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Comments on OTIF's circular of 23.3.2015 (A 91-01/503.2015) on the scope of application of the CUI

1. The annex to OTIF's circular refers to two possible solutions for determining the scope of application of the CUI: either an "international transport service" could be taken as the trigger for applying the CUI, or an "international train". The following attempts to explain why the second solution is preferable, i.e. application of the CUI to *international trains*:

2. The CUI aims to govern the contract of use of infrastructure in international carriage by rail between Member States of OTIF. However, according to the current Article 1 CUI, the CUI only apply to any contract of use of railway infrastructure for the purposes of international carriage by rail *within the meaning of the CIV Uniform Rules and the CIM Uniform Rules*. This restriction is not objectively justifiable, as there are also contracts of use of railway infrastructure in international transport between OTIF States for purposes other than the performance of carriage under CIV or CIM. For example, if goods are carried from Geneva to Moscow with a single, through contract of carriage (without reconsignment at the border between CIM and SMGS), CIM does not apply on any segment of the route; instead, the national law applicable in each country applies to the carriage of these goods. But which law on the use of infrastructure applies to an international freight train between France and Poland if the entire train is loaded with car parts going to Kaluga in Russia and for which a through contract of carriage without reconsignment at the border between the CIM and SMGS jurisdictions has been concluded?

3. In addition, for the contractual relationship between the *infrastructure user* on the one hand, and the *infrastructure manager* on the other, which, if any, transport *service* the infrastructure user provides to any of his customers cannot be the deciding factor. What matters more is whether the railway undertaking *operates* international transport services, i.e. operates a train for which use of the infrastructure has to be governed by a contract. There are also international trains which do not provide customers with any transport services at all in passenger or freight transport. This is the case, for example, for a rail transport undertaking's service journeys to carry its own goods or for test runs operated by rail vehicle manufacturers. These operational train movements also take place on the basis of contracts of use of infrastructure.

Therefore, according to our current understanding of the use of infrastructure, the CUI cannot be applied with reference to the provision of transport services and especially not to the provision of transport services in accordance with CIV and CIM.

4. When establishing the scope of application of an international convention, it is not usual to define the criteria for the application of the convention in the provision relating to the scope

of application. This is usually dealt with in the provision for definitions, in the CUI for example in Article 3 (see 6 below).

5. Following these preliminary comments, a new provision concerning the scope of application of the CUI can be worded as follows:

Article 1 Scope

§ 1 These Uniform Rules shall apply to every contract of use of the railway infrastructure of a Member State by an international train.

§ 2 These Uniform Rules shall apply irrespective of the place of business or the nationality of the contracting parties and even when the railway infrastructure is managed or used by States or by governmental institutions or organisations.

§ 3 Subject to Article 21 ….. (and so on as in § 2 of the current version of the CUI).

Comment on § 1: This provision is oriented towards the introductory words of the current text of the CUI. By keeping the words "to every contract", there is no need for further clarification, as set out in Article 1 § 2 of the OTIF Secretary General's proposal ("... regardless of whether, for an international train, one or several contracts of use of railway infrastructure have to be concluded, ...").

6. The **definitions** in **Article 3 CUI** need to be adapted to the new scope:

a) Firstly, this applies to the **contracting parties**. When the CUI were partly revised in 2009, it was already then considered that the term "carrier" is too narrow in terms of applying the CUI. The new version of Article 5 § 1 of CUI reads as follows: "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."

Article 5bis § 3 CUI says: "The provisions of §§ 1 and 2 concern in particular: -- agreements to be concluded between railway undertakings or authorised applicants and infrastructure managers, ...". This provision no longer refers to "carriers".

The provisions specified just make clear what the CUI dealt with originally, i.e. they governed the contractual relations between those who are entitled and able to use the railway infrastructure operationally and those who make the railway infrastructure available. However, it was believed in 1999 that only carriers within the meaning of CIV and CIM could come under the umbrella of COTIF as users of the railway infrastructure.

Now though, the infrastructure manager's contracting partner has to be described more purposefully as an **infrastructure user** or – more succinctly – a **user**, and has to be defined in **Article 3 c) CUI**, e.g. as follows:

""user" means the person who is entitled to use railway infrastructures himself;"

An "authorised applicant" within the meaning of Art. 5bis § 3 CUI (e.g. a forwarder) should not be considered as a user within the meaning of CUI, as he does not perform transport operations himself. If this were seen differently, such a forwarder would have to assume greater liability for the railway undertaking he has commissioned to carry out the transport operation, in accordance with Art. 9 in conjunction with Art. 18 CUI.

In the other Articles of CUI, the word "carrier" can be replaced by "user" in each case. Art. 3 f), Art. 6 § 1 1st sentence and Art. 7 § 1 a) of CUI should in future be geared towards the authorisation to use railway infrastructure oneself and not towards the authorisation to undertake the activity of a carrier by rail.

b) If, in future, the CUI are to be applicable to contracts of use of infrastructure for international **trains**, then a corresponding definition must be included in Article 3 CUI, e.g. as follows:

""Train" means the operating unit which the user utilises on the infrastructure;"

This definition leaves it open as to whether the train comprises wagons and whether wagons are coupled or detached during the journey. This is not relevant in the context of the CUI (especially in terms of liability in accordance with Art. 8 and 9). Rather, the deciding factor is whether "the train" (identified by the train number) performs an international journey. It is also "the train" which, with its vehicles, personnel, any passengers or goods, suffers damage as a result of defects in the infrastructure or of operating it (= infrastructure manager's liability) or which causes damage to the infrastructure (= liability of the infrastructure user). Wagons which were not yet part of the train at the time of the accident, or which have already been detached from the train, are not covered by liability in accordance with the CUI.

c) The definitions of the various transport services in Directive 2012/34/EU (Art. 3 No. 4 to 8) are not suitable for the purposes of the CUI, because the CUI aim to regulate the authorised *actual international use* of the railway infrastructure by an undertaking, particularly with regard to liability, whereas Directive 2012/34/EU governs *access* to the infrastructure and hence an undertaking's *legal authorisation* to use the infrastructure from the *point of view of competition*, and is oriented towards different types of transport (cf. recitals 15, 17, 18 to 22 of the Directive). But this is not relevant for the CUI.

7. 1.2 of the decisions of principle in the summary of the CUI working group's decisions (10.12.2014) says that the scope of application on the one hand and the liability system on the other should be considered separately: scope of application first, then liability. These comments follow this approach and thus only set out some general thoughts on **adapting the provisions in the CUI** that govern liability.

a) The manager's or user's liability for **bodily loss or damage or for loss of or damage to property** in accordance with **Article 8 and 9 CUI** can remain unaltered, even if the grounds for relief from liability are based on CIV and CIM. This is a liability system that is established in international rail transport. The same applies to the provisions on the extent of compensation for bodily loss or damage in Articles 11 to 14 CUI.

b) The manager's or user's liability for **pecuniary loss** should be extended beyond the cases currently covered in Article 8 § 1 c) CUI in which a carrier has to pay compensation in

accordance with CIV or CIM. The manager and the user should also be required to compensate pecuniary loss suffered by each contracting partner as a result of having to pay, in accordance with the **applicable law** (= national law, EU law, international conventions) or on the basis of **determinations by a public contracting entity**, damages, compensation or assistance services (cf. e.g. Art. 17 and 18 Reg. (EC) 1371/2007) for malpractice or reduction in the quality of service for which the other contracting party is responsible.

However, if in these cases the damages, compensation or assistance service payments are based not on EU law or international conventions, but on national law or directives from national contracting entities, then in order to maintain international legal unity, a **legal provision on the extent of recourse** should be included **in the CUI** for the relationship between the contracting parties. In connection with this, Article 4, 3rd sentence, Article 8 § 4 and Article 9 § 4 of CUI should also be reviewed.