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für den internationalen  
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Intergovernmental Organisation  
for International Carriage  
by Rail (OTIF)

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## **Working group**

# **"Revision of the CUV UR"**

## **1<sup>st</sup> Session**

## **Minutes**

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**Berne, 17.10.2013**



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## DISCUSSIONS

### 1. Opening of the session

**Mr Davenne, the Secretary General of OTIF**, opened the session and welcomed the delegations present. He stressed that, in view of the problems to be considered, not only the legal experts of the Member States and interested international organisations had been invited to participate in the work on revising the CUV UR, but also representatives of the national safety agencies, so that they could contribute their expertise on the issues to be examined.

### 2. Election of Chairman

The working group unanimously elected **the Netherlands**, in the shape of Mr van Belzen, to chair this session.

### 3. Discussion on OTIF's working document

The **Secretary General** reminded the meeting that in order to prepare this session, two documents on the revision of the Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV – Appendix D to the Convention) had been sent to the Member States of OTIF and to the regional organisations that have acceded to COTIF.

The aim of the first document (A 90-01/501.2013 dated 22.7.2013), which also contained the calling notice for the working group, was to describe the problems in this area.

The actors in the operation of wagons are, on the one hand, the railway undertakings (RU) which operate the trains, and on the other, keepers who operate the vehicles and lastly, the entity in charge of maintenance (ECM), which is responsible for the maintenance of the vehicle. In addition, both in the EU regulations, particularly Regulation (EU) No. 445/2011 of 10 May 2011 concerning a system of certification of entities in charge of maintenance for freight wagons, and in the regulations put in place within the ATMF UR, the task and responsibility of vehicle maintenance is entrusted to an ECM.

Every wagon must have an ECM assigned to it before it is approved for operation or used on the network. However, while there is a contractual relationship between the RU and the keeper, there is no direct contractual relationship between the ECM and the RU. These exchanges of information between the RU and the ECM must be covered by specific clauses in the contract between the keeper and the RU and in the contract between the keeper and the ECM. In practice, RUs often do not have contractual arrangements with ECMs. On the other hand, they have contracts with the keepers by virtue of CUV and the GCU. It is for this reason that the Secretariat of OTIF wished to initiate considerations in this working group on the need to deal at legislative level, in CUV, with the rights and obligations of the parties to the contract of use of wagons as regards wagon maintenance.

Therefore, in the second document (CUV 1/2 dated 19.9.2013), the Secretariat of OTIF proposed two amendments to incorporate in CUV the amendments made to the liability regime of the RUs and keepers by the creation of the ECM role in OTIF law in Article 15 of the Uniform Rules concerning the Technical Admission of Railway Material (ATMF UR). The first amendment proposed in this document introduced the concept of the ECM into CUV. The second amendment proposed in the form of a new Article 11 in CUV introduced the contract of use of vehicles as the basis for defining the respective responsibilities, by establishing, on

the one hand, the principle of the keeper's responsibility for maintaining the wagon, and on the other, by creating a link to the concept of the ECM and the keeper's obligation to have a certified ECM for maintenance purposes for each wagon and, lastly, by requiring the contract between the keeper and the ECM(s) to provide reliable information on the ECM associated with the wagon.

The Secretary General then informed the delegations that the CER had submitted comments on OTIF's working document. Delegates had been given these comments at the start of the meeting in document CUV 1 – meeting room document 1 – dated 11 October 2013 (see **annex** to this report). On 16 October 2013, i.e. the day before this meeting, the OTIF Secretariat had also received a proposal to amend Article 7 of CUV (Liability for loss or damage caused by a vehicle) from the Slovak Ministry of Transport. This was also brought to the attention of delegates during the meeting (see **annex** to this report).

The session continued with a *tour de table* to discover delegates' views and those of the rail sector on the amendments proposed in document CUV 1/2.

Discussions then focused on the definition of keeper, introducing the ECM into the CUV, the matter of the exchange of information and the proposal from Slovakia.

These discussions can be summarised as follows:

#### **Amendments proposed by OTIF**

**Germany** and **Austria** did not believe that it was necessary to amend CUV. They said they had received no positive feedback on this matter from actors in the sector in Germany and Austria. In addition, Germany was of the view that it was necessary to avoid any confusion between the CUV provisions of private law and the public law regulations of ATMF.

**Belgium** mentioned that three actors were involved in the maintenance of a wagon at national level: the keeper, the operator and the ECM, and that this should be taken into account.

**France** supported the proposals made by the OTIF Secretariat and asked that the role of the keeper be clearly identified. However, the French representative explained that as he belonged to the EPSF (public institution for railway safety), his views only represented this institution.

**Lithuania, Serbia** and **Sweden** also supported the OTIF Secretariat's proposal to integrate the ECM into the CUV.

The **European Commission (EC)** also supported introducing the ECM into CUV on the grounds that CUV dated back to 1999 and that it was therefore necessary to update this legislation. The only constraint was to ensure consistency between the various Appendices to CO-TIF.

The **railway sector** also supported introducing the ECM into CUV. In the sector's view, it was both appropriate and effective to position the ECM "behind" the keeper. This made it possible to maintain the relationship between the RU and the keeper, especially for the exchanges of information on the operation and maintenance of a wagon in accordance with Article 5 of Annex A of the ATMF on the certification of ECMs. Lastly, the railway sector

called for the definitions to be harmonised and for the roles of the various actors and their respective liabilities to be clearly identified.

### **Definition(s) of the keeper**

**The European Commission** and **CER** all agreed on the fact that it was necessary and appropriate to align the definitions.

The **railway sector** then touched on the issues concerning the marking of wagons.

It emerged from the discussion that followed that the register of vehicles provided for in Article 13 of ATMF was the best solution for identifying the keeper. Similarly, it was proposed to opt for a definition of the keeper identical to that in ATMF and/or proposed by CIT, and therefore to retain the definition of the keeper given in European law.

The **Secretary General** advised the members of the working group to be cautious. They should not lose sight of the fact that OTIF consisted of Member States which were neither Member States of the EU, nor States Parties to ATMF. OTIF could not require these Member States (non-EU and non-ATMF) to apply law which they had declared not to apply under Article 42 of COTIF.

**Decision:** The working group instructed the Secretariat of OTIF to assess the possible needs of its Member States that are not members of the EU and to propose an alignment of the definitions by avoiding an explicit reference to the registers, which only concerned States that apply ATMF.

### **Introduction of the ECM into CUV**

The **Secretary General** presented the various aspects of this issue. The ECM should become the servant of the keeper. The latter is responsible for ensuring that he has a certified ECM with valid certification, it being understood that the role of ECM could be assumed by the keeper himself or another legal entity. It is therefore important that in the contract of use of the vehicle, the keeper indicates the ECM responsible for maintaining the wagon.

**Germany** expressed doubt as to whether a rule corresponding to Article 11 § 2 was necessary at all. This was because there is already a rule concerning liability in Article 7. In addition, the reference to the "keeper" in Article 11 § 2 was too narrow. It was entirely conceivable that someone other than a keeper could make a wagon available – i.e. a RU as a preliminary user of third party wagons.

The **European Commission** supported Article 11 as proposed by the Secretariat of OTIF.

**UIC, UIP and CER** instead suggested that Article 9 should be supplemented by a new § 3, as follows (see **annex** to this report):

"The entity in charge of maintenance designated by the keeper shall be considered as a person (servant) whose services the keeper makes use of regarding his obligations concerning the vehicle."

During the discussion that followed, it was stressed that it was necessary to have a clear framework of responsibility.

For the **European Commission**, this question of responsibility could be resolved either by Article 11 as proposed by the Secretariat, or by adding the new § 3 to Article 9 as suggested by UIC, UIP and CER.

**Decision:** The working group instructed the Secretariat of OTIF to submit a new version of the document to clarify the keeper's responsibilities, taking account of all the issues discussed.

### **Issues concerning the exchange of information**

The **Secretary General** outlined the subject for discussion. While it was one thing to approve a wagon, it was quite another to know whether the wagon accepted was in order during its use by different RUs, in other words, whether it has a certified ECM and whether the latter has the necessary information to fulfil its role completely. The exchange of information was therefore a very important topic, which was specified precisely in ATMF, but without precise definition of the contractual obligations. Therefore, the aim of paragraphs §§ 3 and 4 of the proposed Article 11 of CUV was to create the necessary basis so that the model contracts put in place by the sector (in this case the GCU) can require and organise this information exchange on a uniform basis.

In addition, CUV is what might be called a suppletory type contract, whose provisions apply in the absence of provisions to the contrary. It therefore structures the contracts put in place by the sector. However, it contains some provisions that are mandatory. The question of ECMs should be part of it, given its impact on safety.

The **European Commission** acknowledged that it had not examined all the details of this issue, but that it could support the addition of these paragraphs, as they required that the exchanges of information prescribed in Article 5 of Annex A to ATMF take place.

The **railway sector** stated that the question of the exchange of information was already dealt with in numerous documents and that it was not therefore necessary to deal with this matter in CUV.

However, the **European Commission** reiterated the need, in the interests of safety, to include these new paragraphs in CUV. Although it fully understood the reluctance of the rail sector to take on new responsibilities, the **European Commission** emphasised that in the area of application of COTIF (i.e. all its Member States), only Article 15 § 2 of ATMF said anything about these exchanges of information, which was insufficient.

**Germany** criticised the rules proposed in Article 11 §§ 3 and 4. It did not recognise the need for rules. Furthermore, the rules were not practicable. In particular, it was not clear what should apply if the contract did not contain any of the required information.

The **Secretary General** concluded the discussion by proposing to draft a new proposal. If necessary, it could also be envisaged to introduce these provisions into the Explanatory Report of CUV only.

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

UIC and CIT supported the amendment to Article 7 of CUV proposed by Slovakia (see **annex** to this report).

In Article 7, the **European Commission** proposed to replace "The person" by "The keeper". This proposal was unanimously adopted. Furthermore, the **European Commission** defended the position that throughout CUV, the very general wording "the person who has provided the vehicle" could be replaced by "the keeper".

**Germany** expressed doubt concerning the view of those who supported the proposal that the new proposal would lead to the keeper's liability being parallel to that of the RU. According to Article 4, an RU could be relieved of liability if it could demonstrate the lack of fault on its part. According to the newly proposed Article 7, the keeper of a wagon could only be relieved of liability if he could demonstrate fault on the part of a third party. This meant that the keeper is also liable in the event of force majeure – i.e. clearly more severe than for an RU. Therefore, compared to the current Article 7 of CUV, the proposed rule would lead to a considerable strengthening of the keeper's liability.

Nonetheless, it was not clear who the other potential actors might be. This issue would therefore be discussed at the next meeting of the working group, particularly in the light of the experience of representatives of the sector.

It was also proposed to replace the term "fault" by "cause", which would result in a number of changes in legal terms.

The question of amending Article 7 was deferred to the next meeting of the working group so that all delegations could examine it in more detail.

#### **4. Subsequent procedures**

##### **Timetable of work**

Between now and **11 November 2013**, the Secretary General would prepare a new document with the proposals discussed during the session and would send it to the OTIF Member States and to the regional organisations that have acceded to COTIF.

The Member States and the regional organisations that have acceded to COTIF would have until **16 December 2013** to react to the Secretary General's new proposals. .

The CUV working group would meet for a second session on **28 January 2014**.

#### **5. Any other business**

None.

#### **6. Closing of the session**

The Chairman and the Secretary General of OTIF closed the session and thanked all the delegations for their constructive and open participation.

The Secretary General took this opportunity to reaffirm the importance of the development of the Appendices to COTIF.




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