contents and form

1. In the interest of legal clarity, § 1 sets out the principle according to which it is necessary to conclude a contract of use which, according to § 2, regulates the administrative, technical and financial conditions of use. The parties are, in principle, free to agree the content, particularly the scope of the use and of the respective services. The agreed result must, however, be stated in the contract.

2. § 2 intentionally refers to “financial conditions” since, in principle, it is conceivable that no direct charge for use is received (see No. 1 of the remarks relating to Article 1), but that the infrastructure manager makes the railway infrastructure available free of charge or that provision is made for other forms of benefit as “remuneration” in the private economy sense.

3. Stipulation of the form according to which the contract of use must be concluded in writing or in an equivalent form is justified in consideration of the importance of this contractual relationship and possible cases of litigation. However, non-

compliance with the stipulation regarding form as provided in § 3 does not affect the validity of the contract.

4. At its 24th session, the Revision Committee restructured this provision; see the additional parts of the Explanatory Report below.

Article 6
Special obligations of the carrier and the manager

1. The CUI Uniform Rules do not define the general obligation of the infrastructure manager to grant the carrier the use of the infrastructure in accordance with the contract concluded, since this is clear and therefore superfluous.

2. With regard to § 1, in the terms decided by the Revision Committee, it was objected that a licence should only be granted if there is a guarantee that the entire operation complies with the safety requirements (internal organisation, vehicles, personnel). It was furthermore objected that § 1 represents "an over-regulation" and that it gives the impression that as State could be obliged, contrary to its wishes, to make provision in its legislation for a specific safety certificate. At most, one could require proof of knowledge with regard to the fully safe use of the foreign infrastructure. That notwithstanding, the Revision Committee decided that, in addition to a licence, the carrier must also furnish a safety certificate, as applicable (Report on the 9th session, p. 18/19). A licence is granted irrespective of the infrastructure to be used.

3. The principle adopted by the 5th General Assembly (§ 1, first sentence), according to which the carrier must be authorised to exercise the activity of rail carrier, represents an obligation which, in general, comes within public law and which is or which is to be regulated elsewhere. Instead, in the CUI Uniform Rules, these provisions are declaratory in nature, their purpose being to remind the carrier of his obligations in this area. On the other hand, § 1, third sentence, grants the infrastructure manager a contractual right, in respect of the carrier, to require certain documents in proof.

4. The licence is not the only element of proof of capacity to exercise the activity of carrier. Suitability for the exercise of this activity can also be proved by an other means.

5. The carrier must notify the infrastructure manager, at the time of signature of the contract or in the course of its execution, of any event which is likely to affect the validity of his licence, the safety certificate or other elements of proof (§ 2).

6. Due to the possible extent of bodily loss or damages due to death or injury and loss or damages to property due to destruction or loss within the framework of the use of the railway structure, the infrastructure manager is granted the right (§ 3) to require proof of sufficient financial cover for such cases, despite the fact that, as a general rule, sufficient financial securities are necessary to obtain a rail transport undertaking concession. The infrastructure manager is at liberty to require such a proof or not. The self-insurance practised by certain railways can also be considered as an "equivalent provision" (Report on the 9th session, p. 20).

7. The introduction of similar obligations for the infrastructure manager was considered unnecessary by the majority of the Revision Committee (Report on the 9th session, p. 20). It is only with regard to the obligation to provide information (§ 4) that the infrastructure manager has the same obligations as the carrier (Report on the 17th session, 2nd meeting, p. 17/18).

Article 7 [12]
Termination of the contract

1. § 1 must be read in the light of the provisions contained in §§ 2 to 4 concerning termination of the contract without notice. [13]

2. Article 7 distinguishes between a rescission of the contract, without notice, by one of the parties to the contract, in accordance with §§ 2 and 3, and the possibility of the parties to rescind the contract without notice in accordance with § 4. In the latter case, they may agree between themselves the terms and conditions for the exercise of this right. This distinction is due to the fact that, originally, the draft text had made provision for an automatic cancellation of the contract of use if the carrier no longer has a valid licence or a valid safety certificate or if the infrastructure manager loses his right to operate the infrastructure (Report on the 9th session, pp. 21-24; Report on the 17th session, 2nd meeting, pp. 18-21).

3. § 5 regulates the consequence with regard to liability if the contract of use has been rescinded.

4. § 6 allows the parties to the contract to agree special conditions for rescinding the contract in case of delayed payment and in the case of non-compliance with the obligation of the carrier to provide notification of changes made. Furthermore, the carrier and the infrastructure manager may, by common agreement, provide for dispensations from § 5 concerning the consequences of rescission with regard to compensatory damages.

5. As a result of the decision of the 24th session of the Revision Committee to delete § 1, the comments on §§ 2 and 3 now relate to §§ 1 and 2, while §§ 4, 5 and 6 have become §§ 3, 4 and 5; see the additional parts of the Explanatory Report below.

12 Following a decision by the 24th session of the Revision Committee, the original heading “Duration of the contract” was amended.

13 As the 24th session of the Revision Committee decided to delete this paragraph, this note is only of historical significance. The rules concerning immediate rescission are now contained in §§ 1 to 3.

Title III

Liability

Article 8
Liability of the manager

1. § 1 stipulates the principle of the (strict) objective liability of the infrastructure manager. The person having suffered the damage (the carrier or his auxiliary) must prove the cause of the damage (management failure or infrastructure fault). In addition, that person must furnish proof that the damage was caused during the period of use of the infrastructure. The text adopted by the 5th General Assembly indicates even more clearly that the version adopted by the Revision Committee stipulates the principle of objective liability.

2. The text of § 1, letter b) states that liability for loss or damage to property does not include liability for (purely) pecuniary loss. An exception to these, according to § 1, letter c), is pecuniary loss resulting from damages payable by the carrier in accordance with the CIV Uniform Rules or CIM Uniform Rules. Damages suffered by means of transport are damages to property suffered directly by the carrier, even if these means of transport are not the carrier's property according to civil law, but are at the carrier's disposal by virtue of a contract in accordance with the CUV Uniform Rules (Report on the 5th General Assembly, p. 126/127).

3. Compensatory damages in case of death or injury of passengers which go beyond the damages regulated in Articles 11 and 12, particularly claims for compensatory damages for mental distress (*pretium doloris*) in accordance with Article 13, are determined by national law.

4. The parties to the contract can agree whether, and to what extent, the infrastructure manager is liable in respect of damages caused by a delay of disruption of operation (§ 4).

5. The infrastructure manager may be exonerated from the objective liability described above on the basis of the grounds for exoneration listed in § 2. The grounds for exoneration differ according to whether damages are bodily loss or damage (death, injury or any other impairment of physical or psychic integrity) or loss or damage to property (destruction of or damage to movable or immovable property). In the case of bodily loss or damage, the grounds for exoneration were constituted by analogy with the CIV Uniform Rules and, in the case of loss or damage to property by analogy with the CIM Uniform Rules, but without provision for privileged grounds for exoneration.

6. The words "in spite of having taken the care required in the particul circumstances of the case" had been introduced into the definition of "unavoidable event" at the time of the creation of the additional Convention of 1996 added to the CIV, in order to emphasise the nature of objective liability. The purpose of these words was to prevent the liability on the part of the railway in the case of death or injury of passengers for being transformed into a simple liability for fault with reversal

of the burden of proof. These words were withdrawn in the first reading, but reintroduced in the second reading (Report on the 9th session, p. 28).

7. The Revision Committee simplified the original wording of the draft, by retaining from the words “wholly or partly, to the extent” only the words “to the extent that” (Report on the 9th session, p. 28). The corresponding text of Article 26, § 2, letter b) of the CIV Uniform Rules was adapted to this new version in the 2nd reading.

8. § 3 must be read in the light of § 2, letter a), No. 2. Whereas, according to this provision, the infrastructure manager is partly liable to the extent that the accident is not a fault on the part of the person having suffered the damage, he is wholly liable if the accident is only partly due to the behaviour of a third party. He can thus be exonerated in full or not at all. This regulation was created by the additional Convention of 1996 added to the CIV and corresponds to Article 26, § 2, letter c) of the CIV Uniform Rules 1980. For linguistic and methodological reasons, this regulation will henceforth constitute the subject-matter of a separate paragraph.

9. Also examined was a proposal which sought to introduce an additional sentence (“a carrier using the same infrastructure is not considered as a third party”) into § 2, in letter a), No. 3. This proposal was withdrawn, since a comparison of this provision with Article 26, § 2, letter c) of the CIV Uniform Rules reveals that a parallel provision would not be justified (Report on the 9th session, p. 29).

10. With regard to the liability of the infrastructure manager in respect of damages caused to the carrier as a result of delay or disruption of operation (§ 4), see No. 4.

11. See also the additional parts of the Explanatory Report below.

Article 9
Liability of the carrier

1. According to this provision, the person who has suffered the damage (the infrastructure manager or his auxiliary) may, in accordance with the CUI Uniform Rules, enforce his rights for compensatory damages against the carrier, even if the damage has been caused by persons or goods carried. Any actions in tort (*ex delicto*) against persons carried or against clients responsible for goods carried are not subject to the CUI Uniform Rules (see also No. 8 of the General Points and No. 1 of the remarks relating to Article 19).

2. The grounds for exoneration have been constituted by analogy with the grounds for exoneration defined in Article 8, i.e., by analogy with the CIV Uniform Rules for bodily loss or damage (with the wording amendments mentioned in No. 7 of the remarks relating to Article 8) and by analogy with the CIM Uniform Rules for loss or damage to property, but without provision for privileged grounds for exoneration.

3. Actions for recourse by the carrier against third parties are not regulated in the CUI Uniform Rules. They are regulated either by the CIM Uniform and the CIV Uniform Rules, or by the applicable national law. Nor is direct recourse on the part of the carrier or his agents against third parties (e.g. the consignor or passengers)

regulated in the CUI Uniform Rules, this being subject instead to the CIM Uniform Rules, the CIV Uniform Rules or other provisions of the national law (see Nos. 7-9 of the General Points).

4. See also the additional parts of the Explanatory Report below.

Article 10
Concomitant causes

1. This article regulates liability when causes which are attributable to several involved parties have a concomitant effect. § 1 regulates the case in which causes which are attributable to the infrastructure manager and causes which are attributable to *one* carrier have had a concomitant effect which resulted in the damage. § 2 regulates the case in which there has been a concomitant effect between causes which are imputable to the infrastructure manager and to *several* carriers. § 3 regulates the case in which there has been only one concomitant effect between causes which are attributable to *several* carriers. Applicable to the three cases is the principle according to which pro rata liability exists only if the cause is known. In the cases of §§ 1 and 2, when the cause of the damage is not known, the party having suffered the damage (infrastructure manager, carrier) must bear his own damage, whereas in the case of § 3 the carriers involved are equally liable towards the infrastructure manager.

2. § 2 also includes in this regulation another carrier using the same infrastructure, when causes which are attributable to several carriers have contributed to the damage. In the opinion of the Central Office, an opinion shared by the Revision Committee (Report on the 9th session, p. 32), this is justified by the fact that it is necessary to take as a basis the principle that the other carrier using the infrastructure in question has himself also concluded a contract with the manager of the said infrastructure and that that contract is also subject to the CUI Uniform Rules, since only carriers in accordance with Article 3, letter c) are carriers within the meaning of this article. With regard to the basis of liability and the maximum amounts of liability, the principles of the CUI Uniform Rules are thus applicable to the two carriers involved in the damage.

3. In the case of involvement of rail transport undertakings which are not carriers within the meaning of Article 3, letter c), their relationships are regulated by the national law.

4. § 3 applies to cases in which no cause of damage is attributable to the infrastructure manager (see No. 1).

5. Only the carrier or carriers and the infrastructure manager are parties to the contract, but not their auxiliaries. Actions brought by auxiliaries against their employer or principal are subject to the national law (see No. 8 of the General Points).

Article 11
Damages in case of death

With regard to counts of loss, this provision was constituted following the example of the provision of the CIV Uniform Rules applicable in the case of death or injury of passengers. In the case of bodily loss or damage caused by the carrier or caused by the infrastructure manager, the applicable regulation is identical.

Article 12
Damages in case of personal injury

See the remarks relating to Article 11.

Article 13
Compensation for other bodily harm

Contrary to that which has been provided in the case of loss or damage to property, compensation for indirect damages, particularly for mental distress (*pretium doloris*) is not excluded in the case of bodily loss or damage; this is regulated by the national law. Although the national law determines whether and, if applicable, to what extent compensatory damages can be claimed for injury other than that provided for in Articles 11 and 12, these rights are always *substantively* limited by the conditions of liability of Articles 8 and 9. If the manager of the infrastructure or the carrier can be exonerated from their substantive liability, the national law is not able, either, to grant a right to compensation for other damages.

Article 14
Form and amount of damages in case of death and personal injury

1. This regulation, likewise, was constituted following the example of the provisions of the CIV Uniform Rules concerning the carrier's liability in the case of death or injury of passengers.

2. The amount mentioned in § 2 is not a maximum amount, as is the case for the other limitations of liability, but a *minimum* amount. If the national law does not make provision for limitation of the amount of compensatory damages, or if the maximum amount provided for by the national law exceeds the amount provided for in the CUI Uniform Rules, this provision does not apply. On the other hand, if the national law makes provision for a maximum amount which is less than the amount to be awarded in the form of capital, as provided for in unit of account, then this amount is increased in accordance with the provisions of the CUI Uniform Rules. At 175,000 units of account (see Article 9 COTIF), the amount provided for is the same as in Article 30, § 2 of the CIV Uniform Rules.

3. The Revision Committee initially rejected the possibility of a reservation by Member States in the case of involvement of their own nationals (Report on the Ninth session, p. 35). The Revision Committee returned to this question in the second reading (Report on the 17th session, 2nd meeting, p 3; see also the remarks relating to Article 2).

Article 15
Loss of right to invoke the limits of liability

This provision, included in the Central Office draft of 1 July 1996, was withdrawn on the first reading (Report on the 9th session, p. 36), then reintroduced on the 2nd reading. In the case of misrepresentation or qualified fault, it is to be possible to go beyond the maximum amounts provided for the national law (Report on the 17th session, 2nd meeting, p. 28/29).

Article 16
Conversion and interest

This provisions was constituted following the example of Article 37 of the CIM Uniform Rules and corresponds to Article 47, §§ 1 and 2 of the CIM Uniform Rules 1980, in the terms of the 1990 Protocol.

Article 17
Liability in case of nuclear accidents

The text of this article corresponds to Article 49 of the CIM Uniform Rules 1980.

Article 18
Liability for auxiliaries

For the definition of this term, see No. 3 of the remarks relating to Article 2.

Article 19
Other actions

1. This provision corresponds to Article 51 of the CIM Uniform Rules 1980 and, in its 4th session, the Revision Committee reincluded it in Article 41 of the CIM Uniform Rules. See the remarks relating to this article.

2. Any other direct actions against liable parties other than the infrastructure manager or the carrier or their auxiliaries, e.g., against the consignor who has caused damage to the infrastructure as a result of defective loading, are not subject to the CUI Uniform Rules. Consequently, they are not subject to the restrictions of Article 19. These actions are regulated by the national law (see No. 8 of the General Points).

Article 20
Agreements to settle

In order to avoid long and costly investigations into the causes of damage which would cause disruptions of operation and also to avoid litigation, the parties have the possibility of concluding agreements concerning, for example, contractual compensatory damages, sharing of liability or reciprocal waiver of enforcement of their right to compensatory damages. These agreements concern only the parties to the contract and cannot be concluded to the detriment of third parties (e.g., auxiliaries) (Report on the 9th session, pp. 38, 39).

Title IV

Actions by Auxiliaries

Article 21
Actions against the manager or against the carrier

1. The auxiliaries of the infrastructure manager do not have any contractual relationship with the carrier and there is no contractual relationship between the auxiliaries of the carrier and the infrastructure manager. That notwithstanding, the CUI Uniform Rules also regulate actions by these persons against the other party to the contract of use. The objective, again, is that auxiliaries are only permitted to bring an action for compensatory damages within the conditions and limitations provided for in the CUI Uniform Rules. On the other hand, actions by auxiliaries against their employers or principals are not regulated in the CUI Uniform Rules (see No. 8 of the General Points).

2. Article 21 regulates only actions by auxiliaries against the other party to the contract of use, but not those against third parties in the sense of the definition in Article 3, letter e).

Title V

Assertion of rights

Article 22
Conciliation procedures

1. In consideration of the particularities of the contract of use, it could be expedient to create special institutions with responsibility for conciliation procedures. Insofar as the parties to the contract of use make provision for arbitration based on this provision, such procedures must be implemented within the framework of the respective national law, unless the parties have agreed to have recourse to the court of arbitration provided for under Title V of COTIF.

2. With regard to debarment by limitation (Article 25, § 5), the effect of a conciliation procedure agreed by the parties to the contract of use is uniformly regulated at international level.

3. See also the additional parts of the Explanatory Report below.

Article 23
Recourse

This provision is modelled on Article 62 of the CIM Uniform Rules 1980 (Article 51, § 1 CIM), its purpose being to prevent divergent actions for recourse.

Article 24
Forum

1. The CUI Uniform Rules provide that the parties to the contract can agree the competent court. The courts of the Member State in which the infrastructure manager has his place of business office have subsidiary competence only.

2. The courts of the Member State in which the infrastructure manager has his place of business office are competent irrespective of whether the latter is the defendant or the plaintiff. The reason for this rather unusual regulation of the forum was the expediency of concentrating on the place of the accident any investigations of which the result could be used in several parallel procedures. The technical particularities of the infrastructure in the different Member States were also put forward as an argument (Report on the 9th session, p. 43).

Article 25
Limitation of actions

1. The customary period of limitation in connection with the carrier's liability (one year) seems too short, since litigation could be very complex.

2. The special provision of § 3 in the case of death of persons, which provides for an absolute period of limitation of five years, was taken from the CIV Uniform Rules.

3. § 4 provides for an additional period for recourse actions. This period allows waiting for the outcome of the initial procedure. This regulation corresponds to Article 20, § 5 of the Hamburg Rules.

4. With regard to § 5, see No. 2 of the remarks relating to Article 22.

5. § 6 is aligned to article 60, § 6 of the CIV Uniform Rules and to Article 48, § 5 of the CIM Uniform Rules.

Additions to the Explanatory Report

based on the decisions of the 24th session of the Revision Committee (Berne, 23-25.6.2009) and the 9th General Assembly (Berne, 9/10.9.2009)

NOTE: The general remarks and the remarks on individual provisions in this Explanatory Report contain a summary of the information in relation to the following points:

a) Background to and justification for the amendments that were submitted to the Revision Committee and adopted by it, and

b) Discussion on the provisions for the amendment of which the General Assembly is responsible in accordance with Article 33 § 2 and § 4 letter (e) of the Convention, including editorial amendments.

The information referred to in

a) has been examined and approved by the Revision Committee, together with the approved amendments and the General Assembly has noted them;

b) has been examined and approved by the General Assembly following the Revision Committee's considerations and recommendations in this respect.

General Points

1. Decisions taken by the General Assembly at its 7th and 8th sessions in support of initiatives to solve the legal and practical problems between European Community (EC) law and COTIF envisaged that in relation to Appendices to COTIF other than F and G outstanding issues should be addressed at the appropriate level in order to find practical solutions which may lead to the creation of appropriate working groups.

2. In accordance with these decisions and with an initiative by the Council "Land Transport" working group of 12 December 2007 an ad hoc working group concerning Appendix E (CUI) was established (consisting of representatives of the European Commission, the OTIF Secretariat and legal experts from European Union (EU) Member States and Switzerland, hereinafter the "CUI Group") in order first to review the respective legal regimes and identify areas of potential difficulty and then to propose practical solutions.

3. In several meetings the CUI Group identified and discussed contested areas of incompatibility between EC law and the CUI and agreed a number of suggestions for amendments to the CUI in order not only to deal with such areas but also to clarify certain parts of the CUI, which in part, caused legal difficulties between the two regimes. These amendments and clarifications concern

- the scope of application,
- the definitions of "manager", "carrier", "licence" and "safety certificate",
- the provisions on the contract of use,

- the special obligations of carriers and managers,
- liability for loss or damage caused by delay / disruption of operations and
- conciliation procedures.

4. The primary aim of the amendments suggested by the CUI Group has been to take account of developments in the legislation of the EU including those instruments which, at the time when CUI was adopted, were not yet in force, e.g. Directives 2001/14/EC, 2004/49/EC and 2004/51/EC as well as Regulation EC/1371/2007.

5. Furthermore, this Explanatory Report gives notice that international rail operations entering into the EU from non EU Member States are subject to EU law in addition to any existing obligation under COTIF. The Report is drafted so as to be taken to be "supplementary means of interpretation" as understood by Article 32 of the Vienna Convention on the Law of Treaties 1969. It is further intended to highlight those areas of legal ambiguity or uncertainty caused by the existence of two separate systems of law which have been identified to overlap in some respects and therefore gives notice to operators of the existence of EU legislative provisions.

6. When the Explanatory Report refers to EU Member States, it also applies *mutatis mutandis* to States where the Community legislation applies as a result of international agreements with the European Community.

7. The Revision Committee followed to a large extent the suggestions made by the CUI Group. The wording of the definition of "licence" was however modified in order to better match the meaning of this term in the law of the EU, and in the proposed Article 5bis (law remaining unaffected), a distinction was made between the liability provisions in Articles 8 and 9 of the CUI where only the law of the EU remains unaffected but not national law and provisions of other Articles where national law also remains unaffected (for details see the relevant particular remarks).

8. The 9th General Assembly (Berne, 9/10.9.2009) noted the results of the 24th session of the Revision Committee concerning the amendments to Appendix E (CUI) of the Convention and the Explanatory Report and approved the Explanatory Report on Articles 1, 4, 8 and 9 of CUI. It noted that these amendments are not decisions to which Article 34 of the Convention applies and instructed the Secretary General with regard to bringing these amendments into force to proceed in accordance with Article 35 of COTIF. It also authorised the Secretary General to summarise its decisions on the results of the Revision Committee in the general part of the Explanatory Report.

In particular

Title I

General Provisions

Article 1
Scope

1. According to § 1, the CUI Uniform Rules (UR) are applicable insofar as the purpose of the contract of use of railway infrastructure is international carriage by rail within the meaning of the CIV UR and the CIM UR.

   a) In this context the term “carriage” has the same meaning as in other transport law conventions, such as CMR, Warsaw and Montreal Convention, Hamburg Rules and Athens Convention.

   b) Regarding the term “international carriage within the meaning of the CIV UR and the CIM UR” see explanatory notes with regard to Article 1 CIV and Article 1 CIM.

   c) The question of whether a “national” or a “foreign” railway undertaking/carrier is using the infrastructure is irrelevant with regard to the application of CUI.

   d) CUI also applies to the use of the railway infrastructure in those States where there has been no separation of infrastructure management from the provision of transport services and hence where an integrated undertaking is working in both areas of railway operation, in so far as foreign railway undertakings are allowed access to the infrastructure in these States.

2. The expression “for the purposes of” (CIV/CIM international carriage) in § 1, makes it clear that the purpose of use is a crucial point. So it does not mean, for example, “during the performance” of international carriage by rail. Therefore, use for the purpose of preparations before the train is made ready and dispatched (before the first passenger gets into the train or the goods are loaded) and for the purpose of the work carried on once carriage has been completed (e.g. cleaning and empty returns) are also included in the scope of the contract of use as long as these actions are linked to subsequent or preceding carriage under CIV or CIM.

3. Whilst the CIV/CIM UR refer to the performance of carriage on the basis of a contract of carriage which concerns each single passenger and each single consignment of goods, the use of infrastructure usually concerns carriage of trains containing a number of passengers and consignments. Among these, there might be passengers carried under a contract according to CIV as well as other passengers to whom CIV does not apply. The same goes for a train in which there might be consignments carried under a contract pursuant to CIM as well as other consignments to which CIM does not apply.

4. When it comes to claims for indirect damages, for example, under Article 8 § 1 (c) of CUI:

   a) as regards passengers with national tickets who receive compensation from the carrier under national law, the carrier will have a right of recourse against the infrastructure manager under national law, and,

   b) as regards passengers with CIV tickets who receive compensation from the carrier under CIV, the carrier will have a right of recourse against the infrastructure manager under CUI.

5. The same approach would apply *mutatis mutandis* to claims for damage to freight.

6. There are however differing views on the scope of application of CUI to the case of direct damage. The scope of application of CUI to the case of direct damage may need further clarification in each specific case.

7. Bearing in mind that the scope of application of CUI in any case partly overlaps with that of corresponding EU law or corresponding domestic law provisions in several other Articles of CUI where a potential misunderstanding could arise with regard to such law are modified accordingly and additional information is given in the Explanatory Report.

Article 3
Definitions

1. The definition of the term “manager” in letter b) was broadened to make clear that where the law of the EU or corresponding domestic law applies, a person falling under the definition has to be aware of all respective obligations.

2. The definition of the term “carrier” in letter c) was broadened to make clear that where the law of the EU or corresponding domestic law applies, a person falling under the definition has to be aware of all licensing obligations. In particular, non-EU carriers have to note that, when contracting with infrastructure managers of EU Member States as “railway undertakings” under the law of the EU, they are subject to EU obligations, in particular licensing and safety certification requirements.

3. The modified definition of the term “licence” in letter f) better matches the meaning of this term in the law of the EU (see Directive 95/18/EC). Furthermore it is clarified that the licence needs to be issued by a State. It is also stated that for the relevant authorisation the law in force in the State of issuance is applicable. If that law is that of the EU or corresponding domestic law, the relevant conditions, in particular the requirement for licensing and safety certification, have to be met, see also the remarks on letters c) and g).

4. The wording of the definition of the term “safety certificate” in letter g) is aligned with the corresponding wording in the other modified definitions. In substance it was already clear from the wording adopted by the 5th General Assembly in

1999 that the safety certificate has to be based on the law applicable at the location of the infrastructure, including the law applicable in the EU Member State where the infrastructure is located.

Article 4
Mandatory law

In the context of this Article the term “stipulation” does not refer to any requirement laid down in any other place than in the CUI contract. It does not refer to any legal provision applicable in the EU, its Member States or any other State. As to potential conflicts of the CUI provisions concerning the contract itself, particularly with the law of the EU, see remarks on Article 5.

Title II

Contract of Use

Article 5
Contents and form

8. 1. In its modified form, § 1 refers not only to the carrier but also to other persons entitled to enter into a contract of use of the infrastructure. This takes account of the fact that according to the law of the EU not only a carrier but also an “applicant” as authorised under Article 16.1 of Directive 2001/14/EC (e.g. a public transport authority, freight forwarder, combined transport operator or a shipper), who is not at the same time a carrier, is entitled to enter into an agreement with the infrastructure manager on the use of the infrastructure.

9. 2. § 2 no longer contains a list of details which are included in a contract as a matter of a rule in order to ensure that, where such details are already regulated by the law applicable in the State where the infrastructure is located, and in particular that of an EU Member State, clauses containing those details are not reproduced. Instead it is now required to state that the contract shall contain all details which are necessary for the parties to the contract to determine comprehensively the administrative, technical and financial conditions of use such as the description of the infrastructure to be used, the period for which the contract is valid and the fees for the use. For restrictions which, with regard to various contents of the contract would be applicable under the law of the State in which the infrastructure is located, see remarks on Article 5bis.

Article 5bis
Law remaining unaffected

1. § 1 of this new provision indicates unaffected obligations based on provisions, in particular in the areas listed in § 3. These provisions are contained in the law of the EU but may also be contained in the domestic law of OTIF Member States which do not apply Community legislation. Such obligations have to be met by the parties to the contract of use of the infrastructure and are not superseded by the provisions of the CUI listed in the introduction to § 1.

2. § 2 has the same intention as § 1. However the obligations remaining unaffected by the liability provisions of the CUI listed in the introduction to § 2 are only those which have to be met in an EU Member State or in a State where the Community legislation applies as a result of international agreements with the European Community, but do not concern the domestic law in an OTIF Member State which does not apply Community legislation.

3. § 3 contains a non-exhaustive list of the areas which the obligations indicated in §§ 1 and 2 concern. In this sense,

   a) the 1st indent is important with regard to the issues addressed in Articles 5 and 7, i.e. agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers (see Directive 2001/14/EC),

   b) the 2nd and 3rd indents are important with regard to the issues in Article 6 §§ 1 and 2, i.e. licensing (see Directive 95/18/EC) and safety certification (see Directive 2004/49/EC),

   c) the 4th indent is important with regard to the issue in Article 6 § 3, i.e. insurance (see Directive 95/18/EC),

   d) the 5th and 6th indents, i.e. performance schemes, are important with regard to the issues in Articles 8 § 4 and 9 § 4 to minimise delays and disruptions and to improve the performance of the railway network and compensation in favour of customers (see Directive 2001/14/EC and Regulation EC/1371/2007), and

   e) the 7th indent is important with regard to the issue in Article 22, i.e. dispute resolution (see Directive 2001/14/EC and Article 292 of the EC Treaty).

Article 6
Special obligations of the carrier and the manager

The drafting of Article 6 § 1 has been modified very slightly. The issues in this Article for which, where the law of the EU or corresponding domestic law applies, certain legal provisions have to be observed are dealt with in the 2nd, 3rd and 4th indents of § 3 in the new Article 5bis.

Article 7
Termination of the contract

§ 1 was deleted and the heading adapted to the content of the remaining provisions. This modification takes account of the fact that where the law of the EU or corresponding domestic law applies, the duration of the agreement on the use of the infrastructure is always limited. The limit is expressed as one working timetable period or in specific cases more than one such period. This issue is also dealt with in the first indent of the new Article 5bis.

Title III

Liability

Article 8
Liability of the manager

and

Article 9
Liability of the carrier

With reference to Article 8 § 4 and Article 9 § 4 the issue of performance schemes as well as of standardised and immediate compensatory measures in favour of customers in so far as the latter are relevant in the contractual relation of the parties to the contract of use of infrastructure for which, where the law of the EU applies, certain legal provisions have to be observed, is dealt with in the fifth and sixth indents of the new Article 5bis.

Title V

Assertion of rights

Article 22
Conciliation procedures

The issue in this Article for which, where the law of the EU applies, certain legal provisions have to be observed, is dealt with in the 7th indent of the new Article 5bis.