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ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR  
INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

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**Groupe de travail « RU CUI »  
Arbeitsgruppe „ER CUI“  
Working group "CUI UR"**

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Subjets to be revised – scoping note

This note was made available in advance to the European Commission and the carriers' and infrastructure managers' associations.

The current definition of the scope of application of the CUI UR originates from the beginnings of the CUI UR in the context of the revision of COTIF in the 1990s: at the beginning of that decade, the EU introduced the concept of separating the operation of railway infrastructure from the provision of railway services. Tasks which were formerly carried out by (integrated) railway undertakings were divided into two different areas of activity. Nevertheless, rail traffic still had to keep running as a system and during the discussions on the revised convention, in which this fact had to be taken into account, it was realised that the two areas to be regulated were linked. Setting up a uniform legal regime for the right of recourse between carriers/railway undertakings (RU) and infrastructure managers (IM) has turned out to be particularly important.

In this context, it seemed coherent/logical at the time to link the scope of application of the new Appendix, which governed the contracts of use of infrastructure, with the performance of transport operations in accordance with the CIV and CIM contracts of carriage. As a result, the CUI Uniform Rules apply "to any contract of use of railway infrastructure for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules" (see Art. 1 of the CUI).

Since then, the EU has clearly defined the public order obligations which have an impact on train path contracts<sup>1</sup>, which define the relationships between IMs/RUs, whether in a national or an international context. However, issues relating to civil liability, which is the scope of application of the CUI, have not been given the same general framework, which would be extremely useful for rail transport.

In particular, for EIM, it is necessary to tackle the fundamental issue of how to ensure accordance with the EU *acquis* on numerous aspects and how to deal with the fact that "CUI liability principles are more restrictive in comparison to certain domestic ones".

In the first instance therefore, this note addresses the question of the scope of application of the CUI, bearing in mind train path allocation contracts (1), and raises the question of the place a single international liability regime has in the current architecture of IM/RU relations (2).

## **I. Scope of application: CUI and train path contract**

### **1) Legal definition of the scope of application**

Shortly after the entry into force of COTIF 1999, the question arose as to the interpretation of the provision prescribing the "use of railway infrastructure for the purposes of international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules" as a criterion of the scope of application.

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<sup>1</sup> See Article 38 et seq. of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast).

Following the entry into force of COTIF 1999, CIT pointed out quite correctly that a literal interpretation would be that "it is the relationship between the railway undertaking and its customers which determines the law that applies between the railway undertaking and the infrastructure manager."

This is why the Secretariat had then emphasised that it was the **purpose of the use of the infrastructure** which determined the law applicable to the relationship between the carrier and the infrastructure manager. This means that what is important is to know whether the train is available to passengers for international CIV transport. The Secretariat of OTIF recognised that use could have two parallel objectives which are difficult to dissociate from each other. Taking as a basis the aim that had underpinned the creation of Appendix E, the Secretariat of OTIF has argued that the fact that the train was available to CIV passengers should suffice to encourage application of the CUI, no matter which passengers actually use the train (see annex).

The discussion on the scope of application of the CUI UR continued in the work of the ad hoc CUI group, which was set up by the EU Council's "Land Transport" working group in December 2007. This group, which was made up of representatives from the European Commission, the Secretariat of OTIF and legal experts from the EU Member States (AT, FR, DE, GB, SE, NL) and from Switzerland, held several meetings in 2008 which were chaired by the UK representative. The scope of application was on the list of subjects requiring clarification. In order for the amendments to Appendix E (and to Appendices F and G) to enter into force quickly and hence to achieve compatibility with EU law, only the provisions which the Revision Committee had the competence to modify were amended during the 2009 revision (24<sup>th</sup> session of the Revision Committee). As it is the General Assembly which is responsible for amending Article 1 of the CUI (cf. Art. 33 § 4 e) of COTIF), it has only been possible to produce additional explanations concerning the scope.

As a result, the question of whether it is sufficient for the train to be carrying a single passenger with a CIV ticket or a single consignment with the CIM consignment note has not been dealt with.

The problem arises from the fact that:

- to carry out a **single** contract of carriage, the carrier does not necessarily have to conclude a contract of use of railway infrastructure. Contracts of use of railway infrastructure are concluded in order that **trains** can run on an infrastructure run by a legal entity other than the carrier/RU operating the train;
- it is difficult to make a clear distinction between the use of railway infrastructure for national transport and for international transport.

The working group set up by the Secretary General in accordance with the decision of the 25<sup>th</sup> session of the Revision Committee (25-26.6.2014) will work with a longer term aim, than was the case of the OTIF/EU working group in 2008. This new working group will have to find a solution to the problem described above, in other words, it will have to draft a proposal for new wording for Article 1 of the CUI, which will be submitted to the next session of the Revision Committee for examination and then to the General Assembly for adoption.

In theory, the problem could be resolved by providing for a single contract of use for **international and national** transport. This solution is anticipated in the E-GTC-I (European General Terms and Conditions of Use of Railway Infrastructure) negotiated between CIT and RNE. At present however, it appears that only a small number of infrastructure managers and railway undertakings apply them. In practice, contracts of use of infrastructure are currently concluded at national level, so as a result, carriers are interested in these contracts covering both international and national transport and in their right of recourse in the event of pecuniary damage resulting not just from the CIV UR or the CIM UR, but also from national law, being guaranteed when this damage has its origin in the infrastructure.

However, explicitly incorporating contracts of use for the purpose of transport subject to national law **would not be in conformity** with COTIF and would go beyond its aims. For this reason, the criterion of "international transport" has to be maintained for the CUI, as it is for the other Appendices to COTIF.

States may decide to extend the application of an international regulation to national transport (as is the case, for example, for certain States with the CIM UR and CMR). In particular, the EU may impose this on its Member States (as with CIV, which is annexed to the PRR).

In the OTIF Secretariat's view, the following questions arise in connection with the scope of application of the CUI UR:

- Can the performance of "international carriage within the meaning of the CIV/CIM UR" be maintained as a determining criterion of the scope of application of the CUI?
- Which other criteria could be considered?
- Should the scope of application of the CUI be linked to that of contracts for allocating train paths for international transport?
- If the scope of application were linked to the "use of international train paths", would it not be much clearer and more practical than the criterion of the performance of "international carriage within the meaning of the CIV/CIM"?
- In this case, the use of the infrastructure by "international", i.e. transfrontier trains, would become the only new criterion. With regard to compensating the carrier for indirect damages, the carrier's recourse in the event of compensation paid to customers in accordance with national legislation would also be covered, to the extent that it would concern passengers or goods carried in domestic transport in "international" trains.
- Consequently, can/must the application of the CUI be extended to all national networks within the framework of the EU?

The Secretariat proposes that there should first be a substantive debate on these questions within the working group set up by the Secretary General of OTIF.

## 2) The question of service infrastructures

In EU law, the same principles that apply to the use of railways also apply to the use of service infrastructures, particularly the prohibition of discrimination. With regard to contracts as governed by the CUI UR, must these principles, particularly those concerning liability, also be applied for both the use of railways (and other fixed installations) and for service installations? Should the CUI UR apply to all the associated services or only to part of these services? In any case, in accordance with the version currently in force, the CUI UR apply to service installations and services, insofar as they are operated by the infrastructure manager and are necessary for the operation of railway vehicles and the safety of traffic.<sup>2</sup>

The following arguments support the application of the CUI UR to all services associated with the use of the railway infrastructure, or at least to the majority of them:

- clear and consistent distinction between the areas of regulation: EU law (public order provisions) and COTIF law (contracts under civil law);
- greater clarity in this particularly complex area if all contracts (or as many as possible) follow the same harmonised international rules;
- the resulting legal certainty.

The 4<sup>th</sup> "rail package" will raise new questions that will have to be tackled by agreement with the EU when the time comes. The CIT's work in the CUI working group can then be used as a basis for consideration.

## II. Liability

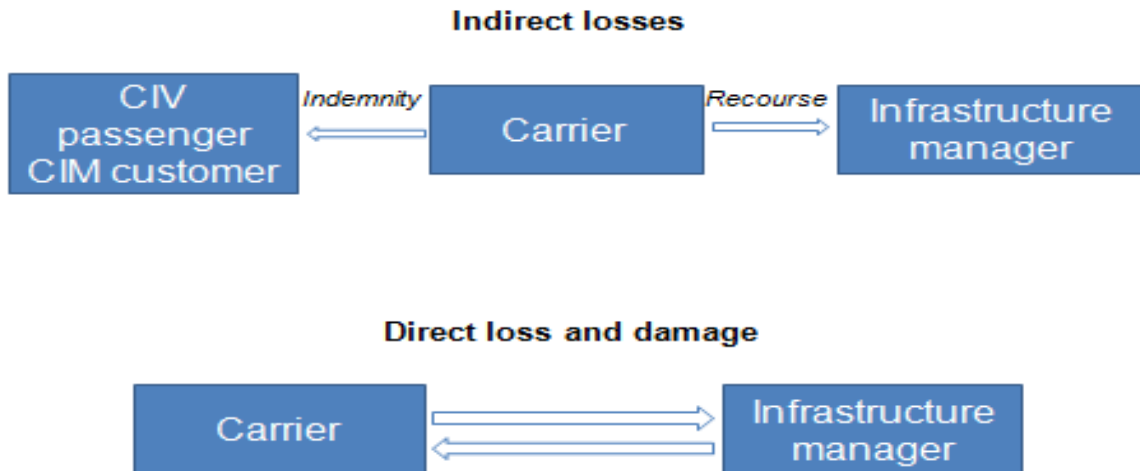
Among experts, the view is often expressed that the liability regime according to the version of the CUI UR currently in force is not sufficient, because, for example, there is no right of recourse in case of payment of damages to passengers by virtue of a legal text other than the CIV UR (Regulation (EC) No. 1371/2007, national law). This issue was recently tackled at the *Quo vadis CUI?* workshop organised by CIT (Berne, 8.4.2014).

In addition, some representatives of carriers wonder whether the concept whereby the infrastructure manager is an auxiliary of the carrier (Art. 51 CIV and 40 CIM) does not go too far. In fact the equality of the parties is something that could be discussed, even though EU regulations and the national regulatory authorities that apply them ensure that this is a reality.

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<sup>2</sup> Information received from EIM: in Poland, and other countries, this kind of installation is not (at all or partly) managed by infrastructure managers and is not therefore subject to agreements on the use of railway infrastructure. The use of this installation is regulated by separate agreements drawn up between the undertaking and the installation owner.

## Direct and indirect losses and damage



The issue concerning the right of recourse of the carrier who has paid the infrastructure manager compensation in accordance with CIV or CIM was at the core of the history of the origins of CUI. Once Article 51 CIV and Article 40 CIM had ensured that for rail transport customers, there was no disadvantage as a result of the separation of rail transport services and the operation of the railway infrastructure, and that customers could still turn to their contracting partners, it had to be ensured that carriers could be compensated if they were held liable for an operational area outside their sphere of influence. Loss or damage caused by the infrastructure and for which the carrier is liable to its customers become **indirect loss or damage** in the relationship between the carrier and the infrastructure manager.

The liability provisions of CUI should cover not just indirect loss and damage, but also **direct loss and damage** which occurs in railway operations, for example if a railway vehicle damages the infrastructure or is damaged by defective infrastructure.

However, in the case of direct damage, such as damage to vehicles or infrastructure, it is difficult, or even impossible, to establish a link between a CIV or CIM contract of carriage, and the question of the applicability of the CUI and of the scope of liability cannot therefore be resolved unequivocally. Supplementary clarification is required for each case (see Additional Explanatory Report concerning the CUI UR, Article 1, para. 6).

This problem is also an argument in favour of redefining the scope of application of the CUI. In future, direct damage should be covered by CUI without having to check and prove a link to a specific contract of carriage in each individual case.

It is OTIF's responsibility to fill in any gaps there might be in the liability regime of the CUI UR. In order to ensure compatibility with EU law, the European Union is invited to take part in the work of the working group thus mandated right from the outset.

In terms of liability, the following questions arise:

- Can the problem of direct damage be resolved by means of an amended definition of the scope of application of the CUI?
- With regard to indirect damage (right of recourse), must the provisions of CUI be broadened to cover other damage?
- If so, should recourse in the case of compensation paid by the carrier in accordance with legal texts other than the CIV/CIM UR be covered?
- Is it necessary to create a parallel between Article 8 § 1 and Article 9 § 1, i.e. to insert a new letter c) in addition to the carrier's liability for bodily loss or damage (a) and for loss or damage to the infrastructure manager's property (b) in order to cover the infrastructure manager's pecuniary loss (indirect damage) as well?

More generally, the question arises as to whether it is necessary, at EU level, to have a uniform international liability regime backed by the train path contract. In this context, the CUI would become the *de facto* legal basis of the E-GTC-I, the question of their extension to national train path contracts remaining open.

*ANNEX:**Interpretation of the scope of application*

The interpretation given by the OTIF Secretariat in 2006 is justified by the interest in achieving real harmonisation of the legal relationships between carriers and infrastructure managers in the Member States of OTIF. Following this clarification between the Secretariats of CIT and OTIF, and after a discussion that took place at the "Berner Tage" organised by CIT in 2006, CIT came to the following conclusions (subsequently confirmed in writing by the Secretariat of OTIF):

"1. Application of the CUI UR should not depend on the actual carriage of passengers or freight under the CIV UR or the CIM UR respectively, but rather on the purpose of the use of the infrastructure. If a rail transport undertaking intends to carry passengers holding tickets governed by the CIV UR, it should include this possible use of the infrastructure in its contract with the infrastructure manager and subject this contract to the CUI UR. **Any contract of use of infrastructure in which it is impossible for a carrier of passengers to rule out the presence of CIV passengers in its trains should therefore be subject to the CUI UR.**

2. Similarly, the concept of **"international carriage within the meaning of the CIV Uniform Rules and the CIM Uniform Rules"** in Article 1 of CUI covers **not only the concept of "international services"**, i.e. trains running on the infrastructure of several countries, **but all railway services likely to carry CIV passengers or to carry freight under the CIM UR.**

3. The CUI UR **apply not only to the use of a country's infrastructure by a "foreign" undertaking, but also to the use of a country's infrastructure by a "national" transport undertaking** when the latter is operating in "international carriage."