

OTIF



**ORGANISATION INTERGOUVERNEMENTALE POUR
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR**

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

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

**CUV 3/3
10.03.2014**

Original : FR

3rd Session
OTIF proposal

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**Reasons for the proposed amendments to the CUV UR
and the Explanatory Report on the CIM UR**

1. In July 2013, the Secretariat of OTIF started considering the need to deal at legislative level, in the CUV UR, with the rights and obligations of the parties to the contract of use of wagons as regards wagon maintenance. The Secretariat's main aim was to clarify the liability regime to be applied between railway undertakings and keepers on this sensitive issue.
2. To this end, the Secretariat set up a working group on the revision of the CUV UR made up of experts from the States, national safety authorities and stakeholders, which met twice in Berne (17 October 2013 and 28 January 2014). This working group also worked closely with the WG TECH working group, which met in Bonn on 5 February 2014.
3. Bearing in mind the discussions in the working group on the revision of the CUV UR and at WG TECH, the Secretariat is submitting this amendment to the CUV Uniform Rules, which aims to integrate the amendments to the obligations of rail transport undertakings (RU) and keepers brought about by the creation of the role of the Entity in Charge of Maintenance (ECM) in OTIF law by Article 15 of the Uniform Rules concerning the Technical Admission of Railway Material (ATMF UR).

The CUV UR are one of the main legal bases of the General Contract of Use of Wagons (GCU). In effect, the CUV UR can be qualified as a suppletory type contract, i.e. their provisions apply to contracts between the parties except if they decide otherwise. In fact, a few provisions are mandatory, but they are rare.

The purpose of the amendments to the CUV UR concerning ECMs is therefore to help support the sector in implementing more detailed provisions, as the amendments proposed only provide a general framework.

Therefore, these amendments takes the form of an amendment to Article 9 (new §§ 3 to 5), which will apply to all vehicles as well as to keepers and the rail transport undertakings of the States Parties.

4. Implementation of the role of ECM in OTIF law is based on Annex A to the ATMF UR on the certification of entities in charge of maintenance¹, which transposes the ECM Regulation² into OTIF law.

The particular feature in the carriage of goods is that the wagons support significant international traffic in which a keeper (who may be a rail transport undertaking or its subsidiary) entrusts a rail transport operation with the operation of his wagons. Therefore, the keeper's specific responsibilities must be particularly clear in OTIF law, as it is the keeper who must provide the direct link to the ECM, whether he decides to be an ECM himself or whether he chooses to sub-contract.

5. The discussions at the meeting of the working group on the revision of the CUV UR held on 28 January 2014 resulted in a request to WG TECH for its opinion on the possible inclusion in the ATMF UR of all the provisions proposed by the Secretariat.

WG TECH met on 5 February 2014 in Bonn and concluded that the provision concerning the keeper's general responsibility for designating an ECM was based on Article 15 § 1 of the ATMF UR. The following wording was decided:

« Railway vehicles must be in a good state of maintenance in such a way that they comply with the provisions as defined in Article 7. The condition of vehicles must not in any way compromise operational safety and must not harm the infrastructure, environment and public health by their circulation or their use in international traffic. To that end, railway vehicles shall be made available for and undergo the service, inspections and maintenance as prescribed in the Maintenance File and updated under the responsibility of the entity in charge of maintenance (ECM). **It shall be the responsibility of the keeper to designate an ECM for this purpose**».

It should be noted that the European Commission entered a reservation, because this wording is not identical to the provisions of EU law, particularly the Safety Directive³.

Nevertheless, the Secretariat considers that this wording of Article 15 § 1 of the ATMF UR could be kept, as the other provisions proposed come under Article 9 of the CUV UR.

6. The new § 3 to 5 of Article 9 would therefore ensure that:
- a) In § 3, the keeper assumes his obligations in respect of the maintenance of the wagon under the contract of use in international traffic by having recourse to an ECM, which is his servant in line with the model of § 2 of Article 9, which deals with the infrastructure manager. It enables identification of both the person responsible and the legal instrument which underpins this responsibility.

1 Annex A (A 94-30/1.2012) to the ATMF UR dated 1 May 2012 on the certification et audit of ECM

2 Commission Regulation (EU) No 445/2011 of 10 May 2011 on a system of certification of entities in charge of maintenance for freight wagons and amending Regulation (EC) No 653/2007

3 Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways.

- b) In § 5, the contract of use (in effect the GCU for wagons) organises the exchanges of information required by Article 5 of Annex A to the ATMF UR. Indeed it is essential that the GCU make it possible clearly to identify the actors' reciprocal role and obligations. This provision is of a supplementary nature in order to enable the sector to implement other arrangements if need be.

Lastly, the Explanatory Report should indicate that the exchange of information may take place directly or indirectly (via the keeper). This point must be explained carefully because as there is no direct contract between the railway undertaking and the ECM, this exchange of information, which is central to transport safety, results from a contractual chain between the contract that links the keeper to the RU (the GCU for wagons) and the contract that links the keeper to the ECM.

7. In addition, the draft text modifies the definition of keeper to align it as much as possible with the definition in Directive 2008/110/EC⁴, which has been taken over in ATMF, bearing in mind the particular features of the CUV UR.

However, it does not link the definition of the keeper to the obligation to be registered in the register of vehicles of Article 13 of ATMF, in order not to restrict the concept of keeper only to the States Parties.

It should also be noted that the Explanatory Report makes it easier to understand the differences in terminology between the French and German with regard to the generic terms of "véhicule" and "Wagen", which only has this meaning in this language. Point 2 of Article 2 of the Explanatory Report concerning definitions explains as follows:

"Unlike the German generic term "Wagen" ["wagon"], the generic French term "véhicule" ["vehicle"] is broader, in that it includes goods wagons, passenger carriages and luggage vans, and even vehicles provided with means of traction. This is why the definition expressly *excludes vehicles provided with means of traction* from the generic French term "véhicule" ["vehicle"]."

The Secretariat proposes to bring the same clarification to the English term "vehicle" and not to change the use of the term "Wagen" in the German version of CUV, even though using the term "Fahrzeug" throughout the German text would have had the advantage of making the various language versions completely homogeneous.

8. During the discussions on the revised version of the UTP WAG at the 6th session of the Committee of Technical Experts (Geneva, 12 June 2013), a question was raised on Appendix I, 6th bullet point, which says that "The rail transport undertaking operating the train must make sure that freight vehicles are safely and securely loaded and remain so throughout the journey. "

4 Directive 2008/110/EC of 16 December 2008 amending Directive 2004/49/EC on safety on the Community's railways.

The need to ensure conformity with Article 13 of CIM was acknowledged. This Article reads as follows:

- § 1 The consignor and the carrier shall agree who is responsible for the loading and unloading of the goods. In the absence of such an agreement, for packages the loading and unloading shall be the responsibility of the carrier whereas for full wagon loads loading shall be the responsibility of the consignor and unloading, after delivery, the responsibility of the consignee.*
- § 2 The consignor shall be liable for all the consequences of defective loading carried out by him and must in particular compensate the carrier for the loss or damage sustained in consequence by him. The burden of proof of defective loading shall lie on the carrier.*

These provisions provide a clear framework of responsibility between the consignor and the loader, which enables the consignor to be made responsible for the consequences of defective loading on his part. Nevertheless, the extent of this responsibility and how it is reconcilable with the railway undertaking's obligation to ensure the safe operation of the train is not made explicit.

The appropriate place to clarify this arrangement is the Explanatory Report, so it is proposed to add to the latter a new paragraph 6 as follows:

- "6. In § 2, the consignor's responsibility in terms of loading is to ensure that the result of his activities will not impair railway safety in normal conditions of transport. By observing its safety obligations under Articles 6 § 2 and 15 § 3 ATMF, current version or under the safety management system in EU law, the railway undertaking, for its part, must ensure that it is able to detect any obvious loading anomalies."

**Amendments to the
Uniform Rules concerning the Contracts of Use of Vehicles
in International Rail Traffic
(CUV - Appendix D to the Convention)**

NB: amendments are shown in bold text.

**Article 1
Scope**

These Uniform Rules shall apply to bi- or multilateral contracts concerning the use of railway vehicles as means of transport for carriage in accordance with the CIV Uniform Rules and in accordance with the CIM Uniform Rules.

**Article 2
Definitions**

For the purposes of these Uniform Rules the term

- a) "rail transport undertaking" means a private or public undertaking which is authorised to carry persons or goods and which ensures traction;
- b) "vehicle" means a vehicle, suitable to circulate on its own wheels on railway lines, not provided with a means of traction;
- c) **"keeper" means the person or entity that, being the owner of a vehicle or having the right of disposal over it, exploits the vehicle as a means of transport;**
- d) "home station" means the place mentioned on the vehicle and to which the vehicle may or must be sent back in accordance with the conditions of the contract of use.

**Article 3
Signs and inscriptions on the vehicles**

§ 1 Notwithstanding the prescriptions relating to the technical admission of vehicles to circulate in international traffic, the person who provides a vehicle, pursuant to a contract referred to in Article 1, must ensure that there appears on the vehicle:

- a) a statement of the keeper;
- b) when applicable, a statement of the rail transport undertaking to whose vehicle park the vehicle belongs;
- c) when applicable, a statement of the home station;
- d) other signs and inscriptions agreed in the contract of use.

- § 2 The signs and inscriptions provided for in § 1 may be completed by means of electronic identification.

Article 4

Liability in case of loss of or damage to a vehicle

- § 1 The rail transport undertaking to which the vehicle has been provided for use as a means of transport shall be liable for the loss or damage resulting from loss of or damage to the vehicle or its accessories, unless it proves that the loss or damage was not caused by fault on its part.
- § 2 The rail transport undertaking shall not be liable for loss or damage resulting from loss of accessories which are not mentioned on both sides of the vehicle or in the inventory which accompanies it.
- § 3 In case of loss of the vehicle or its accessories, the compensation shall be limited, to the exclusion of all other damages, to the usual value of the vehicle or of its accessories at the place and time of loss. When it is impossible to ascertain the day or the place of loss, the compensation shall be limited to the usual value on the day and at the place where the vehicle has been provided for use.
- § 4 In case of damage to the vehicle or its accessories, the compensation shall be limited, to the exclusion of all other damages, to the cost of repair. The compensation shall not exceed the amount due in case of loss.
- § 5 The contracting parties may agree provisions derogating from §§ 1 to 4.

Article 5

Loss of right to invoke the limits of liability

The limits of liability provided for in Article 4 §§ 3 and 4 shall not apply, if it is proved that the loss or damage results from an act or omission, which the rail transport undertaking has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

Article 6

Presumption of loss of a vehicle

- § 1 The person entitled may, without being required to furnish other proof, consider a vehicle as lost when he has asked the rail transport undertaking to which he provided the vehicle for use as a means of transport, to have a search for the vehicle carried out and if the vehicle has not been put at his disposal within three months following the day of receipt of his request or else when he has not received any indication of the place where the vehicle is situated. This period shall be increased by the time the vehicle is immobilised for any reason not attributable to the rail transport undertaking or owing to damage.
- § 2 If the vehicle considered as lost is recovered after the payment of the compensation, the person entitled may require the rail transport undertaking to which he provided the vehicle for its use as a means of transport, within a period of six months after re-

ceiving notice of it, that the vehicle be returned to him, without charge and against restitution of the compensation, at the home station or at another agreed place.

§ 3 In the absence of the request referred to in § 2, or alternatively if the vehicle is recovered more than a year after the payment of the compensation, the rail transport undertaking to which the person entitled provided the vehicle for use as a means of transport, shall dispose of the vehicle in accordance with the laws and prescriptions in force at the place where the vehicle is situated.

§ 4 The contracting parties may agree provisions derogating from §§ 1 to 3.

Article 7 **Liability for loss or damage caused by a vehicle**

§ 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.

§ 2 The contracting parties may agree provisions derogating from § 1.

Article 8 **Subrogation**

When the contract of use of vehicles provides that the rail transport undertaking may provide the vehicle to other rail transport undertakings for use as a means of transport, the rail transport undertaking may, with the agreement of the keeper, agree with the other rail transport undertakings

- a) that, subject to its right of recourse, it shall be subrogated to them, in respect of their liability to the keeper for loss of or damage to the vehicle or its accessories;
- b) that only the keeper shall be liable to the other rail transport undertakings, for loss or damage caused by the vehicle, but that only the rail transport undertaking which is the contractual partner of the keeper shall be authorised to assert the rights of the other rail transport undertakings.

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

§ 1 The contracting parties shall be liable for their servants and other persons whose services they make use of for the performance of the contract, when these servants and other persons 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 persons whose services the rail transport undertaking makes use of.

§ 3 **The entity in charge of maintenance (ECM) shall be considered as a person whose services the keeper makes use of for the safe state of running of the vehicle.**

§ 4 Unless the contracting parties agree otherwise, the contract defined in Article 1 shall contain the relevant provisions to ensure the exchange of information between the ECM and the railway undertaking.

§ 5 §§ 1, 2, 3 and 4 shall also apply in the case of subrogation in accordance with Article 8.

Article 10 Other actions

§ 1 In all cases where these Uniform Rules shall apply, an action in respect of liability, for loss of or damage to the vehicle or its accessories, on whatever grounds, may be brought against the rail transport undertaking to which the vehicle was provided for use as a means of transport only subject to the conditions and limitations laid down in these Uniform Rules and the contract of use.

§ 2 § 1 shall apply also in the case of subrogation in accordance with Article 8.

§ 3 The same shall apply to an action brought against the servants or other persons for whom the rail transport undertaking to which the vehicle was provided for use as a means of transport, is liable.

Article 11 Forum

§ 1 Actions based on a contract concluded in accordance with these Uniform Rules may be brought before the courts or tribunals designated by agreement between the parties to the contract.

§ 2 Unless the parties otherwise agree, the competent courts or tribunals shall be those of the Member State where the defendant has his place of business. If the defendant has no place of business in a Member State, the competent courts or tribunals shall be those of the Member State where the loss or damage occurred.

Article 12 Limitation of actions

§ 1 The period of limitation for actions based on Articles 4 and 7 shall be three years.

§ 2 The period of limitation shall run:

- a) for actions based on Article 4, from the day when the loss of or damage to the vehicle was discovered or the person entitled could consider the vehicle lost in accordance with Article 6 § 1 or § 4;
- b) for actions based on Article 7, from the day when the loss or damage occurred.