



Organisation intergouvernementale pour les transports internationaux ferroviaires
Zwischenstaatliche Organisation für den internationalen Eisenbahnverkehr
Intergovernmental Organisation for International Carriage by Rail

**Commission de révision
Revisionsausschuss
Revision Committee**

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26TH SESSION

Partial revision of the CUI UR

Draft texts from the Secretary General
(resulting from the work of the “CUI UR” working group)

I. PREPARATORY WORK AND RESULTS OF THE “CUI UR” WORKING GROUP

1. At its 25th session (Berne, 25-26.6.2014), the Revision Committee supported setting up a working group initiated by the Secretary General to propose amendments to the CUI UR, together with the European Union and CIT, among others. Since then, a working group set up by the Secretary General to prepare the revision of the CUI UR has met four times: on 10 December 2014, 8 July 2015, 24 November 2015 and 31 May 2016¹. The main aim of its work was to clarify the scope of the CUI UR, which is interpreted differently, thus hindering application and users' security, particularly the infrastructure managers. The scope of the current CUI UR is ambiguous. They only apply to international rail transport, whereas infrastructure capacity is allocated at national level.

The problem with the current wording arises from the fact that international rail transport is defined by means of a contract of carriage. However, a train using the railway infrastructure may simultaneously be carrying passengers in both domestic and international traffic or goods carried in both domestic and international traffic. In such cases, it is difficult to make a clear distinction between the use of railway infrastructure for domestic transport and for international transport. Taking into account the international nature of the whole COTIF system and the fact that an extension of the scope of the CUI UR to domestic traffic would not be acceptable to most of the Member States, it was concluded that the CUI UR should only apply to international railway traffic.

From the legal point of view, there are no international train paths. What needed to be done was to define international railway traffic precisely.

The need for a revision was explained and the subjects to be revised were presented in a scoping note (doc. CUI 1/2 dated 09.10.2014²), which served as a basis for discussions in the “CUI UR” working group. While the OTIF Secretariat theoretically interpreted the scope of the CUI UR very broadly in the past, until recently, the CUI UR were scarcely applied or were not applied at all. The purpose of the clarified scope therefore is to ensure that the CUI UR are applied where really necessary or desirable, i.e. in international railway traffic (freight corridors, international passenger trains). At the same time, it must be made clear that the CUI UR will not apply to domestic traffic. This clarification is particularly important in the area of mutual liability of both parties to the contract of use, i.e. carriers and infrastructure managers.

2. In addition to the Member States, the European Commission and representatives of the stakeholders (CIT, EIM, RNE, CER) also took part in this work. The Secretariat was aware of the importance of the input from stakeholders' associations representing the two parties to the contract of use of railway infrastructure. They were involved from the very beginning.

As an association of carriers, the CIT emphasised the difficulties regarding practical application of the CUI UR, the difficult legal position of carriers resulting from their liability towards their customers for loss or damage caused by railway infrastructure and their limited possibilities for recourse against infrastructure managers.

European infrastructure managers recognised the need to clarify the scope, but repeatedly opposed any modification which might mean extending their liability, particularly with regard to carriers' indirect damages. In order to justify this position, they pointed out that the infrastructure manager is subject to tight regulation of prices on the basis of EU law, is unable to incorporate the operational risks in its prices and does not have any control over damages paid by carriers which they would have to compensate as pecuniary damage suffered by carriers.

¹ Reports of these sessions are available on OTIF's website <http://otif.org>, see Activities/Railway Contract Law/Working Group CUI UR

² Published on http://otif.org/en/?page_id=545

The discussions and comments from Member States and stakeholders were thorough. Prof. Freise also contributed significantly to the work with his legal expertise.

3. At the end of the 4th session, a majority of the members of the working group adhered to the principle that the scope of application should be better coordinated with CIV and CIM contracts of carriage and that it should be linked to international traffic (specifically defined for the purposes of the CUI UR) using railway infrastructure in a Member State. The scope of application of CUI thus revised should better reflect reality.

On 8 June 2016, the Secretary General communicated the text of the CUI articles to be modified resulting from the 4th session of the working group to the members of this group. The corresponding extracts from the Explanatory Report, with amendments taking into account the proposed modifications, questions and comments received from a few members after the 4th session, were sent to all members of the group on 24 July 2016.

After the last session of the working group the Secretary General also received the final positions of the associations of stakeholders.

EIM welcomed the fact that, in the final version of the Secretary General's proposal, the scope of the CUI UR remained linked to the CIV/CIM UR. For EIM this guarantees that the scope cannot be extended to include domestic carriage. EIM insisted that the same condition should apply to a carrier's pecuniary damages as applies to bodily loss or damage/loss or damage to property. In its view, a carrier's recourse should only relate to pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules during the use of the infrastructure ...” (cf. below explanations regarding Article 8).

The CIT drew attention to the fact that, in the final version of the Secretary General's proposal, the scope of the CUI UR has been narrowed if two conditions have to be met at the same time: 1. “use of railway infrastructure for the purpose of the CIV Uniform Rules and the CIM Uniform Rules” and 2. “in international railway traffic” as defined in Article 3 CUI. Moreover, in CIT's view, the element of “coordination between infrastructure managers” should not be included in the definition of the term “international railway traffic”. As far as a carrier's recourse against the infrastructure manager is concerned, according to CIT, the domestic leg prior to or following international traffic should not be excluded. In general, CIT requested that the liability regime be better balanced and pointed out that in addition to compensation under CIM and CIV UR, the carrier has to bear other pecuniary losses, such as those resulting from compensation according to Regulation (EC) No 1371/2007 on rail passengers' rights and obligations.

II. PROPOSAL FOR MODIFICATION OF THE CUI UR FOLLOWING THE RESULT OF THE WORKING GROUP

4. Modification of Article 1 – Scope

Article 1 Scope

§ 1 These Uniform Rules shall apply to any contract of use of railway infrastructure **(contract of use) in a Member State in international railway traffic** for the purposes ~~of international carriage within the meaning~~ of the CIV Uniform Rules and the CIM Uniform Rules. ~~They shall apply regardless of the place of business and the nationality of the contracting parties. These Uniform Rules shall apply even when the railway infrastructure is managed or used by States or by governmental institutions or organisations.~~

§ 2 **These Uniform Rules** ~~They shall apply~~ **irrespective** ~~regardless~~ of the place of business ~~and~~ **or** the nationality of the contracting parties ~~and~~. ~~These Uniform Rules shall apply even when the railway infrastructure is managed or used by States or by governmental institutions or organisations.~~

§ 23 Subject to Article 21, these Uniform Rules shall not apply to other legal relations, such as in particular

- a) the liability of the carrier or the manager to their servants or other persons whose services they make use of to accomplish their tasks;
- b) the liability to each other of the carrier or the manager of the one part and third parties of the other part.

Summary of the discussions and justification³:

The scope was intensively discussed at all sessions of the working group. The working group examined various solutions. The main issue was the question of whether the scope of the CUI UR should be dissociated from CIV and CIM contracts of carriage, and if so, to what extent. The reason for this was that it was actually the link between the scope of the CUI UR and *individual* contracts of carriage that had been identified as the problem that was causing the lack of clarity concerning the scope.

Once the trend concerning this dissociation had emerged, the question arose, quite logically, as to what happens in other cases of use of the railway infrastructure, i.e. those with no connection to carriage under CIV or CIM, such as when the railway infrastructure is used by empty wagons/trains for trial runs or by maintenance vehicles/trains. Once the working group had gained an overview of such cases of use of the railway infrastructure, the majority of the working group members supported the view that “non-commercial use” should not be covered by the newly defined scope. The CUI UR only apply to use of railway infrastructure by trains operated for a commercial purpose, i.e. trains operating for the purpose of carriage under the CIV/CIM legal regime. The working group recognised that, in this sense, there must be a link between the CUI UR and the CIV/CIM UR. However, there was no doubt that a load run by a train might include a non-load run, which then comes under “commercial use”, so it should still be subject to the same legal regime.

³ This justification summarises the discussion and explains the wording that was chosen. Detailed reports and all the relevant documents can be found on OTIF’s website <http://otif.org>, see Activities/Railway Contract Law/Working Group CUI UR

The key element of the revised wording of this provision proved to be the phrase “in international railway traffic”. The working group was aware that the COTIF uniform rules are intended to work together to create a unified system of regulation and not freestanding rules. It therefore checked first whether “international rail traffic”, as mentioned in Article 6 of COTIF, was clear enough for the purpose of determining the scope of the CUI UR. Various possible additional elements were also examined (international service, international train). Eventually the working group came to the conclusion that a new specific definition of this term was needed in order to take into account the fact that in practice, international traffic implies the use of several national train paths. Therefore, the CUI UR have to cover two or more successive national contracts of use that are used to carry out international traffic. Following this conclusion, a corresponding new definition has been introduced in Article 3 (see below).

Thus in terms of the draft Article 1, the following three conditions should be met in order for the CUI UR to apply:

- existence of a contract of use of railway infrastructure in a Member State
- performance of this contract in the context of international railway traffic
- carriage must be performed for the purposes of the CIV or CIM UR.

Possible improvement:

The Revision Committee might wish to make some editorial improvements to this Article. In the process of drafting new wording for § 1, part of the text from this paragraph was moved to a new § 2. A similar text (“irrespective of the domicile or the place of business and the nationality of the parties to the contract of carriage”) is contained in Article 1 § 1 CIV/CIM. Since, at the end of the work of the working group, the wording of § 1 was substantially simplified, it might be appropriate to come back to this purely editorial issue. In order to keep the wording of Article 1 of CUI consistent with Article 1 of CIV and CIM, the second sentence should remain in § 1.

5. Modification of Article 3 – Definitions

Article 3 Definitions

For the purposes of these Uniform Rules, the term

a) ...

aa) “international railway traffic” means traffic which requires the use of an international train path or several successive national train paths situated in at least two States and coordinated by the infrastructure managers concerned;

b) ...

c) “carrier” means the **natural or legal** person ~~who~~ **which** carries persons **and/or** goods ~~by rail~~ in international **railway** traffic ~~under the CIV Uniform Rules or the CIM Uniform Rules~~ and ~~who~~ **which** is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;

Summary of the discussions and justification:

New letter aa) – “international railway traffic”

Thanks to this new definition, which is specific to the purpose of the CUI UR, it was possible to keep the draft text of Article 1 resulting from the 4th session relatively simple.

The issue of the coordination of successive national train paths by the infrastructure managers as an element in defining the term “international railway traffic” was discussed at length. Although the definition is based on the legal situation that exists in the EU Member States, the need to coordinate successive national train paths is not limited to EU Member States. It is also relevant in OTIF Member States which are not members of the EU, such as Serbia or Turkey.

The discussion revealed that the coordination of successive train paths, as defined in Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area, was recognised as an important feature for the definition of the term “international railway traffic”. The arguments brought forward against it and in favour of other solutions (such as replacing coordination by “relevant information provided by the carrier” or simply “obligation to coordinate” in order to take account of situations where coordination was needed and requested, but did not take place) were rejected: firstly, information from a carrier would not be sufficient. Secondly, it could not be assumed when drafting legislation that national or EU rules (prescribing coordination) would not be complied with. If Directive 2012/34/EU were not correctly implemented in all the EU Member States, trying to correct this by revising the CUI would not be the right approach. Nevertheless, even after the last session of the working group one Member State expressed the opinion that the decisive element should be “cooperation”, rather than “coordination”.

A specific feature of the CUI UR, particularly when compared with the CIV/CIM UR, is that the CUI definitions contain not only private law elements, but also some elements taken over from public law. Although the subject matter of the CUI UR is the regulation of contracts, it is not possible to ignore the existing public law that provides the framework for these contracts, in particular the law of the EU. It is important for the Member States of the EU that the CUI UR be adapted to this public law: it was only after the entry into force (in 2010) of the necessary adaptations to the law of the EU (adopted at the 24th session of the Revision Committee in 2009) that they were in a position to withdraw their declarations not to apply the CUI UR.

Therefore, after lengthy discussions, it was considered appropriate to base the definition of the term “international railway traffic” on terms or concepts taken from the public law of the EU, such as “international train path” and coordination between infrastructure managers regarding the allocation of capacity, i.e. train paths.

Letter c) – “carrier”

Against this background, at an early stage of the work, the question arose as to whether a definition of “carrier” still makes sense. As an alternative, the term “user” was proposed and examined. The result of this discussion was as follows: as there is definitely a close connection between the CIV/CIM UR on the one hand and the CUI UR on the other, it was still considered useful to keep the term “carrier”. However, the working group was aware that this term has been defined differently for the purposes of the CUI UR than it is for the purposes of the CIV/CIM UR:

1. Only a carrier who is licensed is entitled to use the railway infrastructure. “Licence” as an element in defining the term “carrier” was discussed in the “CUI UR” working group and it was broadly confirmed that such an element is required. In contrast, a CIV/CIM carrier is not necessarily a licensed railway undertaking.

2. A substitute carrier that uses the railway infrastructure is a “carrier” in the sense of the CUI UR. In contrast, a substitute carrier is not a “carrier” in the sense of the CIV or CIM UR since there is no contractual relation between him and the passenger or consignor.

In addition, the working group aligned the wording of the definition of “carrier” with similar definitions in the legal system of COTIF (Art. 2 letter c) CUV) or in EU law (Art. 3 of Directive 2012/34/EU). The improved wording makes it clear that both legal and natural persons may be carriers.

6. Modification of Article 8 - Liability of the manager

Article 8 Liability of the manager

§ 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 **railway** infrastructure and having its origin in the **railway** infrastructure.

The manager shall also be liable for pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules and the CIM Uniform Rules when such loss has its origin in the railway infrastructure [while it is being used]⁴.

§ 2 The manager shall be relieved of this liability

- a) in case of bodily loss or damage and pecuniary loss resulting from damages payable by the carrier under the CIV Uniform Rules
 - 1. if the incident giving rise to the loss or damage has been caused by circumstances not connected with the management of the **railway** infrastructure which the manager, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent,
 - 2. to the extent that the incident giving rise to the loss or damage is due to the fault of the person suffering the loss or damage,
 - 3. if the incident giving rise to the loss or damage is due to the behaviour of a third

⁴ According to the prevailing opinion in the working group, the infrastructure manager’s liability should not be extended. The deletion of letter c) and addition of a new sentence in § 1 should only be an editorial adaptation. After an exchange with a few Member States after the last session of the working group, the OTIF Secretariat concluded that the words in brackets must be added in order to keep the extent of liability unchanged: the origin of loss or damage **during the use** of railway infrastructure is an important limiting element (also in the current version), irrespective of the fact that in case of indirect damages it is obviously the primary loss or damage (for which the carrier has a right of recourse) that must occur during the use of railway infrastructure.

party which the manager, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

- b) in case of loss of or damage to property and pecuniary loss resulting from damages payable by the carrier under the CIM Uniform Rules, when the loss or damage was caused by the fault of the carrier or by an order given by the carrier which is not attributable to the manager or by circumstances which the manager could not avoid and the consequences of which he was unable to prevent.

...

Summary of discussions and justification:

The working group adapted the wording of Article 8 § 1 CUI in order to take into account the different nature of direct damages on the one hand and indirect damages (pecuniary loss) on the other. In contrast to loss or damage according to letters a) and b), firstly, pecuniary loss does not occur during use of the infrastructure; it is suffered only afterwards, when the carrier has paid damages to its customer. Nevertheless, it must have its origin in the railway infrastructure. Secondly, pecuniary loss cannot be suffered by a carrier's auxiliaries, but only by the carrier himself. It should be kept in mind that a substitute carrier is not considered as an auxiliary of the carrier since he uses the railway infrastructure himself; he is himself a carrier in the sense of the CUI UR.

In § 2 the terminology should be harmonised ("railway infrastructure" instead of "infrastructure") to be consistent within the CUI UR and with the terminology used in Directive 2012/34/EU.

Possible improvement:

The new second sentence in Article 8 § 1 to replace existing letter c) should be further adapted and stipulate that the manager's liability for the carrier's pecuniary loss only relates to loss which has its origin in the railway infrastructure and that – as is the case in the current wording - the loss or damage giving rise to the carrier's recourse against the infrastructure manager must occur during the use of the railway infrastructure. This adaptation is necessary in order to avoid any extension of the infrastructure manager's liability. The Secretariat received input along these lines from two Member States after the last session of the working group.

7. Liability of the carrier

Article 9 Liability of the carrier

§ 1 The carrier 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),

caused to the manager or to his auxiliaries, during the use of the **railway** infrastructure, by the means of transport used or by the persons or goods carried.

...

Summary of the discussions and justification:

The working group did not call into question the asymmetry between Article 8 and 9 CUI, as far as the recourse of the carrier on the one hand and of the infrastructure manager on the other is concerned. The difference between these two provisions is justified in view of the carrier's specific situation/legal position resulting from his liability towards his customers for damage having its origin in the railway infrastructure. In the relationship between the carrier and his customers, the infrastructure manager is considered as an auxiliary of the carrier (according to Article 40 CIM and 51 CIV); within the same legal system, the carrier must therefore be granted a right of recourse against his auxiliary. There is no comparable provision in the COTIF system according to which the infrastructure manager would be liable for damage caused by the carrier. Therefore, there is no reason for symmetry between Articles 8 and 9 as far as pecuniary loss (indirect damages/recourse) is concerned and no need for a provision parallel to existing letter c) in Article 8 § 1, which should be replaced by the new sentence.

In § 1 the terminology should be harmonised ("railway infrastructure" instead of "infrastructure") to be consistent within the CUI UR and with the terminology used in Directive 2012/34/EU.

8. Editorial modifications

The title should read:

Uniform Rules concerning the Contract of Use of Railway Infrastructure in International Rail Traffic

Article 3 letters b) and g) should read:

**Article 3
Definitions**

- b) "manager" means the person who makes railway infrastructure available and who has responsibilities in accordance with the laws and prescriptions in force in the State in which the railway infrastructure is located;
- g) "safety certificate" means the document attesting, in accordance with the laws and prescriptions in force in the State in which the railway infrastructure is located, that so far as concerns the carrier,
- the internal organisation of the undertaking as well as
 - the personnel to be employed and the vehicles to be used on the railway infrastructure,

meet the requirements imposed in respect of safety in order to ensure a service without danger on that railway infrastructure.

Article 5 § 1 should read:

**Article 5
Contents and form**

§ 1 Relations between the manager and the carrier or any other person entitled to enter into such a contract under the laws and prescriptions in force in the State in which the railway infrastructure is located shall be regulated in a contract of use.

Article 5bis § 1 and 2 should read:

**Article 5bis
Law remaining unaffected**

§ 1 The provisions of Article 5 as well as those of Articles 6, 7 and 22 shall not affect the obligations which the parties to the contract of use ~~of infrastructure~~ have to meet under the laws and prescriptions in force in the State in which the railway infrastructure is located including, where appropriate, the law of the European Union.

§ 2 The provisions of Articles 8 and 9 shall not affect the obligations which the parties to the contract of use ~~of infrastructure~~ have to meet in an EU Member State or in a State where legislation of the European Union applies as a result of international agreements with the European Union.

Article 7 § 2 should read:

**Article 7
Termination of the contract**

§ 2 The carrier may rescind the contract of use forthwith when the manager loses his right to manage the railway infrastructure.

Article 10 § 3 should read:

**Article 10
Concomitant causes**

§ 3 § 1, first sentence, shall apply mutatis mutandis in case of loss or damage referred to in Article 9 if causes attributable to several carriers using the same railway infrastructure contributed to the loss or damage. If it is impossible to assess to what extent the respective causes contributed to the loss or damage, the carriers shall be liable to the manager in equal shares.

Justification:

The terminology should be harmonised within the CUI UR and with the terminology used in Directive 2012/34/EU (“contract of use” instead “contract of use of infrastructure” and “railway infrastructure” instead of “infrastructure”).

III. PROPOSAL FOR MODIFICATION OF THE EXPLANATORY REPORT

The Explanatory Report should be adapted to take account of the modifications to be adopted. The following text takes into account proposals received from the Member States relating to the Explanatory Report, which were accepted by the working group, together with the proposals for the modification of the legal text. Certain parts of the Explanatory Report result from an exchange of e-mails with a few members of the working group during the process of consultation on the final results of the work of the working group.

Title

Uniform Rules concerning the Contract of Use of **Railway** Infrastructure in International Rail Traffic

The terminology used in the title of the CUI UR and in a few provisions of the CUI UR was harmonised with the terminology used in Directive 2012/34/EU (“railway infrastructure” instead of “infrastructure”).

Article 1 Scope

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. to every contract of use of railway infrastructure in a Member State in “international railway traffic”. Article 1 § 1 has to be read and interpreted together with Article 3 letter aa) where “international railway traffic” is defined. This means that only commercial use of railway infrastructure is covered. Non-commercial use of railway infrastructure, without any relation to CIV or CIM traffic, is outside the scope of the CUI UR (see items 6 and 7). However, the express link to the CIV/CIM UR as the purpose of the contract does not mean a link with each individual CIV or CIM contract of carriage.~~

The term “international railway traffic” required a specific new definition geared towards the train paths used for such traffic (see also paragraph 1 of the comments on Article 3). This need not necessarily be an international train path (i.e. one established by agreement between two or more infrastructure managers); international traffic can also be performed on two or more successive national train paths located in at least two States. Both cases can be referred to as international use of railway infrastructure.

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 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.~~

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

e) The CUI UR also applies to the use of the railway infrastructure in those States where there has been no separation of **railway** 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 **railway** infrastructure in these States.

2. ... [contracts for reward or not]

3. ~~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 CUI UR only apply to the international use of railway infrastructure. They do not apply to the use of railway infrastructure for domestic traffic.~~ The Member States are nevertheless free to provide the same legal system for **domestic internal** traffic.

4. ~~The final sentence of § 1 2⁵~~ states that the CUI ~~Uniform Rules UR~~ are also applicable to a railway infrastructure managed by a State or by governmental institutions. In the case of a “state” infrastructure, contracts of use are not necessarily contracts under civil law; it is also possible for them to be contracts under public law. The latter, however, are also subject to the CUI ~~Uniform Rules UR~~, particularly with regard to liability.

5. § 2 3⁵ 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. 8 to 10 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 ~~UR Uniform Rules~~. As one of the most important examples of the legal relationships which remain subject to the national law, § 3 2⁵, letter a) states that the liability of employers or principals of auxiliaries towards the latter is not regulated by the CUI **UR Uniform Rules**, but by the national law.

6. ~~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. Use of railway infrastructure usually concerns trains carrying passengers or freight. Among these, t~~There might be passengers carried under a contract of carriage according to the CIV UR as well as other passengers to whom the CIV UR do not apply. The same goes for a train in which there might be consignments carried under a contract of carriage pursuant to the CIM UR as well as other consignments to which the CIM UR do not apply.

7. ~~When it comes to liability for indirect damages, in the event of personal injury, the carrier has~~

⁵ It would not be necessary to renumber if the wording of § 1 were to be editorially improved as proposed above, i.e. if the second sentence were to remain in § 1, rather than being transferred into § 2 as originally suggested; harmonised wording with Article 1 of CIV and CIM would be maintained.

- a) ~~as regards passengers with national tickets (carriage in accordance with national law) who receive compensation from the carrier under national law, a right of recourse against the infrastructure manager under national law, and,~~
- b) ~~as regards passengers with CIV tickets (international contract of carriage) who receive compensation from the carrier under CIV, a right of recourse against the infrastructure manager under CUI (Article 8 § 1 (e) of CUI).~~
8. ~~The same approach would apply *mutatis mutandis* to the right of recourse in case of damage to freight.~~
9. ~~However, in the then CUI group, there were differing views on the scope of application of CUI in 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. The revised scope of application of the CUI UR also covers the international use of railway infrastructure by trains or individual railway vehicles not carrying any passengers or freight, i.e. empty trains or railway vehicles operated before or after the carriage of passengers or freight, if such operations relate to international carriage within the meaning of the CIV UR or the CIM UR. In the case of use of railway infrastructure by empty wagons/trains in connection with CIM/CIV transport, this counts as commercial use in the context of international traffic, as defined for the purpose of the CUI UR in Article 3 aa). Non-load runs cannot be considered in isolation from load runs. Should it be necessary, an empty run can be part of the load run, for instance if the train first goes somewhere empty, e.g. to a port, in order that it can be loaded with goods to be carried in accordance with the CIM UR. 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 international railway traffic.**

Article 3 Definitions

1. These definitions serve to specify the material scope of application and to simplify drafting of the texts. **Following the revision of the scope of application, a new definition of “international railway traffic” became necessary. It is geared towards train paths used for international traffic. International traffic may either be performed on an international train path, i.e. on a train path established by agreement between two or more infrastructure managers, or on two or more successive national train paths coordinated by the infrastructure managers if the railway infrastructure is situated in different States. The CUI UR do not apply to the use of railway infrastructure for domestic traffic. In principle, the Member States are nevertheless free to provide the same legal system for domestic traffic.**
2. [Genesis – RC before the 5th GA]
3. At its 24th session (23-25.6.2009), the Revision Committee decided to ~~broaden~~ **clarify** the definition of the term “**manager**” in letter b) to ~~make clear~~ **explain** 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.

4. ~~The Revision Committee also decided to broaden~~ **The same applies to** the definition of the term “**carrier**” in letter c): **The aim of the revision in 2009 was** 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. **The clarification of the scope of application of the CUI UR resulted in a further amendment to the definition of “carrier”: the specific feature of the definition is not the performance of international transport in accordance with the CIV or CIM UR, but the carriage in international railway traffic, the definition of which was newly introduced. The reference to the CIV/CIM UR has become superfluous in view of the new wording of Article 1 § 1 and the newly introduced definition of “international railway traffic”. In addition, the wording was aligned with similar definitions in the legal system of COTIF (Art. 2 letter c) CUV) or in EU law (Art. 3 of Directive 2012/34/EU). The improved wording makes it clear that both legal and natural persons may be carriers.**

...

11. The definition of “**safety certificate**” in letter g) 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). At the 24th session of the Revision Committee, the wording of this definition was 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 **railway** infrastructure, including the law applicable in the EU Member State where the infrastructure is located.

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 (**damage caused by management failure of railway infrastructure or by the railway infrastructure itself** ~~fault~~) **and the amount of the damage**. In addition, **in case of direct loss or damage**, that person must furnish proof that the damage was caused during the period of use of the **railway** infrastructure **[, or in case of indirect damage that the primary loss or damage giving rise to the carrier’s recourse occurred during the use of the railway infrastructure]**⁶. ~~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. **For personal injury, liability, including the grounds for relief from liability, is based on the relevant provisions of the CIV UR and for material damage on the relevant provisions of the CIM UR.** ~~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.~~
- 3.** Damages suffered by means of transport **are is** 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**

⁶ The part in brackets has to be inserted if the additional proposal to the legal text, for the time being also in brackets, is adopted (“...**when such loss has its origin in the railway infrastructure [while it is being used]**”).

Rules UR (Report on the 5th General Assembly, p. 126/127). In contrast, purely pecuniary loss (loss of use) is not covered.

4. In the context of clarifying the scope of the CUI UR, the consistency between Article 1 and Article 8 was also examined. Finally, only the cumbersome wording of Article 8 § 1 needed to be adapted. In this provision, liability for bodily loss and damage (letter a), as well as for loss or damage to property (letter b) on the one hand, and for pecuniary loss (letter c) on the other hand, had previously been dealt with together in one sentence. This proved not to be justified. Direct loss or damage (letters a) and b) and indirect loss or damage (letter c) have to be dealt with separately for two reasons: firstly, in contrast to loss or damage according to letters a) and b), pecuniary loss must have its origin in the railway infrastructure, but it does not occur during the use; it is suffered only afterwards, when the carrier has paid damages to its customer; secondly, pecuniary loss cannot be suffered by a carrier's auxiliaries, but only by the carrier himself. It should be kept in mind that a substitute carrier is not considered as an auxiliary of the carrier, since he uses the railway infrastructure himself; he himself is a carrier in the sense of the CUI UR.
5. Use of the railway infrastructure usually concerns trains carrying passengers or freight. There might be passengers carried under a contract of carriage according to the CIV UR, as well as other passengers to whom the CIV UR do not apply. The same goes for a train in which there might be consignments carried under a contract of carriage pursuant to the CIM UR, as well as other consignments to which the CIM UR do not apply. The revised scope of application of the CUI UR also covers the international use of infrastructure by trains or individual railway vehicles not carrying any passengers or freight (see item 7 of the Explanatory Report on Article 1 with regard to empty trains or vehicles). Passengers to whom the CIV UR do not apply and consignments to which the CIM UR do not apply are to be compensated in accordance with national law, even if the damage suffered results from the use of railway infrastructure on an international railway journey. The same goes for the carrier's recourse.
6. The carrier has a right of recourse in accordance with the CUI UR (Article 8 § 1, new second sentence) if transport is performed exclusively with one or more international trains, i.e. in the framework of international traffic in accordance with the definition, or, for mixed trains, in the passenger coach intended for international traffic. On the other hand, if part of the transport of a passenger in possession of a CIV ticket is performed in a train or passenger coach operating in domestic traffic only, this does not affect the compensation to be paid to the passenger in the event of an accident; however, the carrier's recourse would be based on national law.
7. The same approach would apply *mutatis mutandis* to the right of recourse in case of damage to freight.

[Items 3-11 of the existing Explanatory Report will follow and should be renumbered]