

**OTIF**



**ORGANISATION INTERGOUVERNEMENTALE POUR  
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN  
INTERNATIONALEN EISENBAHNVERKEHR**

**INTERGOVERNMENTAL ORGANISATION FOR INTER-  
NATIONAL CARRIAGE BY RAIL**

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**Groupe de travail RU CUV  
Arbeitsgruppe ER CUV  
Working group CUV UR**

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## **2<sup>nd</sup> Session**

**Analysis of contributions received on the revision of the CUV UR**

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## ANALYSIS OF THE CONTRIBUTIONS RECEIVED ON THE REVISION OF THE CUV UR

In its letter A 90-01/503.2013 of 12 November 2013, the Secretariat of OTIF sent the Member States, the regional organisations that have acceded to COTIF and the various participants the minutes of the 1st session of the working group on the revision of the CUV UR, which was held in Berne on 17 October 2013, and a new draft proposal from the Secretary General of OTIF, the aim of which is to clarify the responsibilities of the keeper in the light of the various questions that were raised at the working group.

Below you will find the reactions OTIF has received on this new proposal by the Secretary General, transmitted by the representatives of Serbia, France, Slovakia and the European Commission's DG MOVE, as well as by interested stakeholders, such as the International Union of Wagon Keepers (UIP), the Community of European Railway and Infrastructure Companies (CER) and the International Association of Private Sidings Users (AIEP).

### A - POSITIONS OF THE STATES

#### 1. Serbia's position

Serbia proposes to amend Article 7 and Article 9 of the CUV UR.

#### Article 7

#### Liability for loss or damage caused by a vehicle

Current wording	Proposed wording
<p>§ 1 The person who, pursuant to a contract referred to in Article 1, has provided the vehicle for use as a means of transport shall be liable for the loss or damage caused by the vehicle when he is at fault.</p>	<p>§ 1 <b>The keeper, pursuant to a contract referred to in Article 1, shall be liable for the loss or damage caused by the vehicle, when the damage stems from a defect in the vehicle.</b></p>
<p>§ 2 The contracting parties may agree provisions derogating from § 1.</p>	<p>§ 2 <b>He shall be relieved of this liability if he proves that this defect was caused by the railway undertaking using the vehicle.</b></p>

**Justification:** this proposed amendment is similar to UIC's proposal for Article 7, but is not identical. Serbia is of the opinion that the "**person who provides the vehicle for use as a means of transport**" can be only the **keeper**.

**Article 9**  
**Liability for servants and other entities**

Wording proposed by the Secretariat	Wording proposed by Serbia
<p>§ 3     <b>In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be considered as a person whose services the keeper makes use of to maintain the vehicle.</b></p> <p><b>It is the responsibility of the keeper to designate in the contract defined in Article 1 an ECM and to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF.</b></p>	<p>§ 3     <b>In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be regarded as an <i>entity</i> whose services the keeper makes use of to maintain the vehicle.</b></p> <p><b>It is the responsibility of the keeper to designate in the contract defined in Article 1 <i>all ECMs assigned to railway vehicles that he is in charge of</i> and to ensure that the exchanges of information between ECMs and railway undertakings are in conformity with the provisions of ATMF.</b></p> <p><b><i>It is the responsibility of the keeper to inform his contracting partner defined in Article 1 of every significant change regarding the status of the designated ECM. Significant change means that the designated ECM has changed in accordance with the provisions of Article 5 of Annex A to the ATMF UR.</i></b></p>

**Justification:** the amendment proposes to replace the word "**person**" with the word "**entity**", which is more appropriate.

In Article 2 CUV (Appendix D to the Convention) the definition of ECM uses the word "**entity**" to describe the role of ECM.

A keeper can have contracts with one or more ECMs, so he has to designate them all in the contract defined in Article 1.

Keepers must be responsible for informing their contracting partners when the ECM is changed, because we cannot rely on ECMs themselves to inform the registration entity when the ECM certificate is revoked by the certification body, or to ensure that the NVR is updated properly.

**Comments by the Secretariat of OTIF**

For Article 7, Serbia supports an initial proposal that UIC made in the working group. As the only person who can hand over a vehicle for use as a means of transport is "the keeper",

Serbia proposes to include the keeper at the beginning of paragraph 1 of Article 7 and to attribute to him direct liability for loss and damage caused by the vehicle when such loss or damage is the result of a defect in the vehicle.

As mentioned at the first meeting of the working group, the Secretariat still has some reservations concerning this amendment. This is because in the current wording, there is a supplementary rule, which the parties may choose not to apply. In this respect, the Secretariat shares France's position, which is to await the outcome of the GCU's internal work in 2014 before proposing any amendments.

In Article 9 of the CUV UR, Serbia proposes replacing the word "person" by "entity". For the Secretariat, this amendment of form would have the disadvantage of incorporating different wording for ECMs and for infrastructure managers (Article 9 § 2).

Serbia proposes to add a third paragraph to § 3 detailing the information the keeper has to provide to the railway undertaking and to all the parties to a contract of use concerning significant changes made to a vehicle (such as incidents and accidents relating to wagon safety). This information is described in ATMF and in the Secretariat's view, is already covered in the second paragraph of the new paragraph 3 of Article 9.

An alternative wording of the second paragraph is therefore proposed, which is in line with the proposal by CER (B- 1 of this document). This point should be discussed at the meeting of the working group on the basis of the practical aspects of actual contracts.

## **2. France's position**

### **Comments from France**

The French authorities consider in particular that the provisions of CUV must be compatible with the distribution of tasks, and the responsibilities they entail, between wagon keepers, entities in charge of maintenance (ECM) and railway undertakings under Commission Regulation (EU) 445/2011 of 10 May 2011 and Article 15 § 2 of ATMF. The result of this is that it is up to the ECM chosen by the vehicle keeper and not up to the railway undertaking to ensure the safe running of the wagon.

For France, it would seem that the current wording of Article 7 of the CUV has led to some interpretations in the case law which are not very compatible with these rules, because they place the entire burden of proof of a defect in the rolling stock on the railway undertaking alone. This reduces the usefulness of the provisions of the Convention referred to above if this leads to the railway undertaking alone – unless there are exceptional circumstances – ensuring that the rolling stock can be operated safely.

France therefore believes that it would be useful if Article 7 of Appendix D were to set out more clearly the rules concerning the parties' commitments to responsibility, particularly in terms of the notion of "cause" or "fault", in order better to reflect the distribution of the tasks provided for in the European texts.

The French authorities have noted that at the beginning of 2014, there will be some work on the General Contract of Use of Wagons (GCU) between keepers and rail transport undertakings grouped in the GCU in order to define the liability regime for the various parties to the contract before the end of March 2014. In the positive event that the sector were to reach an agreement in line with the principles outlined above, it might suffice simply to amend the CUV to clarify the elements defining the participants in such a way as to bring the CUV into line with the other Appendices.

Similarly, France is in favour of clarification and of standardising the concept of keeper throughout the various Appendices of COTIF. It seems to us that the obligations of the various actors should be based around the following notions: the keeper operates the wagon, the rail transport undertaking operates the train and the entity in charge of maintenance (ECM) acts as the keeper's agent.

### Proposal from France

France proposes to reword points a), c) and d) of Article 2 of the CUV UR in the following terms:

Wording proposed by the Secretariat	Wording proposed by France
a) "rail transport undertaking" means a private or public undertaking which is authorised to carry persons or goods and which ensures traction;	a) "rail transport undertaking" means a private or public undertaking which is authorised to <i>operate a train for the carriage</i> of persons or goods and which ensures traction;
c) <b>"keeper" means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport;</b>	c) <b>"keeper" means the <i>physical or legal</i> person that, being the owner of a vehicle or having the right to use it, operates the vehicle as a means of transport;</b>
d) <b>"entity in charge of maintenance" (ECM) means the entity that is in charge of the maintenance of a vehicle defined in Article 2 of the ATMF Uniform Rules;</b>	d) <b>"entity in charge of maintenance" (ECM) means the entity that is in charge of the maintenance of a vehicle defined in Article 2 of the ATMF Uniform Rules.</b>

Lastly, the OTIF Secretariat's proposals for amendments to Article 9, § 3 and 4 might be acceptable to France, subject to the discussions on the ATMF (Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic) that are currently taking place.

### Comments by the Secretariat of OTIF

France correctly points out that the liability regime of Article 7 should first be discussed in depth by the GCU group.

With regard to the change of definitions, the Secretariat underlines that it would be appropriate to have homogeneous definitions, at least for railway undertakings and keepers: France's suggestion would lead to specific definitions in CUV, which is not the Secretariat's position.

With regard to Article 9, France shares the Secretariat's point of view and seems to agree with the texts that have been proposed.

### 3. Slovakia's position

#### Amendment of Article 7 of the CUV

Slovakia proposes to amend Article 7 § 1 and 2 concerning liability for loss or damage caused by a vehicle, as follows:

Current wording	Proposed wording
§ 1 The person who, pursuant to a contract referred to in Article 1, has provided the vehicle for use as a means of transport shall be liable for the loss or damage caused by the vehicle when he is at fault.	§ 1 The person who, pursuant to a contract referred to in Article 1, has provided the vehicle for use as a means of transport shall be liable for the loss or damage <b>caused by the vehicle when the loss or damage is attributable to a defect in the vehicle.</b>
§ 2 The contracting parties may agree provisions derogating from § 1.	§ 2 <b>He shall be relieved of liability if he furnishes proof that the defect was caused by a fault on the part of the railway undertaking.</b>

### Comments by the Secretariat of OTIF

As Slovakia only contacted OTIF the day before the working group's session on 17 October, the working group had left this issue open until the next meeting of the working group so as to give all delegations the opportunity of examining it in more detail.

The Secretariat has the same reservations on this proposal, which is similar to that of Serbia.

## B – THE STAKEHOLDERS' POSITION

### 1. CER's position

- In **Article 2 c)**: CER refers to the remark contained in the comments from CER (§ 3) dated 12.9.2013. In the French version at least, CER proposes to use the words that are in Directive 2008/57/EC, because in the CUV, it is the rail transport undertaking (and not the keeper) which uses the vehicle:

"keeper" means the person or entity that, being the owner of a vehicle **or having the right to use it**, exploits the vehicle as a means of transport".

- In **Article 3 § 1**: CER refers to the remark made in its document of 12.9.2013 (§ 2). To make the text clear, CER proposes to replace "the person who provides a vehicle, pursuant to a contract referred to in Article 1," by "the keeper who provides a vehicle, pursuant to a contract referred to in Article 1".

CER also proposes to delete letter b), which reads:

- b) when applicable, a statement of the rail transport undertaking to whose vehicle park the vehicle belongs;

- In **Article 7**: CER supports the proposal submitted by Slovakia at the last meeting.
- In **Article 9 § 3**, the first paragraph is very relevant, but the second is not correct, because the ECM is not designated in the contract. According to EU and OTIF law, the ECM is designated in the vehicle register (NVR in the EU). This is important because there have been some bad experiences where some deceptive keepers have designated as the ECM entities which had no contract with them



CER therefore proposes the following wording:

Wording proposed by the Secretariat	Wording proposed by CER
<p>§ 3 In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be considered as a person whose services the keeper makes use of to maintain the vehicle.</p> <p>It is the responsibility of the keeper to designate in the contract defined in Article 1 an ECM and to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF.</p>	<p>§ 3 In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be regarded as an <b>entity</b> whose services the keeper makes use of to maintain the vehicle.</p> <p>It is the responsibility of the keeper of the vehicle:</p> <p>to designate an ECM and to register it in the data bank listed in Article 13 of ATMF;</p> <p>to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the provisions of ATMF;</p> <p>for a freight wagon, to ensure that this ECM is and remains certified according to the ATMF annex "Certification and auditing of entities in charge of maintenance (ECM)".</p>

### Comments by the Secretariat of OTIF

For Article 2 c), the Secretariat can support the proposal, but wishes to maintain the same definitions in ATMF and CUV.

With regard to Article 3, the Secretariat is indeed of the view that it would be interesting to remove the ambiguity concerning the nature of "the person who, pursuant to a contract referred to in Article 1, has provided the vehicle". It should be clear that throughout the text, this is the keeper. In contrast, there seems to be no reason to delete letter b).

With regard to Article 7, as for the equivalent proposal on this issue, the Secretariat reserves its position.

The proposal to amend Article 9 § 3 drafted by OTIF's Secretary General contains two paragraphs with very different content. One refers to the ECM as a person whose services the keeper makes use of to maintain the vehicle; the other requires the keeper to designate the ECM in the contract and to ensure that the exchange of information between the ECM and the carrier is in conformity with the provisions of ATMF.

The Secretariat does not share CER's position on the amendment of the second paragraph: it is in fact the contract which embodies the fact that an ECM is attributed to a wagon. Entry into the register is a consequence of this and in no case constitutes proof of the actual allocation of

the ECM. CER also agrees, as it writes: "there have been some bad experiences where some deceptive keepers have designated as the ECM entities which had no contract with them".

## 2. UIP's position

With regard to the text proposed by the Secretariat for **Article 2 c)**:

"keeper" means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport

Comments: UIP welcomes the (partial) alignment of the wording of the definition of "keeper" with the more recent wording in Article 2 n) ATMF which is also consistent with the wording used in the EU Safety and Interoperability directives as well as with the wording used in the General Contract of Use for Wagons (GCU).

With regard to the text proposed by the Secretariat for **Article 2 e)**:

"entity in charge of maintenance" (ECM) means the entity that is in charge of the maintenance of a vehicle defined in Article 2 of the ATMF Uniform Rules

Comments: In the view of UIP the question must be raised whether it makes sense to have a definition of ECM in the CUV which is just a reference to another definition in the ATMF, considering that the scope of application of CUV and ATMF is not identical. This definition will have no meaning for countries applying the CUV but not the ATMF (e.g. France, United Kingdom, Spain, Norway, Czech Republic and Slovakia).

If a reference to the ECM in the CUV is considered necessary at all, the term "ECM" should be defined in a more general way in order to include both ECMs based on ATMF and on the identical concept of ECM in the EU legislation.

With regard to the text proposed by the Secretariat for **Article 9 § 3, 1<sup>st</sup> paragraph**:

*In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be regarded as a person whose services the keeper makes use of to maintain the vehicle.*

Comments: UIP agrees with the principal interpretation that within the scope of Article 9 CUV the ECM is to be considered a servant of the keeper. The proposed text contains a rule of interpretation comparable to Article 7.2 of the GCU: "For the purposes of this contract and vis-à-vis the other signatories, the keeper is considered to be, and have the responsibilities of, the entity in charge of maintenance for the wagon. "

UIP therefore supported the similar amendment proposed during the 1<sup>st</sup> session of the working group on 17 October 2013: "The entity in charge of maintenance designated by the keeper shall be considered as a person whose services the keeper makes use of regarding his obligations concerning the vehicle."

However, the new wording of the proposed amendment now limits the application of the rule to the scope of application of ATMF. In UIP's view, this raises the question of whether an ECM based not on ATMF but on the identical concept in the EU legislation should be considered a servant of the keeper or not, and if not, why not.

A rule of interpretation should serve to provide clarification. However, a rule of interpretation in the CUV limited to the parallel application of the ATMF does not clarify, but instead potentially creates confusion.

With regard to the text proposed by the Secretariat for **Article 9 § 3, 2<sup>nd</sup> paragraph**:

*It is the responsibility of the keeper to designate in the contract defined in Article 1 an ECM and to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF.*

Comments from UIP: The obligation created for the keeper by the first part of the sentence – to designate an ECM for each individual contract of use – will be practically impossible to fulfil in many cases.

As freight wagons travel across borders and are frequently interchanged between railway undertakings (RUs), they can be subject to several successive contracts of use within one chain of transport. Whether within the scope of application of the GCU or just the CUV, such individual contracts of use are usually concluded by the mere fact of wagons being accepted in a train. There are regularly no individual negotiations and no individual documentation of the contracts of use. The keeper in many cases may not even have any knowledge of which RU uses his wagon and therefore may not have a chance to agree specific contents of the contract of use.

Apart from this practical obstacle the question must be asked which purpose a mandatory obligation to identify the ECM of a wagon in each individual contract of use under the CUV should serve?

Under ATMF, as well as under EU rules, each wagon has to have an ECM designated and registered before ever being entered into any contract of use. The contract of use would therefore only repeat the contents of a public register – the "designation" of the ECM must have happened before.

The obligation for the keeper mentioned in the second part of the sentence – to ensure exchanges of information between the ECM and RU are in conformity with ATMF – is in fact only a reference to obligations of the keeper already existing elsewhere. The reference is also again limited to ATMF.

If a reference to public law obligations outside of the CUV is to be considered, in the view of UIP this should be a more general one without specifically naming ATMF or other sources of public law obligations for wagon keepers or RUs. From a systematic point of view the CUV deals solely with the contractual obligations of the parties under civil law. Public law obligations should not be entered into the CUV and a reference to them in the view of UIP is not an urgent necessity.

### **Comments by the Secretariat of OTIF**

UIP supports the first paragraph of the proposal to amend Article 9 § 3 drafted by the Secretary General of OTIF, but with regard to the second paragraph, UIP raises the question of the reference to ATMF standards and the non-application of its rules by certain countries. Notwithstanding this, UIP's concerns could soon be redundant, as the Member States of the European Union withdraw their reservations against the ATMF UR.

Having said this, this explicit reference to ATMF in the body of the text could be replaced by an explanatory note clarifying the fact that this provision applies both to States that have ratified ATMF and to the EU States, whether they have ratified ATMF or not.

UIP believes it would be very difficult to proceed as required by the second paragraph of Article 9 § 3 and says that in practice, the transport chain complicates designation of the ECM, because each contract is concluded simply by acceptance for transport or by the carrier, and most of the time, the keeper does not know which transport undertaking is using his vehicle and he is unable to make additions to the contract of use as soon as he wishes to.

For the Secretariat, this argument has no real basis, particularly as the fact that the wagon can be exchanged between multiple networks is already provided for in the GCU, which requires the presence of multiple information to this effect. In addition, Article 7.2 of the GCU stipulates that "the keeper must furnish proof to user RUs on request that the maintenance of his wagons is compliant with the legislation in force".

Therefore, it does not seem out of place or particularly disadvantageous to designate an ECM in the contract, as this reference can also be indirect and can be updated (e.g. by reference to a register, the keeper accepting responsibility for the accuracy of the information given there). In addition, the keeper's liability can only be clearly established in the context of a contract.

The same applies to the exchanges of information between the RUs and the ECM, where the ECM Regulation and the UTP give preference to the contractual route, as the ECM Regulation stipulates, for example in Article 5 § 3, "Following contractual arrangements, a railway undertaking may request information for operational purposes on the maintenance of a freight wagon. The entity in charge of the maintenance of the freight wagon shall respond to such requests either directly or through other contracting parties. "

So there is no need to see any mixture of provisions of a public nature and provisions of private law in the Secretariat's proposal. On the contrary, the latter is precisely part of the purpose of CUV, which is a regulatory model contract which is mostly suppletory. That is to say that it is an instrument of public law which aims to regulate contracts under private law in such a way as to ensure that the law is applied uniformly and that the actors are given real legal certainty.

One argument can however be retained in UIP's position in terms of the difficulty the keeper has in ensuring that the exchanges of information between the railway undertakings and the ECM are consistent with ATMF. It may be sufficient to recall that the contract must provide for these exchanges.

### **3. AIEP's position**

AIEP notes with satisfaction that the draft corresponds to the discussions at the working group on 17 October 2013 and provides a good basis for future discussions.

The main objective, i.e. the correct legal incorporation of the entity in charge of maintenance (ECM) into the CUV UR, seems to AIEP to have been achieved. The definition of the keeper, which is in line with the EU and ATMF, is also satisfactory.

AIEP thinks that regulating the exchange of information poses a fundamental problem, given that the solution proposed would alter the legal character of the CUV UR. Unlike ATMF,

which is public law, the CUV UR are part of international private law and it is therefore against this background that they govern the contractual relationship between legal persons (railway undertakings and keepers). The ATMF UR have a sovereign character, have force of law for subjects of law and apply independently of the existence and setting up of contractual relations. This fundamental difference between the CUV UR and the ATMF UR must be respected and maintained, otherwise COTIF would run the risk of losing its clear structure and legal logic.

With regard to the legal definition of "keeper" (Art. 2 c) CUV), AIEP believes that the wording proposed corresponds in the three languages to the wording of ATMF UR once the part concerning the vehicle register has been removed.

In French however, "comme moyen de transport" has been replaced by "en tant que moyen de transport". Was this done inadvertently or deliberately?

The following difference, which already appears in the ATMF UR, is more problematical: the German "*Verfügungsberechtigung*" ("*droit de disposition*") is rendered in French as "*droit de l'utiliser*" and in English as "right to use it". This translation is too weak and restrictive. The railway undertaking has a simple right of use, which is rightly the subject of the contract of use according Article 1 of the CUV UR; in no case does a simple right of use confer or be able to confer the capacity of keeper.

It would therefore seem more precise and correct to translate "*Verfügungsberechtigung*" as "*droit de disposition*" and "right to dispose of it", as in the applicable CUV UR. For the English version and the associated reservations, it should be noted that in legal language "to dispose of it" may also mean "dispose of, cede, sell, get rid of".

In addition, in Art. 18 of CIM, "*Verfügungsrecht über das Gut*" ("*Droit de disposer de la marchandise*") is translated as "Right to dispose of the goods".

This terminology issues will obviously have to be dealt with in the light of the terminology used in the EU. In the EU, "*Verfügungsrecht*" is correctly translated into French by "*droit de disposition*", while "Right to use it" is used in English.

As there are major consequences in being a keeper in terms of liability and in view of Article 45 § 1 of COTIF, which says that in case of differences, only the French text prevails, the accuracy and consistency of the terminology used in COTIF are of considerable importance.

As for the legal definition of "ECM" (Art. 2 d) CUV), according to AIEP, it would be a good idea to take over word for word in German the definition given in Art. 2 h) of ATMF and thus to write "[...] *die Stelle, deren Aufgabe die Instandhaltung eines Wagens ist [...]*" rather than "[...] *die für die Instandhaltung eines Wagens zuständige Stelle [...]*".

In terms of considering ECMs as agents (Art. 9 § 3 para. 1 CUV), AIEP believes that it is objectively right and correct legally to consider ECMs as agents of the keeper.

However, it seems neither essential nor appropriate to limit this legal construct to the States parties to ATMF. For cases that arise in countries that only apply the CUV UR and not the ATMF UR (i.e. at present: Czech Republic, France, Monaco, Norway, Slovakia, Spain and United Kingdom) there might be a lot of legal uncertainty, as it is not established immediately in all national laws whether the ECM is considered as a third party or an agent. But this question is vitally important in determining whether the keeper is liable or relieved from liability.

AIEP also makes the following editorial comment concerning the German version: no comma is necessary after "[...] *Einheitlichen Rechtsvorschriften ATMF [...]*".

With regard to the exchanges of information (Art. 9 § 3 para. 2 CUV), AIEP is of the view that this provision is wrong insofar as it modifies the CUV UR and calls into question their reputation as legislation that is irrevocable.

The keeper's obligation to designate an ECM and to ensure the exchange of information between the ECM and the railway undertaking comes under public law and hence the law of the EU and ATMF. The corresponding regulatory and safety provisions do not justify the issuing of instructions on how to structure contractual relations. This does not exist in any other mode of transport and the rail sector must guard against this.

The explanation according to which Art. 15 § 2 of ATMF is not worded clearly enough cannot justify intervening on the wrong subject. Any clarification and additions that might be necessary for the exchange of information between the ECM and the railway undertaking should appear in EU law and/or the ATMF. For the rest, AIEP is of the view that the (equivalent) provisions of Art. 5.2 of Regulation 445/2011 and Annex A of ATMF are entirely clear and complete, that they explicitly prescribe the exchange of information between those involved in the maintenance process and explain that the ECM requesting certification must be able to provide proof, on the basis of the assessment criteria of Annex III, that these processes have been followed.

In conclusion, it believes that it might be possible to envisage supplementing the CUV UR along the lines of CIM Art.2 and to introduce a provision (e.g. between Art. 2 and Art. 3) referring very generally to public law with (declaratory) reserves. AIEP would be in favour of this approach.

### **Comments by the Secretariat of OTIF**

In general, AIEP agrees with the OTIF Secretariat's proposal concerning the wording of Article 2 of the CUV UR. The Secretariat will of course do everything possible to align the different language version of the CUV UR along these lines. However, the Editorial Committee will have to deal with this when the time comes.

AIEP believes that it is right to consider ECMs as agents of the keeper.

With regard to Article 9, the concerns raised by UIP and AIEP are the same and the Secretariat's position is identical.

### **Annexes**



РЕПУБЛИКА СРБИЈА  
ДИРЕКЦИЈА ЗА ЖЕЛЕЗНИЦЕ  
Београд, Немањина бр. 6

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16 DEC. 2013				
A	90	01	10.2013	

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**Subject:** Revision of CUV - Appendix D to the Convention – New proposal from OTIF (draft)

Dear Secretary General,

Thank you for sending working material of Working Group „ Revision of the CUV UR “ which we considered carefully.

In accordance with new proposal from OTIF – CUV- Appendix D to the Convention (draft) we propose to amend Article 7 and Article 9 as follows:

NB: amendments are shown in red bold text



## Article 7

### Liability for loss or damage caused by a vehicle

§ 1 The **keeper**, pursuant to a contract referred to in Article 1, shall be liable for the loss or damage caused by the vehicle, **when the damage stems from the vehicle's defect.**

**§ 2 He is relieved of this liability if he proves that this defect was induced by the railway undertaking using the vehicle.**

**Justification:** this proposed amendment is in accordance with UIC proposal of Article 7 , but not completely. Our opinion is that “ **person who provide the vehicle for use as a means of transport**” can be only the keeper.

## Article 9

### Liability for servants and other **entities**

§ 1 The contracting parties shall be liable for their servants and other **entities** whose services they make use of for the performance of the contract, when these servants and other **entities** are acting within the scope of their functions.

§ 2 Unless the contracting parties otherwise agree, the managers of the infrastructure on which the rail transport undertakings use the vehicle as a means of transport, shall be regarded as **entities** whose services the rail transport undertaking makes use of.

**§ 3 In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be regarded as **entity** whose services the keeper makes use of to maintain the vehicle.**

**It is the responsibility of the keeper to designate in the contract defined in Article 1 **all ECM's assigned to railway vehicles that he is in charge with and to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF.****

**It is responsibility of the keeper to inform contracting partner defined in Article 1 about every significant change regarding status of designated ECM. Significant change means that designated ECM is changed according to Article 5 of Annex A to the ATMF UR.**

**§ 4 §§ 1, 2 and 3 shall also apply in the case of subrogation in accordance with Article 8.**

**Justification:** this proposed amendment is changed as follows:

- Word “ **person**” is replaced with much proper word “ **entity**”. When we talk about entity whose services they make use of for the performance of the contract, we never mean that it is a person, but some kind of legal entity or some other subject that is in charge of giving services.  
In Article 2 CUV - Appendix D to the Convention we have definition of ECM which uses word “ **entity**” when describes the role of ECM.
- Keeper can have contracts with one or many ECM's , so he has to designate them all in contract defined in Article 1.
- Keeper has to be responsible to inform contracting partner when ECM is changed, because we can not rely on keeper informing the registration entity when ECM certificate is revoked by certification body, or that NVR is updated properly. We have to think of black sheep and to well ensure that matter.

The safest way of informing about changed ECM would certainly be : certification body →ERA or OTIF→ quick update of the NVR. But it could be subject of revision of Annex A to the ATMF UR.

Best regards,

**Nataša Cerović**

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MINISTÈRE DE L'ÉCOLOGIE, DU DÉVELOPPEMENT DURABLE  
ET DE L'ÉNERGIE

Direction générale des infrastructures,  
des transports et de la mer

Paris, le 07 JAN. 2014

Direction des services de transport  
Sous-direction de la sécurité et de la régulation ferroviaires

OTIF CORRESPONDANCE				
11 JAN. 2014				
A	90	01	1.2014	

Monsieur le Secrétaire Général,

Par courrier du 12 novembre 2013, vous nous avez demandé de vous communiquer nos remarques sur les dernières propositions de révision de l'appendice D de la COTIF (CUV – Contrats d'Utilisation de Véhicules en trafic international ferroviaire).

A titre liminaire, les Autorités françaises souhaitent souligner leur attachement aux principes d'une pleine inscription du droit OTIF dans la lettre et l'esprit du droit ferroviaire de l'Union européenne ainsi qu'à la cohérence du CUV avec les autres appendices de la COTIF,

Elles considèrent, notamment, que les stipulations du CUV doivent être compatibles avec la répartition des tâches, ainsi que des responsabilités qui en découlent, entre détenteurs de wagons, entités en charge de l'entretien (ECE) et entreprises ferroviaires découlant du règlement (UE) 445/2011 du 10 mai 2011 de la Commission concernant un système de certification des entités chargées de l'entretien des wagons de fret et de l'article 15 § 2 de l'ATMF. Il résulte de ceux-ci qu'il revient à l'ECE choisi par le détenteur du véhicule, et non à l'entreprise ferroviaire, de garantir la circulation en sécurité de celui-ci.

Or il semblerait que la rédaction actuelle de l'article 7 du CUV ait donné lieu à des interprétations jurisprudentielles peu compatibles ces règles, en faisant porter l'intégralité de charge de la preuve d'un dysfonctionnement du matériel sur la seule entreprise ferroviaire. Cela réduit l'effet utile des dispositions conventionnelles précédemment mentionnées dès lors que cela peut conduire à faire garantir par la seule entreprise ferroviaire, sauf circonstance exceptionnelles, que le matériel roulant était bien apte à circuler en sécurité.

Nous estimons donc qu'il serait opportun que l'appendice D précise davantage, dans son article 7, les règles relative à l'engagement de responsabilité des parties, notamment via la notion de « cause » ou de « faute », afin de mieux refléter la répartition des tâches prévues par les textes européens.

Les Autorités françaises ont noté que des travaux auront lieu début 2014 sur le Contrat Uniforme d'Utilisation des wagons (CUU) entre les détenteurs et les entreprises de transport ferroviaire, regroupés au sein du GCU (General Contract of Use for wagons) afin de préciser, avant la fin du mois de mars 2014, le régime de responsabilité des différentes parties au contrat. Dans l'hypothèse favorable où le secteur parviendrait à un accord conforme aux principes énoncés ci-dessus, une simple adaptation du CUV pourrait suffirait à préciser des éléments de définition des intervenants, de manière à mettre le CUV en cohérence avec les autres appendices.

De même, nous sommes favorables à une clarification et à une uniformisation de la notion de détenteur au travers des différents appendices de la COTIF. Il nous apparaît que les obligations des différents acteurs devraient être axées autour des notions suivantes : le détenteur exploite le wagon, l'entreprise de transport ferroviaire exploite le train, et l'entité en charge de l'entretien (ECE) agit en tant que préposé du détenteur.

Aussi, nous proposons une reformulation des points a), c) et d) de l'article 2 RU-CUV, dans les termes suivants :

a) « entreprise de transport ferroviaire » désigne toute entreprise à statut privé ou public qui est autorisée à **exploiter un train pour le** transport des personnes ou des marchandises, la traction étant assurée par celle-ci ;

c) « détenteur » désigne la personne **physique ou morale** qui, ayant la qualité de propriétaire d'un véhicule ou le droit de l'utiliser, exploite le véhicule en tant que moyen de transport ;

d) « entité chargée de l'entretien » (ECE) désigne l'entité chargée de l'entretien d'un véhicule, définie à l'article 2 des Règles uniformes ATMF.

Enfin, les propositions de modification apportées par vos services aux § 3 et 4 de l'article 9 pourraient nous convenir, sous réserves des discussions actuellement en cours concernant l'ATMF (Admission Technique de Matériel Ferroviaire utilisé en trafic international).

Je vous prie d'agréer, Monsieur le Secrétaire Général, l'expression de ma haute considération.

*Bien amicalement,*

Le Sous-Directeur



Benoît CHEVALIER

**Monsieur François DAVENNE  
Secrétaire Général de l'Organisation  
pour les Transports Internationaux Ferroviaires  
(OTIF)  
BERNE**

**MINISTERSTERIUM FÜR VERKEHR, AUSBAU  
UND REGIONALE ENTWICKLUNG  
DER SLOWAKISCHEN REPUBLIK**  
Sektion für Eisenbahnverkehr und Bahnen  
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OTIF CORRESPONDANCE				
16 OCT. 2013				
A	90	01	5.2013	

Zentralamt  
für den internationalen Eisenbahnverkehr  
Generaldirektor  
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Ihr Zeichen                      Unser Zeichen  
A 90-01/502.213    25424/213/C310-SŽDD/63848

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Bratislava, den  
16.10.2013

**Betr.**

Revision des Anhanges D (CUV) zum COTIF 1999 – Stellungnahme

Sehr geehrter Herr Generaldirektor,

Vielen Dank für die Einladung zur Tagung der Arbeitsgruppe betreffend die Revision von CUV und die Sendung des Änderungsvorschlages erarbeiteten von der OTIF. Leider die Slowakei kann nicht an dieser Tagung teilnehmen.

Nach der Erörterung dieses Vorschlages mit den interessierten Eisenbahnunternehmen wir schlagen vor, Artikel 7 **Haftung für Schäden, die durch einen Wagen verursacht werden** § 1 und § 2 zu ändern wie folgt:

- § 1 Wer den Wagen auf Grund eines Vertrages nach Artikel 1 zur Verwendung als Beförderungsmittel zur Verfügung gestellt hat, haftet für den durch **den Wagen verursachten Schaden, sofern dieser Schaden auf einen Mangel am Wagen zurück zu führen ist.**
- § 2 Er ist von dieser Haftung befreit, wenn er beweist, dass dieser Mangel **durchein Verschulden des verwendenden Eisenbahnverkehrsunternehmens verursacht wurde.**

**Begründung:** Dieser Änderungsvorschlag präzisiert die Verantwortlichkeit zwischen dem Halter und dem ausführenden Beförderer. Die eventuelle Ansprüche der ausführenden Beförderer against dem Infrastrukturbetreiber können gemäss des Anhanges E (CUI) zum COTIF 1999 geltendgemacht werden.

Mit freundlichen Grüßen

Dipl.-Ing. Jiří Kubáček, CSc.  
Generaldirektor der Sektion  
für Eisenbahnverkehr und Bahnen

BA/ 16/12/2013

### CER remarks and proposals about the new CUV proposal dated 07/11/2013

- Art. 2 c): Look at the remark done in the CER remarks (§3) of 12/09/2013 sent on 13/10/2013 20:21. In FR at least, CER proposes to use the words that are in Directive 2008/57/EC, because in the CUV, it is the rail transport undertaking (and not the keeper) which uses the vehicle:

«détenteur» désigne la personne ou l'entité qui, ayant la qualité de propriétaire d'un véhicule ou le droit de disposition sur celui-ci, exploite ledit véhicule en tant que moyen de transport »

- Art. 2 d): CER has no problem, but OTIF should have, as the definition of the ECM has disappeared in article 2 of ATMF. Look at its version 7 received on 09/12/2013 11:08. The new reference should be article 15 §2 of ATMF.

- Art. 3 §1:

- Look at the remark done in the CER remarks (§2) of 12/09/2013. To make the text clear, CER proposes to replace "the person who provides a vehicle, pursuant to a contract referred to in Article 1," by "the keeper who provides a vehicle, pursuant to a contract referred to in Article 1".
- CER proposes to delete b): look at the CER remarks (§4) of 12/09/2013.

- Art. 7: CER supported the UIC-CIT proposal made during the last meeting; a small editorial change should be included; this gives:

"CUV Article 7 Liability for damage caused by a vehicle

The keeper who, pursuant to a contract referred to in Article 1, has provided the vehicle for use as a means of transport shall be liable for the damage caused by the vehicle insofar as the damage results from a defect on the vehicle.

He shall be relieved of his liability if he proves that this defect was caused by a fault of the rail transport undertaking to whom the vehicle has been provided for use as a means of transport".

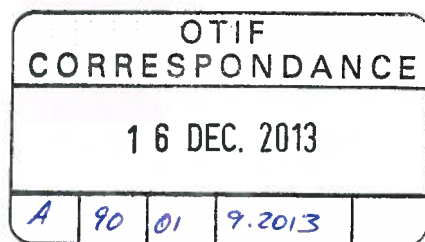
As said during the last meeting, this topic is very important. UIC and UIP have discussions about this topic, in order to try and propose a consensual approach before end of April 2014.

- Art. 9 §3: The first sentence is very appropriate. But the second one is not accurate. In fact, the ECM is not designated in the contract (look for instance at the GCU, even if it covers less than 90% of the wagons used in the EU). According to the EU and OTIF laws, the ECM is designated in the Vehicle Register (NVR in the EU): today it is done through the definition of the ECM in ATMF article 2 h. In the draft version 07 of ATMF, it is done through article 15 §2. This is important; we have several bad experiences where some deceptive keepers designated as ECM entities which had no contract with them: through the vehicle registers, which can be consulted, the wrongly designated entities could react to the relevant registering entity in order to delete such wrong allocation of responsibilities. But the ECM has no knowledge of each contract of use and cannot have such eye on them. Therefore CER proposes to write:

"It is the responsibility of the keeper of the vehicle:

- to designate an ECM and to make it registered in the data bank listed in article 13 of ATMF,
- to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF
- and, for a freight wagon, to ascertain that this ECM is and remains certified according to the annex of ATMF "CERTIFICATION AND AUDITING OF ENTITIES IN CHARGE OF MAINTENANCE."

OTIF CORRESPONDANCE				
16 DEC. 2013				
A	90	01	8.2013	



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**To:**

- OTIF, Secretary General, F. Davenne

**Copy to:**

- UIP, Co-chairman JC GCU, S. Lohmeyer

Brussels, 16<sup>th</sup> December 2013

**OTIF Working group CUV UR**

**Comments re. new proposal dated 7<sup>th</sup> of November 2013**

Dear Mr. Davenne,

With reference to your new proposal dated 7<sup>th</sup> of November 2013 and transmitted by email on 15<sup>th</sup> of November 2013 for the 2<sup>nd</sup> session of Working Group CUV UR, please find UIP's comments below:

**Proposed text:** Article 2 c):

*"keeper" means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport*

**Comments UIP:** UIP welcomes the (partial) alignment of the wording of the definition of "keeper" with the more recent wording in Article 2 n) ATMF which is also consistent with the wording used in the EU Safety and Interoperability directives as well as with the wording used in the General Contract of Use for Wagons (GCU).



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**Proposed text:** Article 2 e):

*"entity in charge of maintenance" (ECM) means the entity that is in charge of the maintenance of a vehicle defined in Article 2 of the ATMF Uniform Rules*

**Comments UIP:** In the view of UIP the question must be raised whether it makes sense to have a definition of ECM in the CUV which is just a reference to another definition in the ATMF, considering that the scope of application of CUV and ATMF is not identical. This definition will have no meaning for countries applying the CUV but not the ATMF (e.g. France, United Kingdom, Spain, Norway, Czech Republic and Slovakia).

If a mention of the ECM in the CUV is considered necessary at all, the term "ECM" should be defined in a more general way in order to include both ECMs based on ATMF and on the identical concept of ECM in the EU legislation.

**Proposed text:** Article 9 § 3, 1st sentence:

*In the scope of application of the ATMF Uniform Rules, the entity in charge of maintenance (ECM) shall be regarded as a person whose services the keeper makes use of to maintain the vehicle.*

**Comments UIP:** UIP agrees with the principal understanding that within the scope of Article 9 CUV the ECM is to be considered a servant of the keeper. The proposed text contains a rule of interpretation comparable to Article 7.2 of the GCU: "For the purposes of this contract and vis-à-vis the other signatories, the keeper is considered to be, and have the responsibilities of, the entity in charge of maintenance for the wagon."

UIP therefore supported the similar amendment proposed during the 1st session of the working group on 17th of October 2013: "The entity in charge of maintenance designated by the keeper shall be considered as a person whose services the keeper makes use of regarding his obligations concerning the vehicle."





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However, the new wording of the proposed amendment now limits the application of the rule to the scope of application of ATMF. In UIP's views, this raises the question whether an ECM based not on ATMF but on the identical concept in the EU legislation should be considered a servant of the keeper or not, and if not, why.

A rule of interpretation should serve the purpose of providing clarification; a rule of interpretation in the CUV limited to the parallel application of the ATMF does not clarify but on the opposite potentially creates confusion.

**Proposed text:** Article 9 § 3, 2nd sentence:

*It is the responsibility of the keeper to designate in the contract defined in Article 1 an ECM and to ensure that the exchanges of information between the ECM and the railway undertaking are in conformity with the prescriptions of ATMF.*

**Comments UIP:** The obligation created for the keeper by the first part of the sentence – to designate an ECM for each individual contract of use – will be practically impossible to fulfil in many cases.

As freight wagons travel across borders and are frequently interchanged between Railway Undertakings (RUs), they can be subject to several successive contracts of use within one chain of transport. Whether within the scope of application of the GCU or just the CUV, such individual contracts of use are usually concluded by the mere fact of wagons being accepted in a train. There are regularly no individual negotiations and no individual documentation of the contracts of use. The keeper in many cases may not even have any knowledge of which RU uses his wagon and therefore may not have a chance to agree specific contents of the contract of use.

Apart from this practical obstacle the question must be asked which purpose a mandatory obligation to identify the ECM of a wagon in each individual contract of use under the CUV should serve?



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Under ATMF as well as EU rules each wagon has to have an ECM designated and registered before ever being entered into any contract of use. The contract of use would therefore only repeat the contents of a public register – the “designation” of the ECM must have happened before.

The obligation for the keeper mentioned in the second part of the sentence – to ensure exchanges of information between the ECM and RU are in conformity with ATMF – is in fact only a reference to obligations of the keeper already existing elsewhere. The reference is also again limited to ATMF.

If a reference to public law obligations outside of the CUV is to be considered, in the view of UIP this should be a more general one without specifically naming ATMF or other sources of public law obligations for wagon keepers or RUs. From a systematic point of view the CUV solely deals with the contractual obligations of the parties under civil law. Public law obligations should not be entered into the CUV and a reference to them in the view of UIP is not an urgent necessity.

UIP is looking forward to discussing the above in the 2<sup>nd</sup> session of the Working Group CUV scheduled for 28th of January 2014.

Yours sincerely,



Gilles Peterhans

**Secretary General**



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**CARGO RAIL EUROPE**

Association Internationale des Usagers  
 et de Branchement Particuliers



Internationale Vereinigung der  
 Anschlussgleis-Benutzer

OTIF CORRESPONDANCE				
1 6 DEC. 2013				
A	90	01	11.2013	

OTIF Generalsekretariat  
 Gryphenhübelweg 30  
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Uitikon, 13.12.2013

**Revision ER CUV: Entwurf vom 7.11.2013**

Sehr geehrter Herr Generalsekretär

Wir danken Ihnen für Ihr Schreiben A 90-01/503.2013 vom 12.11.2013 und die uns gewährte Möglichkeit, zum neuen Vorschlag der Arbeitsgruppe ER CUV (CUV 2/x vom 7.11.2013) schriftlich Stellung zu nehmen.

Mit Befriedigung stellen wir fest, dass der vorliegende Entwurf den Beratungen der Arbeitsgruppe vom 17. 10. 2013 entspricht und eine gute Basis für die weitere Erörterung darstellt.

Das Hauptanliegen, die für die Instandhaltung zuständigen Stelle (ECM) in den ER CUV rechtlich korrekt zu erfassen, erscheint erfüllt. Ebenso befriedigt die EU- und ATMF-konforme Legaldefinition des Halters. Für die Details verweisen wir auf die nachstehende Kommentierung der Texte.

Ein grundlegendes Problem sehen wir bei der Regelung des Informationsaustausches, da die vorgeschlagene Lösung den Rechtscharakter der ER CUV verändern würde. Im Gegensatz zu den ER ATMF, die öffentliches Recht darstellen, sind die ER CUV internationales Zivilrecht, regeln also die vertragliche Beziehung zwischen Rechtspersonen (Eisenbahnunternehmen und Halter) auf gleicher Ebene. Die ER ATMF dagegen weisen hoheitlichen Charakter auf, sind für alle Rechtsunterworfenen kraft Gesetz verbindlich und gelten unabhängig von der Existenz und Ausgestaltung vertragsrechtlicher Beziehungen. Dieser grundlegende Unterschied zwischen ER CUV einerseits und ER ATMF andererseits ist weiterhin zu respektieren und zu pflegen, ansonsten die COTIF Gefahr läuft, ihre klare Struktur und Rechtslogik aufzugeben.

Im Detail nehmen wir zu den Textvorschlägen wie folgt Stellung:

#### Legaldefinition "Halter" (Art. 2 lit. c CUV)

Der vorgeschlagene Wortlaut entspricht in allen drei Sprachen demjenigen der ER ATMF (unter Weglassung des Satzteils betreffend Fahrzeugregister).

Im Französischen heisst es allerdings statt „comme moyen de transport“ „en tant que moyen de transport ». Ist dies ein Versehen oder gewollt?

Grössere Schwierigkeiten bereitet folgende, schon in den ER ATMF enthaltene Divergenz : Die Verfügungsberechtigung wird im Französischen mit „droit de l'utiliser“ und im Englischen mit „right to use it“ wiedergegeben. Diese Übersetzung ist zu schwach und zu eng. Ein einfaches Nutzungsrecht steht dem verwendenden Eisenbahnunternehmen zu und bildet just Gegenstand des Verwendungsvertrag gemäss Art. 1 ER CUV; keinesfalls kann und darf ein blosses Nutzungsrecht den Berechtigten schon zum Halter machen.

Die Übersetzung „droit de disposition“ und „right to dispose of it“ der geltenden ER CUV erscheint von daher zutreffender und korrekt. Für die englische Fassung und diesbezüglichen Vorbehalten ist darauf hinzuweisen, dass in der Rechtssprache „to dispose of it“ auch „disponieren, umsetzen, veräussern, verfügen“ bedeuten kann.<sup>1</sup>

Überdies übersetzt Art. 18 CIM „Verfügungsrecht über das Gut“ ebenfalls mit „Right to dispose of the goods“.

Selbstverständlich sind diese terminologischen Fragen mit Blick und in Rücksicht auf die EU-Terminologie zu bearbeiten. Dort wird Verfügungsberechtigung im Französischen richtigerweise mit „droit de disposition“ übersetzt, während es im Englischen „right to use it“ heisst.<sup>2</sup>

Da mit der Haltereigenschaft grosse haftungsrechtliche Konsequenzen verbunden sind und im Hinblick auf Art. 45 § 1 COTIF, wonach bei sprachlichen Differenzen allein der französische Wortlaut massgeblich ist, kommt einer einwandfreien und kohärenten COTIF-Terminologie erhebliche Bedeutung zu.

#### Legaldefinition "ECM" (Art. 2 lit. d CUV)

Aus unserer Sicht empfiehlt es sich, die Legaldefinition in Art. 2 lit. h ATMF wortwörtlich zu übernehmen, also nicht „... die für die Instandhaltung eines Wagens zuständige Stelle ...“, sondern „... die Stelle, deren Aufgabe die Instandhaltung eines Wagens ist ...“.

#### Erfüllungsgehilfenschaft der ECM (Art. 9 § 3 Abs.1 CUV)

<sup>1</sup> Köbler, Rechtsenglisch, 5. A., S. 252.

<sup>2</sup> RL 2004/49 Art. 3 lit. s

Wie eingangs erwähnt, halten wir die rechtliche Erfassung der ECM als Erfüllungsgehilfin des Halters für sachlich richtig und korrekt.

Allerdings erscheint die Einengung dieser Rechtskonstruktion auf ATMF-Länder weder zwingend noch sinnvoll. Bei Ereignissen in Ländern, in denen nur die ER CUV, nicht jedoch die ER ATMF zur Anwendung gelangen (zurzeit Frankreich, Monaco, Norwegen, Slowakei, Spanien, Tschechien und Vereinigtes Königreich) könnte dies zu grossen Rechtsunsicherheiten führen, steht doch nicht überall von vorneherein fest, ob die betreffenden Landesrechte die ECM als Dritten oder als Erfüllungsgehilfin qualifizieren. Für die Haftung des Halters bzw. für seine Entlastung ist diese Frage aber von entscheidender Bedeutung.

Rein orthographisch: kein Komma nach „... Einheitlichen Rechtsvorschriften ATMF...“

#### **Informationsaustausch (Art. 9 § 3 Abs. 2 CUV)**

Wie bereits dargelegt, erscheint uns diese Bestimmung insofern verfehlt, als sie den Rechtscharakter der ER CUV verändert und ihren guten Ruf als einwandfreie Gesetzgebung in Frage stellt.

Die Verpflichtung des Halters, eine ECM zu bestimmen und den Informationsaustausch zwischen der ECM und dem Eisenbahnunternehmen sicherzustellen, ist öffentlich-rechtlicher Natur und gehört ins einschlägige EU- und ATMF-Recht. Entsprechende Sicherheits- und Ordnungsvorschriften bilden keinen Grund, Gestaltungsvorschriften für vertragsrechtliche Beziehungen zu erlassen. Dies macht kein anderer Verkehrssektor, und auch der Eisenbahnsektor sollte sich davor hüten.

Die Begründung, Art. 15 § 2 ATMF sei unzureichend formuliert, darf nicht zu Eingriffen am falschen Objekt führen. Allenfalls erforderliche Präzisierungen oder Ergänzungen zum Informationsaustausch zwischen ECM und Eisenbahnunternehmen wären deshalb im EU- und/oder ATMF-Recht vorzunehmen. VAP/Cargorail/AIEP/IVA sind übrigens der Meinung, dass die (äquivalenten) Bestimmungen in Art. 5.2 der EU-Verordnung 445/2011 bzw. ATMF-Anlage A durchaus klar und umfassend sind, stipulieren sie doch explizit den Informationsaustausch zwischen allen am Instandhaltungsprozess Beteiligten und muss die das Zertifikat beantragende ECM auf Basis der Bewertungskriterien des Anhangs III entsprechende Prozesse nachweisen können.

Ins Auge fassen könnte man eventuell die Möglichkeit, die ER CUV – analog zu Art. 2 CIM – zu ergänzen und eine Bestimmung einzufügen (z.B. zwischen Art. 2 und 3), die ganz generell auf öffentliches Recht verweist und solches (deklaratorisch) vorbehält. Dieser Stossrichtung stünden VAP/Cargorail/AIEP/IVA grundsätzlich positiv gegenüber.

Hinsichtlich der Diskussion zu Artikel 7 ER CUV haben wir das Schreiben des „Gemeinsamen Ausschuss' AVV“ vom 13.11.2013 zur Kenntnis erhalten und unterstützen den

Weg, diese Thematik innerhalb des Sektors zu diskutieren und nicht auf der Ebene der OTIF.

XXXXXXXXXXXXX

Gerne hoffen wir, mit unserer Stellungnahme einen konstruktiven Beitrag zur erfolgreichen Weiterentwicklung der ER CUV zu leisten und sehen mit Interesse der nächsten Tagung vom 28. Januar 2014 entgegen.

Wir benützen die Gelegenheiten, Ihnen für Ihre Dienste im vergangenen Jahr zu danken und ein gutes neues Jahr zu wünschen.

Freundliche Grüsse



Markus Vaerst  
Regulation - Technik