

OTIF



**ORGANISATION INTERGOUVERNEMENTALE POUR
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR**

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

**Commission de révision
Revisionsausschuss
Revision Committee**

**CR 24/NOT/Add.2
21.12.2009**

Original : EN

24th Session

Partial revision of Appendix E (CUI) to the Convention
(Text as modified and Explanatory Report)

Text modifications

Title I General Provisions

Article 3 Definitions

Amend b), c), f) and g) to read:

(For the purposes of these Uniform Rules, the term)

- b) “manager” means the person who makes railway infrastructure available and who has responsibilities in accordance with the laws and prescriptions in force in the State in which the infrastructure is located;
- c) “carrier” means the person who carries persons or goods by rail in international traffic under the CIV Uniform Rules or the CIM Uniform Rules and who is licensed in accordance with the laws and prescriptions relating to licensing and recognition of licenses in force in the State in which the person undertakes this activity;
- f) “licence” means the authorisation issued by a State to a railway undertaking, in accordance with the laws and prescriptions in force in that State, by which its capacity as a carrier is recognized;
- g) “safety certificate” means the document attesting, in accordance with the laws and prescriptions in force in the State in which the infrastructure is located, that so far as concerns the carrier,
- the internal organisation of the undertaking as well as
 - the personnel to be employed and the vehicles to be used on the infrastructure,
- meet the requirements imposed in respect of safety in order to ensure a service without danger on that infrastructure.

Title II
Contract of Use

Article 5
Contents and form

Amend §§ 1 and 2 to read:

“§ 1

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

§ 2

The contract shall regulate the necessary details for the determination of the administrative, technical and financial conditions of use.”

Insert, after Article 5, a new Article 5bis as follows:

“Article 5bis
Law remaining unaffected

- § 1 The provisions of Article 5 as well as those of Articles 6, 7 and 22 shall not affect the obligations which the parties to the contract of use of infrastructure have to meet under the laws and prescriptions in force in the State in which the infrastructure is located including, where appropriate, the law of the European Community.
- § 2 The provisions of Articles 8 and 9 shall not affect the obligations which the parties to the contract of use of infrastructure have to meet in an EC Member State or in a State where Community legislation applies as a result of international agreements with the European Community.
- § 3 The provisions of §§ 1 and 2 concern in particular:
- agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers,
 - licensing,
 - safety certification,
 - insurance,
 - charging involving performance schemes to minimise delays and disruptions and improve the performance of the railway network,
 - compensation arrangements in favour of customers and
 - dispute resolution.“

Article 6
Special obligations of the carrier and the manager

Amend § 1 to read:

“§ 1

The carrier must be authorised to undertake the activity of a carrier by rail. The personnel to be employed and the vehicles to be used must satisfy the safety requirements. The manager may require the carrier to prove, by the presentation of a valid licence and safety certificate or certified copies, or in any other manner, that these conditions are fulfilled.”

Article 7
Duration of the contract

*Delete § 1, renumber §§ 2 to 6 accordingly and modify the heading to read “**Termination of the contract**”.*

Explanatory Report

NOTE: The general remarks and the remarks on individual provisions in this Explanatory Report contain a summary of the information in relation to the following points:

- a) Background to and justification for the amendments that were submitted to the Revision Committee and adopted by it, and
- b) Discussion on the provisions for which the General Assembly is responsible in accordance with Article 33 §§ 2 and 4 (e) of the Convention, including editorial amendments.

The information referred to in

- a) has been examined and approved by the Revision Committee, together with the approved amendments and the General Assembly has noted them;
- b) has been examined and approved by the General Assembly following the Revision Committee's considerations and recommendations in this respect.

General Points

1. Decisions taken by the General Assembly at its 7th and 8th sessions in support of initiatives to solve the legal and practical problems between European Community (EC) law and COTIF envisage that in relation to Appendices to COTIF other than F and G outstanding issues shall be addressed at the appropriate level in order to find practical solutions which may lead to the creation of appropriate working groups.
2. In accordance with these decisions and with an initiative by the Council Land Transport working group of 12 December 2007 an ad hoc working group concerning Appendix E (CUI) was established (consisting of representatives of the European Commission, the OTIF Secretariat and legal experts from European Union (EU) Member States and Switzerland, hereinafter the "CUI Group") in order first to review the respective legal regimes and identify areas of potential difficulty and then to propose practical solutions.
3. In several meetings the CUI Group identified and discussed contested areas of incompatibility between EC law and the CUI and agreed a number of suggestions for amendments to the CUI in order not only to deal with such areas but also to clarify certain parts of the CUI, which in part, caused legal difficulties between the two regimes. These amendments and clarifications concern
 - the scope of application,
 - the definitions of "manager", "carrier", "licence" and "safety certificate",
 - the provisions on the contract of use,
 - the special obligations of carriers and managers,

- liability for loss or damage caused by delay / disruption of operations and
 - conciliation procedures.
4. The primary aim of the amendments suggested by the CUI Group has been to take account of developments in the legislation of the EC including those instruments which, at the time when CUI was adopted, were not yet in force, e.g. Directives 2001/14/EC, 2004/49/EC and 2004/51/EC as well as Regulation EC/1371/2007.
 5. Furthermore, this Explanatory Report gives notice that international rail operations entering into the EU from non EU Member States are subject to EC law in addition to any existing obligation under COTIF. The Report is drafted so as to be taken to be 'supplementary means of interpretation' as understood by Article 32 of the Vienna Convention on the Law of Treaties 1969. It is further intended to highlight those areas of legal ambiguity or uncertainty caused by the existence of two separate systems of law which have been identified to overlap in some respects and therefore gives notice to operators of the existence of EC legislative provisions.
 6. When the Explanatory Report refers to EC Member States, it also applies *mutatis mutandis* to States where the Community legislation applies as a result of international agreements with the European Community.
 7. The Revision Committee followed to a large extent the suggestions made by the CUI Group. The wording of the definition of "licence" was however modified in order to better match the meaning of this term in the law of the EC, and in the proposed Article 5bis (law remaining unaffected), a distinction was made between the liability provisions in Articles 8 and 9 of the CUI where only the law of the EC remains unaffected but not national law and provisions of other Articles where national law also remains unaffected (for details see the relevant particular remarks).
 8. The 9th General Assembly (Berne, 9/10.9.2009) noted the results of the 24th session of the Revision Committee concerning the amendments to Appendix E (CUI) of the Convention and the Explanatory Report and approved the Explanatory Report on Articles 1, 4, 8 and 9 of CUI. It noted that these amendments are not decisions to which Article 34 of the Convention applies and instructed the Secretary General with regard to bringing these amendments into force to proceed in accordance with Article 35 of COTIF. It also authorised the Secretary General to summarise its decisions on the results of the Revision Committee in the general part of the Explanatory Report.

In particular

Title I General Provisions

Article 1 Scope

1. According to § 1, the CUI Uniform Rules (UR) are applicable insofar as the purpose of the contract of use of railway infrastructure is international carriage by rail within the meaning of the CIV Uniform Rules and the CIM Uniform Rules.
 - a) In this context the term “carriage” has the same meaning as in other transport law conventions, such as CMR, Warsaw and Montreal Convention, Hamburg Rules and Athens Convention.
 - b) Regarding the term “international carriage within the meaning of the CIV UR and the CIM UR” see explanatory notes with regard to Article 1 CIV and Article 1 CIM.
 - c) The question of whether a “national” or a “foreign” railway undertaking/carrier is using the infrastructure is irrelevant with regard to the application of CUI.
 - d) CUI also applies to the use of the railway infrastructure in those States where there has been no separation of infrastructure management from the provision of transport services and hence where an integrated undertaking is working in both areas of railway operation, in so far as foreign railway undertakings are allowed access to the infrastructure in these States.
2. The expression “for the purposes of” (CIV/CIM international carriage) in § 1, makes it clear that the purpose of use is a crucial point. So it does not mean, for example, “during the performance” of international carriage by rail. Therefore, use for the purpose of preparations before the train is made ready and dispatched (before the first passenger gets into the train or the goods are loaded) and for the purpose of the work carried on once carriage has been completed (e.g. cleaning and empty returns) are also included in the scope of the contract of use as long as these actions are linked to subsequent or preceding carriage under CIV or CIM.
3. Whilst the CIV/CIM UR refer to the performance of carriage on the basis of a contract of carriage which concerns each single passenger and each single consignment of goods, the use of infrastructure usually concerns carriage of trains containing a number of passengers and consignments. Among these, there might be passengers carried under a contract according to CIV as well as other passengers to whom CIV does not apply. The same goes for a train in which there might be consignments carried under a contract pursuant to CIM as well as other consignments to which CIM does not apply.

4. When it comes to claims for indirect damages, for example, under Article 8 § 1 (c) of CUI:
 - a) as regards passengers with national tickets who receive compensation from the carrier under national law, the carrier will have a right of recourse against the infrastructure manager under national law, and,
 - b) as regards passengers with CIV tickets who receive compensation from the carrier under CIV, the carrier will have a right of recourse against the infrastructure manager under CUI.
5. The same approach would apply *mutatis mutandis* to claims for damage to freight.
6. There are however differing views on the scope of application of CUI to the case of direct damage. The scope of application of CUI to the case of direct damage may need further clarification in each specific case.
7. Bearing in mind that the scope of application of CUI in any case partly overlaps with that of corresponding EC law or corresponding domestic law provisions in several other Articles of CUI where a potential misunderstanding could arise with regard to such law are modified accordingly and additional information is given in the Explanatory Report.

Article 3 Definitions

1. By extending the definition of the term “manager” in letter b) it is indicated that where the law of the EC or corresponding domestic law applies, a person falling under the definition has to be aware of all respective obligations.
2. By extending the definition of the term “carrier” in letter c) it is indicated that where the law of the EC or corresponding domestic law applies, a person falling under the definition has to be aware of all licensing obligations. In particular, non-EU carriers have to note that, when contracting with infrastructure managers of EU Member States as “railway undertakings” under the law of the EC, they are subject to EC obligations, in particular licensing and safety certification requirements.
3. The modified definition of the term “licence” in letter f) better matches the meaning of this term in the law of the EC (see Directive 95/18/EC). Furthermore it is clarified that the licence needs to be issued by a State. It is also stated that for the relevant authorisation the law in force in the State of issuance is applicable. If that law is that of the EC or corresponding domestic law, the relevant conditions, in particular the requirement for licensing and safety certification, have to be met, see also the remarks on letters c) and g).
4. The wording of the definition of the term “safety certificate” in letter g) is aligned with the corresponding wording in the other modified definitions. In substance it is already clear from the existing wording that the safety certificate has to be based on the law applicable at the location of the infrastructure, including the law applicable in the EU Member State where the infrastructure is located.

Article 4

Mandatory law

In the context of this Article the term “stipulation” does not refer to any requirement laid down in any other place than in the CUI contract. It does not refer to any legal provision applicable in the EU, its Member States or any other State. As to potential conflicts of the CUI provisions concerning the contract itself, particularly with the law of the EC, see remarks on Article 5.

Title II

Contract of Use

Article 5

Contents and form

1. In its modified form, § 1 refers not only to the carrier but also to other persons entitled to enter into a contract of use of the infrastructure. This takes account of the fact that according to the law of the EC not only a carrier but also an “applicant” as authorised under Article 16.1 of Directive 2001/14/EC (e.g. a public transport authority, freight forwarder, combined transport operator or a shipper), who is not at the same time a carrier, is entitled to enter into an agreement with the infrastructure manager on the use of the infrastructure.
2. § 2 no longer contains a list of details which are included in a contract as a matter of a rule in order to ensure that, where such details are already regulated by the law applicable in the State where the infrastructure is located, and in particular that of an EU Member State, clauses containing those details are not reproduced. Instead it is now proposed to state that the contract shall contain all details which are necessary for the parties to the contract to determine comprehensively the administrative, technical and financial conditions of use such as the description of the infrastructure to be used, the period for which the contract is valid and the fees for the use. For restrictions which, with regard to various contents of the contract would be applicable under the law of the State in which the infrastructure is located, see remarks on Article 5bis.

Article 5bis

Law remaining unaffected

1. § 1 indicates unaffected obligations based on provisions, in particular in the areas listed in § 3. These provisions are contained in the law of the EC but may also be contained in the domestic law of OTIF Member States which do not apply Community legislation. Such obligations have to be met by the parties to the contract of use of the infrastructure and are not superseded by the provisions of the CUI listed in the introduction to § 1.
2. § 2 has the same intention as § 1. However the obligations remaining unaffected by the liability provisions of the CUI listed in the introduction to § 2 are only those which have to be met in an EC Member State or in a State where the Community legislation applies as a result of international agreements with the European Community, but do not concern the domestic law in an OTIF Member State which does not apply Community legislation.

3. § 3 contains a non-exhaustive list of the areas which the obligations indicated in §§ 1 and 2 concern. In this sense,
- a) the first indent is important with regard to the issues addressed in Articles 5 and 7, i.e. agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers (see Directive 2001/14/EC),
 - b) the second and third indents are important with regard to the issues in Article 6 §§ 1 and 2, i.e. licensing (see Directive 95/18/EC) and safety certification (see Directive 2004/49/EC),
 - c) the fourth indent is important with regard to the issue in Article 6 § 3, i.e. insurance (see Directive 95/18/EC),
 - d) the fifth and sixth indents, i.e. performance schemes, are important with regard to the issues in Articles 8 § 4 and 9 § 4 to minimise delays and disruptions and to improve the performance of the railway network and compensation in favour of customers (see Directive 2001/14/EC and Regulation EC/1371/2007), and
 - e) the seventh indent is important with regard to the issue in Article 22, i.e. dispute resolution (see Directive 2001/14/EC and Article 292 of the EC Treaty).

Article 6 **Special obligations of the carrier and the manager**

The drafting of Article 6 § 1 has been modified very slightly. The issues in this Article for which, where the law of the EC or corresponding domestic law applies, certain legal provisions have to be observed are dealt with in the second, third and fourth indents of § 3 in the new Article 5bis.

Article 7 **Termination of the contract**

Article 7 § 1 is deleted and the heading adapted to the content of the remaining provisions. This modification takes account of the fact that where the law of the EC or corresponding domestic law applies, the duration of the agreement on the use of the infrastructure is always limited. The limit is expressed as one working timetable period or in specific cases more than one such period. This issue is also dealt with in the first indent of the new Article 5bis.

**Title III
Liability**

**Article 8
Liability of the manager**

and

**Article 9
Liability of the carrier**

With reference to Article 8 § 4 and Article 9 § 4 the issue of performance regimes as well as of standardised and immediate compensatory measures in favour of customers in so far as the latter are relevant in the contractual relation of the parties to the contract of use of infrastructure for which, where the law of the EC applies, certain legal provisions have to be observed, is dealt with in the fifth and sixth indents of the new Article 5bis.

**Title V
Assertion of rights**

**Article 22
Conciliation procedures**

The issue in this Article for which, where the law of the EC applies, certain legal provisions have to be observed, is dealt with in the seventh indent of the new Article 5bis.