



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

Working Group to amend the procedure for revising COTIF

(Berne, 3 May 2017)

Minutes

AGENDA

1. Opening of the session and election of chairman
2. Adoption of the agenda
3. Amendment of the procedure for revising COTIF
 - Presentation of Mrs Brölmann's legal opinion
 - Questions on the legal opinion
 - Discussions
4. Any other business
5. Subsequent procedure

DISCUSSIONS

1. Opening of the session and election of chairman

Mr Davenne, the Secretary General (SG), opened the session and welcomed all the experts from the Member States and the interested associations that were present. He reminded them that in line with the well-established practice for working groups set up by the Secretary General, participants could speak in any of the Organisation's three working languages. However, simultaneous interpretation would only be provided into English.

The **working group** elected **Mr Krzysztof Kulesza (PL)** to chair the session. The Chairman thanked the meeting for electing him.

2. Adoption of the agenda

Doc. LAW-17004-WGREVCOTIF 2 – Provisional agenda

The provisional agenda was adopted by consensus.

3. Amendment of the procedure for revising COTIF

Documents¹:

LAW-17034-WGREVCOTIF 3-01 - Legal assessment of the COTIF revision procedure and of possibilities for its amendment - Dr. Catherine Brölmann

LAW-17020-WGREVCOTIF 3-02 - Feasibility of amending the procedure for revising COTIF - Document from the Secretariat of OTIF

LAW-17050-WGREVCOTIF 3-03 - Meeting room document - Feasibility of amending the procedure for revising COTIF - Position of Germany (provisional assessment)

LAW-17052-WGREVCOTIF 3-04 - Meeting room document - Feasibility of amending the procedure for revising COTIF - Comments from Sweden

LAW-17054-WGREVCOTIF 3-05 – Meeting room document - Feasibility of amending the procedure for revising COTIF - Position of the United Kingdom

LAW-17056-WGREVCOTIF 3-06 - Meeting room document - Feasibility of amending the procedure for revising COTIF - View of the CIT on the documents

LAW-17058-WGREVCOTIF 3-07 - Meeting room document (FR only) - Feasibility of amending the procedure for revising COTIF - Comments from France

LAW-17060-WGREVCOTIF 3-08 - Meeting room document (DE only) - Feasibility of amending the procedure for revising COTIF - Position of Serbia.

With regard to the meeting room documents, the **SG** reminded the meeting that in his circular of 3 April 2017, the OTIF Secretariat had urgently requested States and the international organisations concerned to send it, by no later than 24 April 2017, their standpoints or comments on the documents that were sent out. By this deadline, the Secretariat had received standpoints or comments from Germany, the United Kingdom, Sweden and the CIT. These are set out in the meeting room documents available in the Organisation's three working languages. After the deadline, the OTIF Secretariat also

¹ See Working [Documents](#)

received comments from France and Serbia. These are set out in the meeting room documents that are only available in their original version.

With regard to the substance, the SG emphasised that the question of whether it was feasible to amend the procedure for revising COTIF was a crucially important matter for the Organisation. On average, it took six years for amendments to COTIF adopted in accordance with Article 34 of COTIF to enter into force, which was undoubtedly too long, as the amendments adopted by the Revision Committee entered into force after one year. There was therefore a risk of both internal and external misalignment.

At present, only 12% of the Member States had approved the amendments adopted by the last General Assembly. The SG had convened this working group to find a solution. As this was a complex issue, he had wanted to obtain an expert opinion to try and find a compromise between the efficiency of the procedures under COTIF and observing the Member States' national procedures. The Secretariat had therefore entrusted this task to an expert in international public law, Mrs Brölmann, to give a legal opinion on the procedure for revising COTIF and the possibilities for modifying it. The Secretariat had also invited Mr Guilherme Filho, the Director of the UPU International Bureau's Legal Affairs Directorate, to give a presentation on the revision procedures used by UPU.

- **Presentation by Mrs Brölmann**
(see annex 2)

Mrs Brölmann introduced her presentation by explaining that she had been commissioned to examine, from the legal point of view, the need to amend the procedure for revising COTIF and the possibilities for doing so. She then presented the current legal framework for revising the Convention and its Appendices. The legal framework for revision had three dimensions: COTIF, domestic law, and EU law, which interact. In terms of the disadvantages of the current revision procedure, Mrs Brölmann was of the view that the lengthy procedure for revising COTIF seemed to have several adverse effects, both legal and non-legal.

Briefly, her report concluded that for reasons of internal consistency of the COTIF regime, its predictability and its general adaptability to external circumstances and the market, it was strongly advisable to take a further step towards simplifying the revision regime.

- **Presentation by Mr Guilherme Filho**
(see annex 3)

Mr Guilherme Filho explained that, owing to the role of designated operators as the entities designated by UPU member countries to operate international postal services and to fulfil the related obligations arising out of the Acts of the Union on their respective territories, UPU had in the past been faced with questions similar to the one to be discussed by this working group, although in a more complicated framework than that of OTIF. The aim of his presentation was briefly to present the main legal and procedural aspects pertaining to the UPU and highlight a number of specific points, particularly with regard to the adoption and entry into force of the Acts of the Union.

He underlined that for UPU, it was important from the practical point of view that all the amendments adopted by a Congress could enter into force simultaneously and independently of their being approved under national legislation. This was why amendments to the Acts of UPU adopted by the Congress were implemented simultaneously on the date specified by the Congress, generally one and a half to two years after the Congress. The Congress may nevertheless decide to implement certain provisions within a shorter deadline. From the day set by the Congress for the implementation of the Acts, the corresponding Acts of the previous Congress are repealed.

This presentation was followed by a discussion between DE, FR, NL, UPU, Mrs Brölmann, the SG and the head of the legal department. It emerged from this discussion:

- that with regard to the interactions between international procedures and internal legal procedures, UPU was not able to quote a specific example in which there had been a problem with a member country that was bound by international public law, but which had not completed its national procedures. On the other hand, the legal affairs department sometimes had to deal with disputes by designated operators on the interpretation of the Acts, and hence also on the Act to be applied. Some countries were indeed very late in ratifying Acts adopted by the various Congresses. So if there was a dispute with a designated operator from another member country, this dispute would have to be resolved in accordance with the Vienna Convention on the Law of Treaties, i.e. the latest Act ratified or approved by the two member countries would apply. This problem arose ever more frequently, because the designated operators were no longer necessarily state entities and the financial stakes were quite high (SG, UPU);
 - that with regard to the nature of the UPU's regulations, like OTIF's, they come under international public law, even though they are aimed at the designated operators. They have an inter-governmental basis. The approval procedures in the states can be more or less complex. Regulations adopted by the Postal Operations Council enter into force automatically on a specific date. It is up to the member countries to decide whether they have to be transposed into their national law. In the context of reforming UPU, some of the UPU member countries had raised a very controversial issue. According to these countries, the technical provisions should no longer be binding, but should merely become recommendations addressed directly to the designated operators. This issue, which was very sensitive within UPU at the moment, would be dealt with at an extraordinary Congress to be held in 2018 (DE, Mrs Brölmann, UPU);
 - that with regard to the question of reservations, they are allowed for Acts other than the Constitution and the General Regulations. However, the system for reservations at UPU is very specific and is considerably different to the system used by other international organisations. Reservations may only be made at the Congress; they must be approved by the member countries at the Congresses by the majority required in each case for the modification of the Act which is the subject of the reservation. The reservations are then included in the final protocol and are followed by the signatures of the plenipotentiaries (head of the legal department and UPU);
 - that with regard to the question of internal procedures, states are bound by international public law. International public law does not deal with internal procedures. The fact remains that states must implement international public law in their national law in order to avoid a legal disparity between international public law and their national law. Some states justifiably raised this issue (FR, NL, Mrs Brölmann, SG).
- **Presentation by the Secretariat of OTIF**
(see annex 4)
 - **Discussions**

DE and **FR** again raised the question of the procedures to be carried out and briefly described the procedures that apply in their respective countries. **DE** and **FR** emphasised that it was more important to take account of whether or not an amendment is substantive, rather than of an organic criterion. **DE** said that according to German constitutional law, regulations or amendments of substance always had to be dealt with by means of a law, with the involvement of the Parliament.

The recommendations and text proposals in the legal opinion were then examined one by one.

- **Proposals I and VII**

Firstly, these proposals sought to bring all amendments to the CIV, CIM, CUV, CUI, APTU and ATMF UR within the competence of the Revision Committee and secondly, to do the same with the new Appendices.

In reply to a question from **NL**, **Mrs Brölmann** confirmed that according to her proposal, the new Appendices would fall within the competence of the Revision Committee, whether for adoption or amendment, the logical aim being to follow the same timetable as for an amendment to the existing Appendices. Of course it would also be possible to provide that adoption of the new Appendices falls within the competence of the General Assembly and that amendments fall within the competence of the Revision Committee.

DE expressed its reservations. This approach was too simplistic. COTIF and its Appendices had been examined in detail, particularly when they were revised in 1999, and the result was Article 33 of COTIF, which distinguishes between amendments which the Member States consider to be substantive and those which are not.

AT explained that it had not yet been able to state its position in writing owing to the complex nature of the matter and the short deadline that was given. It was nevertheless wise to deal with this issue, which was still topical. The aim of bringing all amendments to the Appendices within the competence of the Revision Committee was laudable. **AT** did not think the CIM and CIV were comparable to the UPU regulations, in that the CIM and CIV govern the rights and obligations of the parties to rail transport contracts, including issues of liability, which are also transposed into traditional national rail transport law. It was therefore not without reason that amendments to the CIM and CIV were reserved for the competence of the General Assembly and the approval of the Member States. On the other hand, the procedure took too long. **AT** thought it was necessary to move forward in a more differentiated manner. It should not be necessary to have to submit every amendment, even though it might just be an editorial amendment to a comma, to the General Assembly. All possible solutions should therefore be discussed.

FR commented that it was necessary to keep an eye on the consistency of COTIF, as the amendments currently being proposed might entail amendments to other provisions of COTIF.

The **SG** shared **AT**'s view. The most important point to be discussed was what was so substantive as to require such a cumbersome procedure. Before being proposed, amendments were discussed for two or three years, so there should be no major problems in transposing them into internal law.

The **head of the legal department** emphasised that the last revision cycle had shown that some substantive amendments had been adopted by the Revision Committee, whereas the General Assembly had had to adopt the editorial amendments. It was national law that would determine which criterion was applicable, whether it was organic or substantive, and the response could vary from one Member State to another. The head of the legal department asked delegates how this matter was dealt with in their national law.

The **European Commission** said that for the EU, this issue was dealt with in the agreement on accession to COTIF. Subjects that fell within the competence of the EU only had to be approved by the EU if they came under the competence of the General Assembly.

DE clarified that Germany did not automatically apply an organic criterion. According to the constitution, amendments of substance had to be approved by Parliament. Assessing which provisions are substantial and which are not was dealt with in COTIF 1999 by allocating

provisions to the competence of the General Assembly or the Revision Committee in accordance with the criterion of whether the provisions to be amended are of a technical or implementing nature (in which case the Revision Committee is competent) or whether the material substance of the COTIF regime is being amended (in which case the General Assembly is competent). This subdivision into substantial and non-substantial rules is carried over into German law by the analogous arrangement of Germany's procedure for approving amendments to COTIF: amendments that fall within the competence of the Revision Committee can be implemented by means of a governmental order, with no involvement of the German Bundestag (parliament), although the Bundesrat (Federal Council) might have to give its approval. For amendments adopted by the General Assembly, a parliamentary legislative procedure is always required, with the involvement of both the Bundestag and Bundesrat.

According to **GR**, a statutory order was only necessary for technical provisions; other provisions had to be approved by Parliament. In practice though, it was often difficult to tell the difference.

- **Proposal II**

This proposal suggested an additional role for the General Assembly, which could be asked to approve all amendments adopted by the Revision Committee without being able to amend them.

DE and **FR** had some reservations about this proposal, as the General Assembly was the Organisation's supreme body.

- **Proposal V (combination of proposals III and IV)**

This proposal was to provide for the entry into force of amendments on the basis of provisional application, coupled with a fixed deadline.

DE explained that German constitutional law was not very flexible and that entry into force would only be possible if the provisions were already transposed into national law. With regard to the fixed period, experience had shown that states needed more than two or three years to complete their internal procedure. They would therefore be forced to declare that they did not approve the amendments, which was contrary to the spirit of COTIF. Consequently, **DE** did not support this proposal.

In contrast, **ES** supported the proposal for a fixed period of three years, but could not accept provisional application.

Once again, the **SG** drew delegates' attention to the fact that two or three years elapse before an amendment is submitted to the General Assembly. States therefore had the time to form an idea of the nature of the amendment and its transposition into internal law. They would then still have two or three years to complete the national procedures. That was the perspective this proposal should be examined from.

The **head of the legal department** added that this solution gave the Member States more legal certainty, as they would then know that they had to finish their internal procedures within a period fixed in advance, which was not the case at present. **CIT** also supported this solution, as it meant that the entry into force of amendments could be predicted precisely, which was very important for the sector.

- **Proposal IV**

This proposal was to provide for the entry into force of amendments on the basis of provisional application.

The **Chairman** noted that delegates had already given their views on this proposal, which did not seem to be an acceptable option.

- **Proposal VI**

This proposal was for a non-binding mechanism whereby the Member States would submit a report each year until they had completed their national procedures.

DE, FR, AT and **RS** were in favour of this proposal and made the following comments:

- It would still have to be decided whether this mechanism had to be included in the Convention or whether it could be implemented more informally (**DE**);
- The wording of the proposal would have to be reviewed, if need be, to specify when the Member States had to start submitting a report (**FR**);
- The yearly report should be combined with one of the other solutions proposed, e.g. the proposal for entry into force of amendments within a fixed deadline, otherwise the yearly report would have a very limited impact (**AT**).

The **European Commission** said it would prefer entry into force on a specific date, as was also the case for EU legislation. However, it could also support this proposal if states were of the view that the report might have a positive impact on the entry into force of amendments.

- **Proposal VII**

This proposal was to apply the simplified procedure to those provisions of COTIF that do not create any new obligations for the Member States.

The **SG** explained that some provisions, for example the provision concerning the periodicity of the budget, could certainly be made subject to the simplified procedure.

The **head of the legal department** summarised the discussions as follows: some delegations could support the proposal for entry into force within a fixed period; however, the distribution of tasks between the General Assembly and the Revision Committee currently prescribed in COTIF would not be changed. He invited those delegations that had not yet expressed an opinion on this subject to do so.

The **European Commission** thought this was a reasonable compromise. Bearing in mind the total duration of the process required for the adoption of amendments, followed by the period fixed for their entry into force, the European Commission was of the view that the Member States had numerous opportunities for their points of view to be taken into account. States had some significant protections, as they could also declare at the end of the process that they did not approve the amendments.

In **AT**'s view, this proposal was appropriate, as it met the objective of speeding up the revision procedure. **AT** thought that if this option were to be matured and refined in the framework of the current COTIF, it would be a promising way forward. For example, the period could be set at three years so as to remain within the framework of the periodicity of the General Assembly meetings. It could also be combined with a revised solution VI proposal

(report), which would enable those states that were not yet able to approve the amendments to explain why, so that the Organisation could try to identify and overcome these obstacles.

The **SG** fully supported this proposal.

FR pointed out that the constitutional problem could sometimes only be identified at the time of approval. **FR** was concerned that this could lead to a multispeed COTIF. **DE** shared **FR**'s concerns.

4. Any other business

None.

5. Subsequent procedure

The **head of the legal department** reminded the meeting that the Revision Committee would take place from 27 February to 1 March 2018 and that the documents for that session would have to be sent out on 27 October 2017. The next General Assembly would be held in September 2018. He asked delegates whether or not another session of this working group should be planned.

FR was of the view that an intermediate step was necessary before the documents for the Revision Committee were sent out, in order to give the Member States more time to examine this complex issue, which also required internal consultation. **FR** did not know whether a second session was necessary and would rely on the **SG**'s judgement in this respect. However, the Member States must be allowed a further period of time to look at the issue in more depth.

NL and **DE** agreed with **FR**.

Following a discussion between **FR**, **NL**, the **SG** and the **head of the legal department**, the working group agreed the following dates and subsequent procedure:

- 1 June 2017, the Secretariat would send delegates the provisional minutes and a questionnaire to help simplify their internal consultations;
- 1 September 2017, deadline for positions and comments from the Member States.

The **head of the legal department** appealed to delegates not to wait until 1 June 2017 to continue their internal consultations. They already had the most important documents, i.e. the legal opinion and the Secretariat's document.

The Chairman closed the session and thanked all the participants for their contributions and the interpreter for his work. **AT** thanked the Chairman for his able conduct of the discussions.



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

**Groupe de travail «Modification de la
procédure de révision de la COTIF »**

**Arbeitsgruppe “Änderung
Revisionsverfahren COTIF”**

**Working group to amend the
procedure for revising COTIF**

Bern, 3.5.2017

Liste des participants

Teilnehmerliste


List of participants

I. Gouvernements / Regierungen / Governments

Allemagne/Deutschland/Germany

Mme/Fr./Ms Christine **Ehard**


Referentin, stellvertretende Referatsleiterin LA 11
Bundesministerium für Verkehr und digitale
Infrastruktur (BMVI)
Referat LA 11, Eisenbahnrecht
Invalidenstrasse 44
10115 Berlin
Deutschland

 +49 (30) 18 300 4111
Fax +49 (30) 18 300 8074111
E-mail christine.ehard@bmvi.bund.de

Autriche/Österreich/Austria

M./Hr./Mr. Wolfgang **Catharin**

Abteilungsleiter IV/SCH1
Bundesministerium für Verkehr, Innovation und
Technologie
Abteilung IV/SCH1 - Logistik und internationale
Angelegenheiten Eisenbahnen und Rohrleitungen
Radetzkystraße 2
1030 Wien
Österreich

 +43 (1) 711 62 65 21 00
Fax +43 (1) 711 62 65 21 99
E-mail wolfgang.catharin@bmvit.gv.at

Belgique/Belgien/Belgium


S'est excusée.
Hat sich entschuldigt
Sent apologies.

Bosnie-Herzégovine/Bosnien und Herzegowina/Bosnia and Herzegovina

S'est excusée.
Hat sich entschuldigt
Sent apologies.

Espagne/Spainien/SpainMme/Fr./Ms **Silvia Cosano**

Embassy of Spain
 Kalcheggweg 24
 Case postale 310
 3000 Bern
 Switzerland

 +41 31 350 52 52
 E-mail silvia.cosano@maec.es

Finlande/Finnland/Finland

S'est excusée.
 Hat sich entschuldigt
 Sent apologies.


France/Frankreich/FranceM./Hr./Mr. **Mafal Thiam**

Chargé de mission conventions internationales
 Ministère de l'Environnement, de l'Énergie et de la
 Mer (MEEM)
 Direction générale des infrastructures, des transports
 et de la mer
 Direction des services des transports
 1, Place Carpeaux
 92055 Paris-La Défense Cedex
 France

 +33 (1) 40 81 78 75
 Fax +33 (1) 40 81 17 22
 E-mail mafal.thiam@developpement-durable.gouv.fr


Grèce/Griechenland/GreeceM./Hr./Mr. **Fotios Liakeas**

Deputy Head of Rail and combined Transport Unit
 Ministry of Infrastructure and Transport
 2 Anastasseos street
 156 69 Papagou
 Greece

 +30 (210) 650 8609
 Fax +30 (210) 650 8491
 E-mail f.liakeas@yme.gov.gr

Hongrie/Ungarn/HungaryM./Hr./Mr. Roland **Simon**

International Officer
 Ministry of National Development
 Fö u. 44-50
 1011 Budapest
 Hungary


 +36 (1) 795 34 53
 E-mail roland.simon@nfm.gov.hu

Jordanie/Jordanien/Jordan

S'est excusée.
 Hat sich entschuldigt
 Sent apologies.

LuxembourgM./Hr./Mr. Albert **Zigrand**

Attaché/Juriste
 Ministère du Développement durable et des
 Infrastructures
 Département des transports
 Direction des Chemins de fer
 4, place de l'Europe
 1499 Luxembourg
 Luxembourg


 +352 (247) 844 74
 Fax +352 (247) 22 85 68
 E-mail albert.zigrand@tr.etat.lu

Norvège/Norwegen/Norway

S'est excusée.
 Hat sich entschuldigt
 Sent apologies.


Pays-Bas/Netherlands/NetherlandsMme/Fr./Ms Charlotte **Duijf**

Legal adviser
 Ministry of Infrastructure and Environment
 Administrative and Legal Affairs Department
 Division Transport
 Plesmanweg 1-6
 Postbus 20901
 2500 EX The Hague
 The Netherlands

 +31 611926051
 E-mail charlotte.duijf@minienm.nl


Pologne/Polen/PolandM./Hr./Mr. Krzysztof **Kulesza**

Minister's Counselor
 Ministry of Infrastructure and Construction
 Railway Department
 4/6, Chalubinskiego St.
 00 928 Warszawa
 Poland

 +48 (22) 630 14 18
 Fax +48 (22) 630 19 30
 E-mail Krzysztof.Kulesza@mib.gov.pl


Roumanie/Rumänien/RomaniaM./Hr./Mr. Ioan **Spinu**

State Inspector
 Romanian Railway Authority
 393 Calea Grivitei, Sector 1
 Bucharest
 Romania

 +40 (21) 307 22 24
 Fax
 E-mail luigispinu@afer.ro

Roumanie/Rumänien/RomaniaM./Hr./Mr. George **Micu**

Head of Department
 Romanian Railway Authority
 393 Calea Grivitei, Sector 1
 Bucharest
 Romania


 +40 (21) 307 79 35
 Fax
 E-mail micu.george@afer.ro

**Royaume-Uni/Vereinigtes Königreich/
United Kingdom**

S'est excusé.
 Hat sich entschuldigt
 Sent apologies.


Serbie/Serbien/SerbiaMme/Fr./Ms **Branka Nedeljković**

Head of the Department for Regulatory Affairs
 Directorate for Railways
 Nemanjina 6
 11000 Belgrade
 Serbia

 +381 (11) 3618219
 Fax +381 (11) 361 82 91
 E-mail branka.nedeljkovic@raildir.gov.rs

Suisse/Schweiz/SwitzerlandM./Hr./Mr. **Christian Messerli**

Jurist
 Eidgenössisches Departement für Umwelt, Verkehr,
 Energie und Kommunikation (UVEK)
 Bundesamt für Verkehr BAV
 Abteilung Politik
 Sektion Recht
 3003 Bern
 Schweiz

 +41 (0) 584656242
 Fax +41 (0) 584625595
 E-mail christian.messerli@bav.admin.ch

**Republique tchèque/Tschechische
Republik/Czech Republic**

S'est excusée.
 Hat sich entschuldigt
 Sent apologies.

Turquie/Türkei/Turkey


S'est excusée.
 Hat sich entschuldigt
 Sent apologies.

**II. Organisation régionale d'intégration économique
Regionale Organisation für wirtschaftliche Integration
Regional economic integration organisation**

**Commission européenne/Europäische
Kommission/European Commission**

M./Hr./Mr. Andrew **Ashton**

Policy Officer
European Commission - DG MOVE
Unit B2 - Single European Rail Area
Rue De Mot 28 04/27
1049 Brussels
Belgium


 +32 (2) 2981077
E-mail Andrew.Ashton@ec.europa.eu

**III. Organisations et associations internationales
Internationale Organisationen und Verbände
International organisations and associations**

EIM

M./Hr./Mr. Tommaso **Spanevello**


Manager of Public Affairs and EU Policy
EIM aisbl (European Rail Infrastructure Managers)
Square de Meeus 1
1000 Brussels
Belgium

 +32 (2) 234 37 73
Fax +32 (2) 234 37 79
E-mail tommaso.spanevello@eimrail.org

UIRR


M./Hr./Mr. Akos **Ersek**

Chief Policy Advisor
UIRR
Montoyerstraat 31
1000 Brussels
Belgium

 +32 (2) 548 7891
E-mail aerssek@uirr.com


UPUM./Hr./Mr. **Ricardo Guilherme Filho**

Directeur des affaires juridiques (DAJ)
Union Postale Universelle (UPU)
Bureau international
Weltpoststrasse 4
Case postale
3000 Berne 15
Suisse

 +41 31 350 31 11
E-mail Ricardo.Guilherme@upu.int

UPUMme/Fr./Ms **Houda Tahiri**


Legal Affairs Expert
Universal Postal Union, International Bureau
Legal Affairs Directorate
Weltpoststrasse 4
Case postale
3000 Berne 15
Switzerland

 +41 31 350 35 80
Fax +41 31 350 31 10
E-mail houda.tahiri@upu.int

**IV. Secrétariat
 Sekretariat
 Secretariat**


M./Hr./Mr. François **Davenne**

Secrétaire général
Generalsekretär
Secretary General

 +41 (31) 359 10 10
E-mail francois.davenne@otif.org


M/Hr./Mr. Aleksandr **Kuzmenko**

Chef du département juridique
Leiter der Rechtsabteilung
Head of Legal Department

 +41 (31) 359 10 13
E-mail aleksadr.kuzmenko@otif.org


Mme/Fr./Ms Eva **Hammerschmiedová**

Experte/Expertin/Expert
Rechtsabteilung

 +41 (31) 359 10 14
E-mail eva.hammerschmiedova@otif.org


Mme/Fr./Ms Iris Petra **Gries**

Experte/Expertin/Expert
Département juridique

 +41 (31) 359 10 15
E-mail iris.gries@otif.org

Mr/Hr./Mr. Bas **Leermakers**


Chef du département de l'interopérabilité technique
Leiter der Abteilung für technische Interoperabilität
Head of Technical Interoperability Department

 +41 (31) 359 10 25
E-mail bas.leermakers@otif.org

**V. Experte de l'OTIF
Sachverständige der OTIF
OTIF expert**

Mme/Fr./Ms Catherine **Brölmann**

Expert
University van Amsterdam
Associate Professor of international law
Oudemanhuispoort 4-6
1012 CN Amsterdam
Netherlands

 +31 (02) 052 527 05
E-mail C.M.Brolmann@uva.nl

**VI. Interprète
Dolmetscher
Interpreter**

M./Hr./Mr. David **Ashman**

Possibilities for amendment of the COTIF revision procedure (3 may 2017)



Dr. Catherine Brölmann



Groupe de travail du Secrétaire général sur la modification de la procédure de révision de la COTIF – Berne, le 3 et le 4 mai 2017

Arbeitsgruppe des Generalsekretärs über die Änderung des Revisionsverfahrens des COTIF – Bern, 3.-4. Mai 2017

Working group set up by the SG to amend the procedure for revising COTIF – Berne, 3 and 4 May 2017

Current legal framework for revision of the Convention and Appendices

- (GA) modifications to general Convention enter into force 12 mnth after approval by 2/3 of the member States
- (GA) modifications to the Appendices enter into force 12 mnth after approval by 1/2 of the member States
- (Rev Ctee) modifications to Convention and Appendices enter into force 12 mnth after notification to the member States

Domestic mechanisms enabling international-legal approval

- Government's regulatory powers
- Parliamentary approval
- Domestic legislation

Complexities and adverse effects of the current COTIF revision procedure I

External circumstances:

- Speed of revisions is increasing
- The factor of EU law
- The factor of OSJD
- The Market (requiring ever more speedy responses)

Complexities and adverse effects of the current COTIF revision procedure II

Adverse effects of current COTIF revision procedures:

- Interference with other amendments
- Different procedures coexisting – risk of inconsistencies
- Discrepancies between COTIF law and EU (EEA) law, which may lead to overall non-application of COTIF appendices
- Current mechanisms will not meet the Market's need for adaptability
- Problem is not only length of time but also unpredictability

The practice of reconciling regime adaptability and state consent I

- Modify treaty regime the classic way (e.g. WHO Constitution)
- Explicit approval by states of rule/modification proposed by IO (e.g. currently amendments under OTIF GA remit)
- Implicit approval by states of rule/modification proposed by IO: 'opting-out' or 'tacit acceptance' (e.g. ICAO, IMO, WHO Regulations)
- Modification adopted by IO/treaty body without additional approval member States (e.g. Montreal protocol, and to some extent UPU Regulations)

The practice of reconciling regime adaptability and state consent II

Other means for streamlining enactment of modifications:

- Provisional application (e.g. UPU, OECD)
- Fixed date on which the Acts enter into force (UPU)

Proposals for possible amendments to the
COTIF revision procedure

Proposals I and VII

I. Appendices under the competence of the Revision Committee (preferable solution)

- Appendices in their entirety fall under the competence of the Revision Committee
- The same approach to rules with ‘private law character’ and those with a ‘technical character’
- Advantages: speed, predictability and systematic clarity

VII. New Appendices

- Follow the same time frame as the amendments to existing appendices

I. Appendices under the competence of the Revision Committee. Modification of Article 33 §4
VII. New Appendices; Modification of Article 33 §4

§4 Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify **or set up**:

- a) Articles 9 and 27 §§ 2 to 5;
- b) the CIV Uniform Rules ~~except Articles 1, 2, 5, 6, 16, 26 to 39, 41 to 53 and 56 to 60~~;
- c) the CIM Uniform Rules ~~except Articles 1, 5, 6 §§ 1 and 2, Articles 8, 12, 13 § 2, Articles 14, 15 §§ 2 and 3, Article 19 §§ 6 and 7 and Articles 23 to 27, 30 to 33, 36 to 41 and 44 to 48~~;
- d) the CUV Uniform Rules ~~except Articles 1, 4, 5 and 7 to 12~~;
- e) the CUI Uniform Rules ~~except Articles 1, 2, 4, 8 to 15, 17 to 19, 21, 23 to 25~~;
- f) the APTU Uniform Rules ~~except Articles 1, 3 and 9 to 11 and the Annexes of these Uniform Rules~~;
the ATMF Uniform Rules ~~except Articles 1, 3 and 9~~.

new Appendices containing provisions with technical or private law character.

When [modification proposals] [**proposal for modification of Appendices or creation of new Appendices**] are submitted to the Revision Committee in accordance with letters a) to [g)] [h], one-third of the States represented on the Committee may require these proposals to be submitted to the General Assembly for decision.

Proposal II

II. Additional role for the General Assembly

- Add a role for the General Assembly, especially in the procedure for revising the CIV, CIM, CUV and CUI Appendices
- Revision Committee takes a decision on modification, this decision is subject to approval of the General Assembly
- General Assembly has no right to propose modifications
- No ex post approval by the individual Member States
- Advantage: additional check by plenary body and previsible period for Member States to examine the possibilities and preferences as to implementation in their domestic legal systems

II. Additional role for the General Assembly ; Modification of Article 33 §4 & Article 35 §3

Art 33 §4 Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify:

- a) Articles 9 and 27 §§ 2 to 5;
- b) the CIV Uniform Rules ~~except Articles 1, 2, 5, 6, 16, 26 to 39, 41 to 53 and 56 to 60;~~
- c) the CIM Uniform Rules ~~except Articles 1, 5, 6 §§ 1 and 2, Articles 8, 12, 13 § 2, Articles 14, 15 §§ 2 and 3, Article 19 §§ 6 and 7 and Articles 23 to 27, 30 to 33, 36 to 41 and 44 to 48;~~
- d) the CUV Uniform Rules ~~except Articles 1, 4, 5 and 7 to 12;~~
- e) the CUI Uniform Rules ~~except Articles 1, 2, 4, 8 to 15, 17 to 19, 21, 23 to 25;~~
- f) the APTU Uniform Rules ~~except Articles 1, 3 and 9 to 11 and the Annexes of these Uniform Rules;~~
- g) the ATMF Uniform Rules ~~except Articles 1, 3 and 9.~~

~~When the Revision Committee has taken a decision on modification proposals are submitted to the Revision Committee in accordance with letters a) to g), this decision shall be subject to the approval of the General Assembly; the General Assembly may not [under any circumstances] modify it [/propose modifications]. one-third of the States represented on the Committee may require these proposals to be submitted to the General Assembly for decision.~~

II. Additional role for the General Assembly ; Modification of Article 33 §4 & Article 35 §3

Art. 35 §3 Modifications of Appendices to the Convention, decided upon by the Revision Committee **and approved by the General Assembly**, shall enter into force for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States. Modifications decided upon by the RID Expert Committee or by the Committee of Technical Experts shall enter into force for all Member States on the first day of the sixth month following that during which the Secretary General has given notice of them to the Member States.

V. Provisional application combined with a fixed time period for the entry into force of amendments (= III + IV)

A fixed time period for the entry into force of the amendments

- Fixed time period (2 or 3 years) prescribed for the entry into force of the amendments
- No explicit ex post approval on the part of Member States is required
- Member States have a right to file a declaration of non-application before entry into force

Provisional application

- The General Assembly is given the explicit right to decide on provisional application of modifications

- III. A fixed time period for the entry into force of the amendments - modification of Article 34§3
- IV. Provisional application - new Article 34 §8

34 §3 Modifications of the Appendices to the Convention, decided upon by the General Assembly, shall enter into force for all Member States **[twenty-four/thirty-six] months after the modifications have been notified to the Member States by the Secretary General, with the exception of those which, before entry into force, have** ~~twelve months after their approval by half of the Member States which have not~~ made a declaration pursuant to Article 42 § 1, first sentence, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications and with the exception of those which have made a declaration pursuant to Article 42 § 1, first sentence.

34 §8 The General Assembly may decide on the provisional application of modifications to the Convention.

IV. Provisional application

- The General Assembly is given the explicit right to decide on provisional application of modifications
- Streamline the effectuation of modifications
- Risk of legal indeterminacy

Provisional application - New Article 34 §8

34 §8 The General Assembly may decide on the provisional application of modifications to the Convention.

VI. Rapportage

- Compulsory rapportage
- Soft compliance mechanism

Rapportage - new Article 34 §9

34 §9 Member States shall endeavour to start the national approval procedures referred to in §§ 2 and 3 within 6 months after the notification of modifications to the Member States by the Secretary General. Member States which have not notified approval to the Secretary General shall provide an annual report to the Secretary General on the measures which they have taken with a view to being able to approve modifications adopted by the General Assembly. The Secretary General shall inform the Member States about ongoing national procedures.

VIII. Amendments to the general Convention

- Simplified procedure with regard to several provisions, such as administrative provisions which would not impact the Member States' existing obligations
- Simplified procedure by Revision Committee or General Assembly

Amendments to the general Convention - Modification of Article 33 §4, letter a) or Article 34 §2 bis

Article 33 §4, letter a)

§4 Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify :

a) Articles 9 and 27 §§ 2 to 5; **and [...]**;

[...]

OR

Article 34 §2 bis

§2 bis The General Assembly may decide that modifications to the general Convention which do not impose new obligations on Member States [shall] enter into force for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications.



UPU

UNIVERSAL
POSTAL
UNION

UPU legal framework

Selected legal and procedural issues
(presentation to OTIF)



UPU

UNIVERSAL
POSTAL
UNION

OBJECTIVES

- Briefly present the main legal and procedural aspects pertaining to the UPU as an intergovernmental organization and specialized agency of the United Nations;
- Highlight a number of specific points which may be of interest to OTIF, particularly with regard to the adoption and entry into force of the Acts of the Union.



UPU

**UNIVERSAL
POSTAL
UNION**

STRUCTURE OF THIS PRESENTATION

**Basic overview of
the UPU**

**Legal and
procedural
aspects**

**Concluding
remarks and
specific points
worth
emphasizing**



UPU

**UNIVERSAL
POSTAL
UNION**



UPU overview (1)



**Third
oldest
intergovernmental
organization
(1874)**



**Specialized
agency of the
United Nations
(since 1948)**



**Headquarters in
Berne, Switzerland**



UPU overview (2)

192 member countries form one single postal territory through a tridimensional network

- > Physical (Delivery logistics)
- > Electronic (E-Services)
- > Financial (Payments)



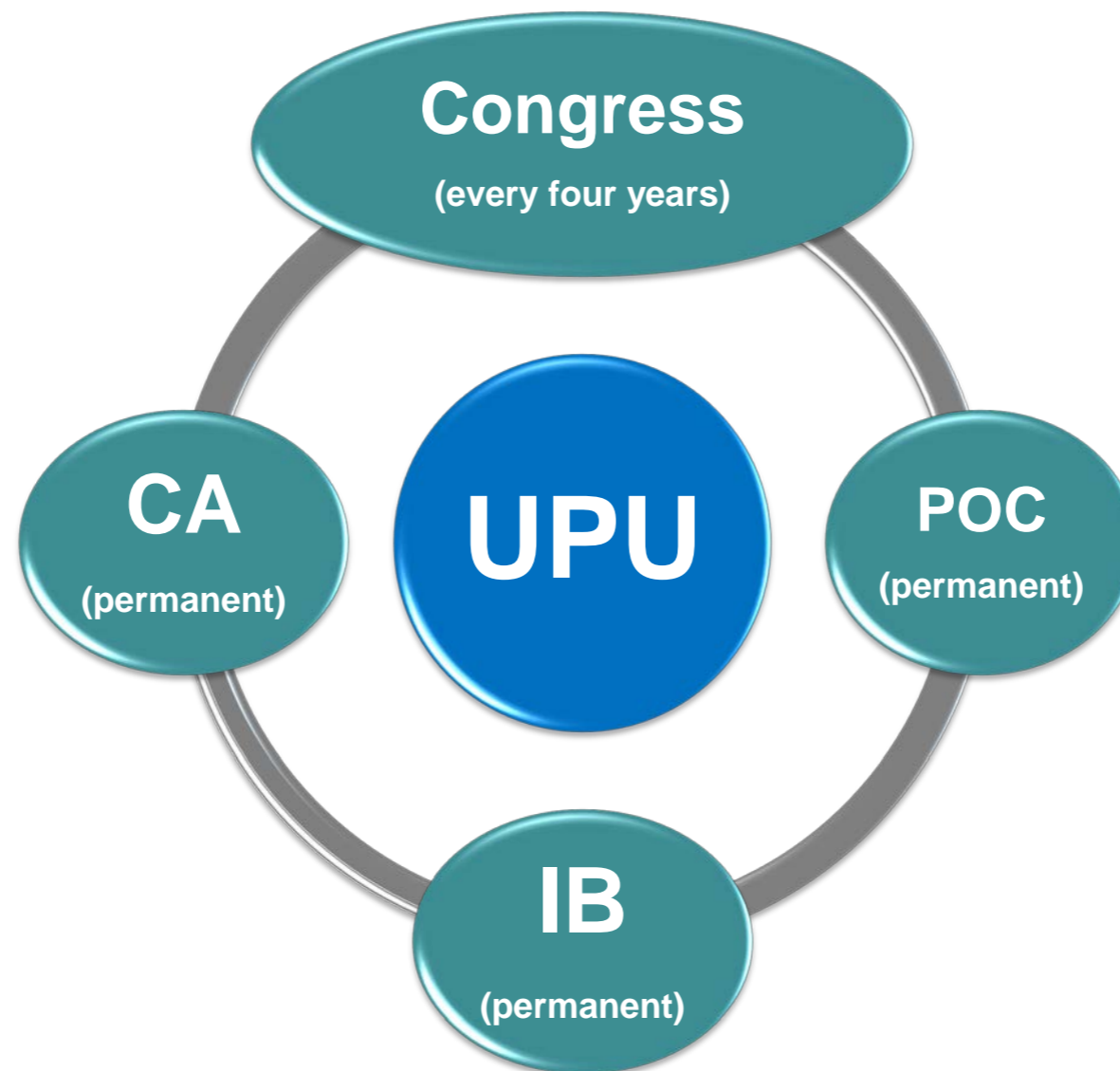


UPU

UNIVERSAL
POSTAL
UNION



UPU overview (3)





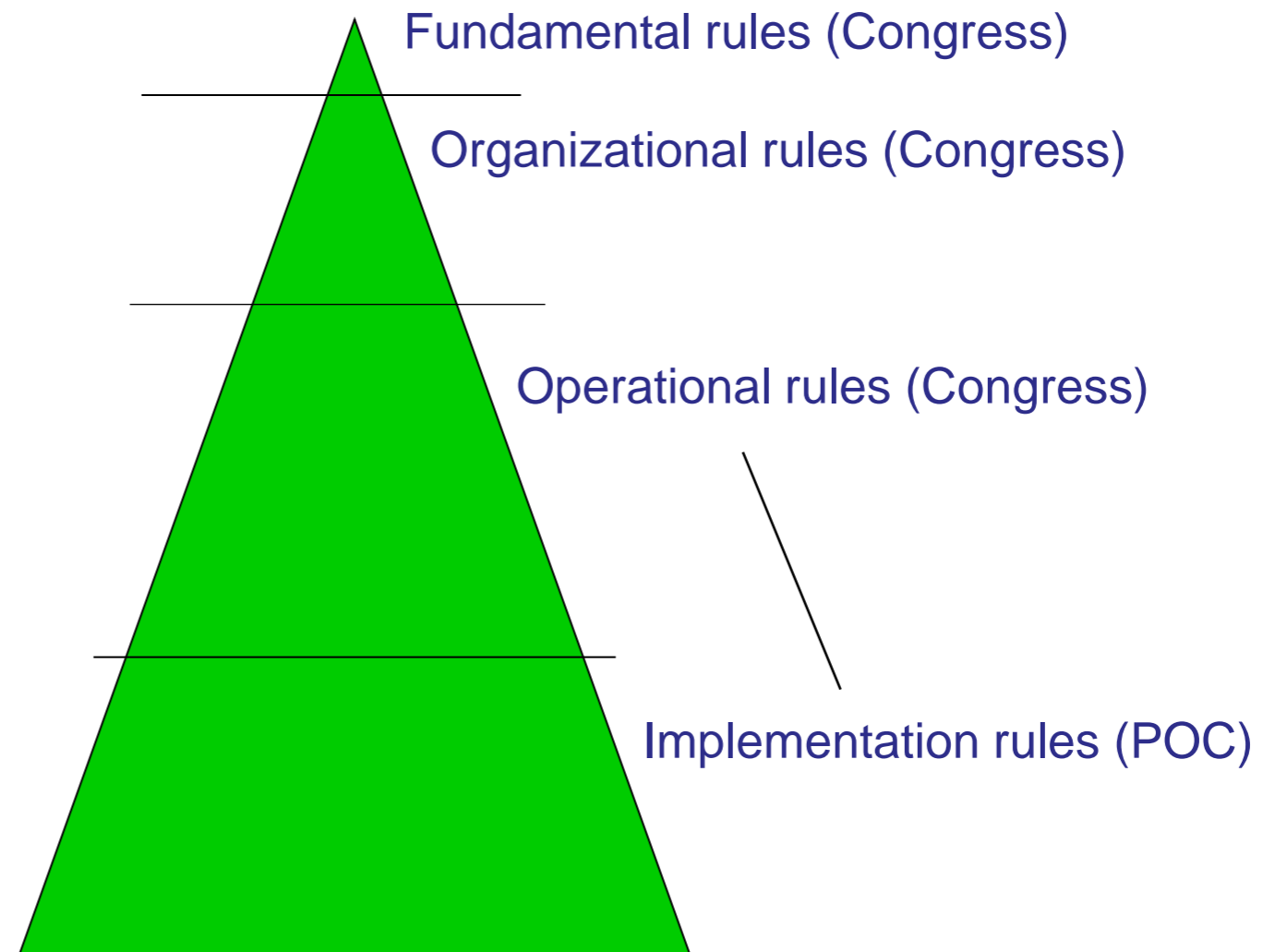
UPU overview (4)

Constitution

Gen Regs

**Convention
PPSA**

Regulations





UPU

**UNIVERSAL
POSTAL
UNION**



UPU overview (5)



- **Constitution**
- **General Regulations**



- **Convention**
- **PPSA**
- **Regulations**



UPU overview (6)



- **CA: 41 members**
- **Supervisory powers**
- **Deals with legal, administrative and regulatory questions**
- **Meets twice a year**



- **POC: 40 members**
- **Practical measures**
- **Deals with operational and technical questions**
- **Meets twice a year**



UPU

**UNIVERSAL
POSTAL
UNION**

STRUCTURE OF THIS PRESENTATION

*Legal overview
provided*

**Legal and
procedural
aspects**

**Concluding
remarks and
specific points
worth
emphasizing**



Voting principles (1)

Opening of the meeting and voting:

- 1/2 of member countries represented in Congress and having the right of vote.
- For PPSA, 1/2 of member countries represented in Congress which are parties to the PPSA and have the right of vote.

Qualified quorum for votes on amending the Constitution and General Regulations:

- 2/3 of member countries having the right to vote.

ATTENTION 1: QUORUM is NOT the same as necessary VOTING MAJORITY. Quorum is simply the minimum number of delegations needed to be present for a meeting and/or vote to take place.



UPU

UNIVERSAL
POSTAL
UNION



Voting principles (2)

Proposal involving amendments to	Required majority
Constitution	2/3 of member countries of the Union having the right to vote (today: 114 countries, considering that 22 countries are under sanctions)
General Regulations	Majority of member countries represented in Congress and having the right to vote (exact number depends on attendance/representation of countries at Congress)
Convention	Majority of member countries present and voting and having the right to vote (simple majority of countries present/represented)
PPSA	Majority of member countries present and voting which are parties to the PPSA and have the right to vote (similar to the Convention but limited to PPSA members)



UPU

UNIVERSAL
POSTAL
UNION

Structure of this presentation

*Legal overview
provided*

*Legal and
procedural
aspects
presented*

**Concluding
remarks and
specific points
worth
emphasizing**



Concluding remarks and specific points of possible interest to OTIF (1)

Acts of the Union = Treaties?

- ALL Acts of the Union are to be deemed as treaties adopted within an international organization, thus falling under the purview of article 5 of the VCLT; this is also confirmed in article 22 of the UPU Constitution, regardless of specific modes of approval of the different Acts by member countries;
- ALL Acts of the Union are, indeed, governed by international law (article 2 of the VCLT). Otherwise, member country reservations would not make sense in our Regulations. SOME of them permanent, others approved on a provisional, cycle-limited basis (Convention, PPSA, Regulations).

Full powers and adoption of the Acts of the Union:

- In the light of the above, articles 7 and 9 of the VCLT would also apply to any Acts of the Union adopted within the UPU (Congress and POC).



Concluding remarks and specific points of possible interest to OTIF (2)

Provisional application, consent to be bound and approval/ratification:

- Acts enter into force as decided by Congress (as per article 158 of the General Regulations and in line with article 24 § 1 of the VCLT) – expressions of consent are given by member countries as per article 11 of the VCLT;
- Formal approval/ratification of the Acts of the Union by a member country often takes much longer – however, this is not an issue under the point above PLUS article 18 of the VCLT, whereby the expression of consent already determines that a member country shall “refrain from acts which would defeat the object and purpose of a treaty”.

Issues related to International Bureau commentary:

- International Bureau commentary is currently under review in order to avoid legal inconsistencies – once more, ALL Acts of the Union are of an intergovernmental nature, with ONLY UPU member countries as normative addressees (even if other entities, i.e. designated operators, are “ensuite” charged with implementing many of them as per article 1bis § 1.7 of the UPU Constitution.



UPU | UNIVERSAL
POSTAL
UNION

Thank you very much for your attention!

Contact details:

Ricardo Guilherme Filho

Director - Legal Affairs Directorate

T +41 31 350 35 25

F +41 31 350 31 10

Email: ricardo.guilherme@upu.int



COTIF revision procedure

Working Group to amend the procedure for revising COTIF, Berne, 3 and 4 May 2017



Contents

- ✓ Introduction
- ✓ General Legal Framework
- ✓ COTIF 1999 Legal Framework
- ✓ Timeframe for amending COTIF revision procedure

Intensive regional and national rail regulatory development

- ✓ Repartition of public and private sector roles and responsibilities
- ✓ Transformation of rail market structure:
 - Separation of transport and infrastructure management
 - Emergence of new actors
 - New cooperation models
 - Etc.
- ✓ Ensuring fair intra-modal and intermodal competition

**Rail competitiveness and OTIF relevance depends on
ability to meet market needs
in due time**

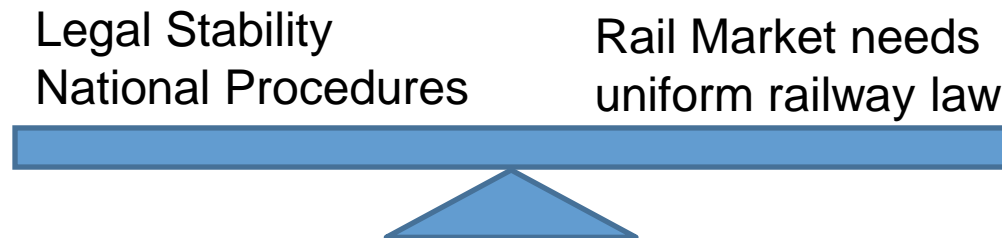
Finding the right balance

Legal stability vs legal stagnation

Lengthy delays between the time of adoption of amendments and their entry into force mean that an accelerated amendment procedure must be found

... [t]he constantly changing needs of international society have made it essential to include in most multilateral treaties an effective mechanism for their amendment [A. Aust, Modern Treaty Law and Practice].

For each of the States under consideration it is necessary to balance the need for efficiency, and indeed efficacy, in the international treaty-making process, so that it will produce clear and reliable results within a reasonable period of time, against the need for democratic control and the accountability of those exercising public powers [Council of Europe, Treaty Making – Expression of Consent by States to be bound by a Treaty].



General Legal Framework

Vienna Convention on the Law of Treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II [Conclusion and entry into force of treaties] apply to such an agreement **except insofar as the treaty may otherwise provide** [Article 39 VCLT].

Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs [Article 40 (1)].

Council of Europe treaty practice confirms that the **rules of international treaty law** concerning amendments are **flexible** and that **states have the freedom** to adapt these rules to new circumstances, as long as some basic principles of *jus cogens* are not violated [J. Polakiewicz, Treaty-making in the Council of Europe].

COTIF 1999 Legal Framework (1/2)

Different speed procedures

General Assembly (GA)	Revision Committee (RC)	RID Committee of Experts (RID)	Committee of Technical Experts (CTE)
COTIF except Article 9 and 27 §§ 2 to 5	COTIF Article 9 and 27 §§ 2 to 5		
CIV/CIM/CUV/CUI/APTU/ATMF (specific articles)	CIV/CIM/CUV/CUI/APTU/ATMF (specific articles)	RID	Annexes to the APTU/UTPs
Other provisions of Appendices if decided that modifications under consideration are closely linked with them	1/3 of the MSs represented on the Committee may require proposals to be submitted to GA for decision		

Different speed procedures

GA	RC	RID	CTE
<p>Enter into force for all MSs (*) 12 months after approval by:</p> <ul style="list-style-type: none"> - 2/3 MSs (COTIF) - 1/2 MSs (Appendices) 	<p>Enter into force for all MSs (*) on the first day of the twelfth month following the notification</p>	<p>Enter into force for all MSs (*) on the first day of the sixth month following the notification</p>	
<ul style="list-style-type: none"> - Right of declaration of non-approval of modifications before entry into force. The application of the Appendix in question is suspended in so far as concerns traffic with and between those MSs. Under prescribed conditions membership will be terminated. 	<p>Right of Objection during four months from the day of the notification. The application of the Appendix (or validated technical standard or adopted UTP) in question is suspended in so far as concerns traffic with and between those MSs</p>		
	<p>Objections by 1/4 of MSs: no entry into force</p>		

- Except those MSs which made a declaration of non-approval or objected to the modification, or made a declaration pursuant to Article 42 § 1

Division of competence – General Assembly and Revision Committee

Articles reserved for the General Assembly according to Art. 33 of COTIF (core substance)

In general: scope of application, liability, assertion of rights, ... are subject matters of substantial importance and as such they are usually, in many Member States, governed at legislative level; therefore the competence of the General Assembly is justified. Other provisions can be modified by the Revision Committee in its own competence. [Articles listed in Art. 33 COTIF for each Appendix. What about new Articles?]

With a view to some examples regarding previous revisions, is such a division of competences justified?

24th Revision Committee (2009): substantial change to the COTIF system of technical approval of railway material to adapt it to the EU Interoperability directive (in particular UTPs, ECM, interaction between EU law and ATMF - Art. 3a ATMF), without any change to Articles reserved for the competence of the GA

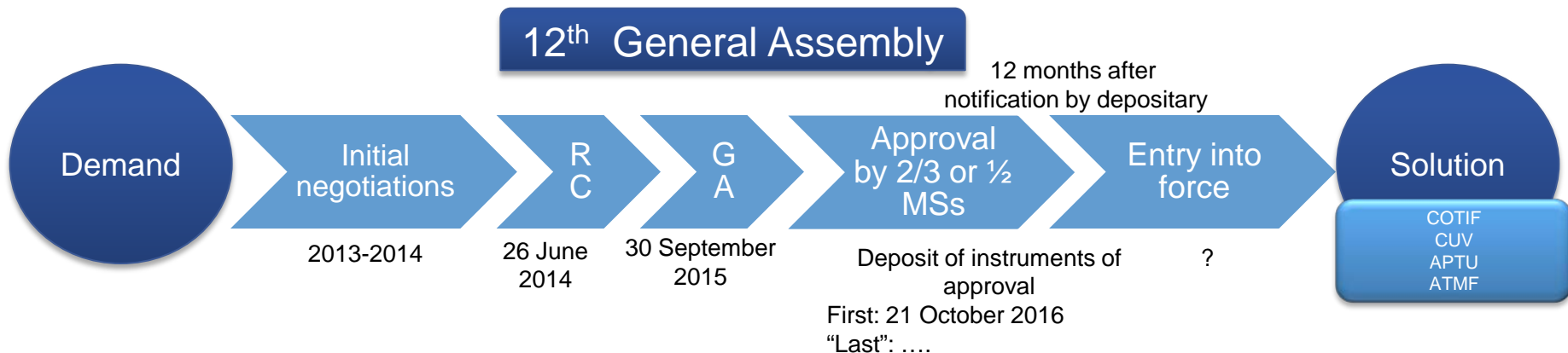
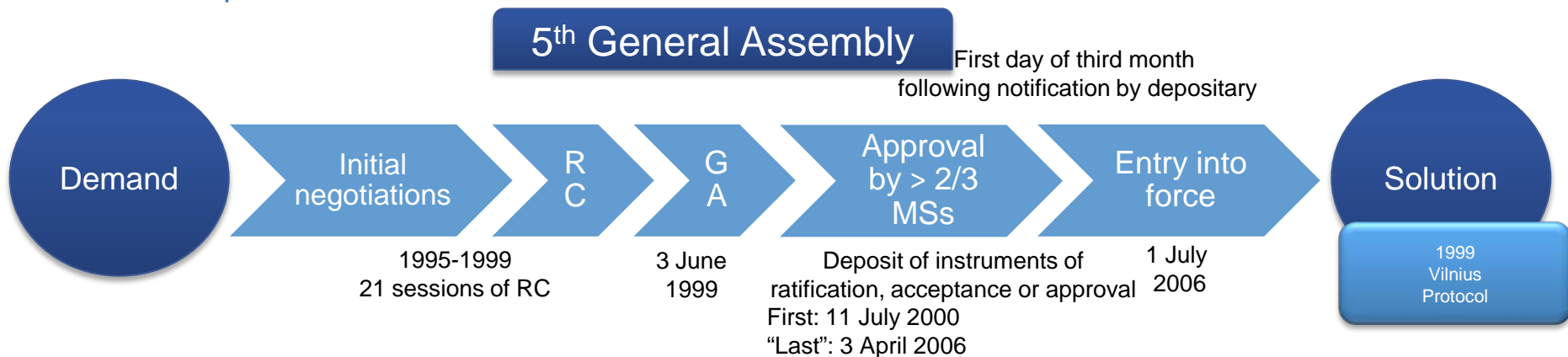
25th Revision Committee (2014): substantial changes regarding ATMF (amendment to inter alia registers, maintenance, new Article on train composition and operation); deletion « other railway material » in Articles within the RC's own competence

12th General Assembly (2015): is the deletion of “other railway material” in Articles within the GA's competence a substantial change?

Does the new Art. 1a CUV (Areas governed) constitute a substantial change?

Current time frame for amending COTIF (1/2)

Classical procedure

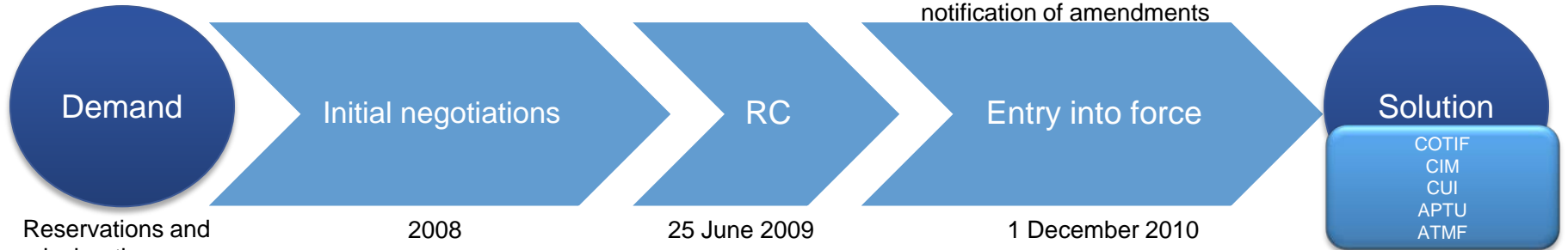




Current time frame for amending COTIF (2/2)

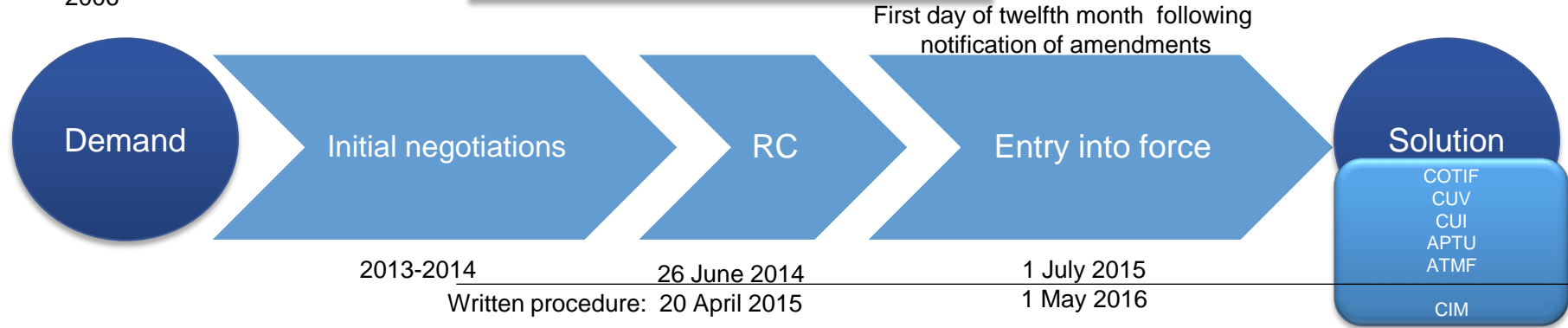
Simplified procedure

24th Revision Committee



Withdrawal of reservations and declarations on CUI: 2011-... (GB) APTU, ATMF: 2011-2016

25th Revision Committee



1 July 2015
1 May 2016

Next steps – schedule

SG's Working group – Revision Committee – General Assembly

- 27.10.2017** – Calling notice incl. provisional agenda and other documents for the next session of the Revision Committee
- 19.12.2017** – deadline for additional items on the agenda of the RC
deadline for positions
- 27.02.-01.03.2018** – **26th session of the Revision Committee**
- September 2018** – **13th General Assembly**



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

Gryphenhübeliweg 30
CH - 3006 Berne
www.OTIF.org