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The CIT's position and suggestions for amendments to the preliminary draft submitted by the OTIF SG on 30.04.15 for a proposed amendment to Article 1 of the CUI Uniform Rules

Dear Secretary General,

Many thanks for the documents we received from the 2nd meeting of "CUI UR" Working Group. We are pleased to send you our comments and suggestions to your first draft below as a supplement to the provisional statement of our position of 30 April 2015.

1. Introductory remarks

From the carrier's viewpoint, the consistency of the various appendices to COTIF, in particular the CIV, CIM and CUI Uniform Rules, is of eminent significance. For this reason, the CIT wishes to make some statements in the form of introductory remarks on the regulatory purpose of the CUI Uniform Rules (hereinafter referred to as CUI UR) and their inclusion in the overall context of the COTIF currently in force, and on the background to its suggestions for amendments dated April 2014.

1.1 Aim and purpose of Appendix E from the carrier's viewpoint

The purpose of COTIF – even after the separation of railway infrastructure and operations in the EU – is to achieve the overall objective of encouraging international carriage by unifying the laws governing the transport chain and creating legal certainty for both the carrier and their customers. Appendix E was created to fill the gaps in the liability chain between the carrier and the new, independent infrastructure managers resulting from the elimination of the joint and several liability of the former integrated railways.

Regardless of the benefits of having a more clearly defined scope of application, the CUI UR should continue to serve the purpose of achieving COTIF's overall objective, without making the carriers additionally liable for damages caused by circumstances beyond their control¹. Leaving the liability between the carrier and the infrastructure manager to national law would be taking a step backwards with regard to unifying law, which is to be avoided. The fact that carriers in the "single European railway area" would be liable for causes having their origin in the infrastructure if there were no uniform rights of recourse is, from the carriers' viewpoint, difficult to reconcile with the objectives of COTIF.

¹ Article 40 of the CIV UR and Article 51 of the CIM UR contain the legal definition, according to which the infrastructure manager is considered to be an auxiliary of the carrier. In accordance with this definition, the RU that provides a carriage service is also liable (to the final customer or cooperating carriers) for any loss or damage caused by circumstances that have their origin in the infrastructure. The CUI UR provide a unified legal framework for recourse against the Infrastructure manager.

For the upcoming revision of Article 1 CUI, it is necessary from the carrier's viewpoint that the CUI UR share the liability among all parties involved in the contracts of use of railway infrastructure in a clear and balanced way along the entire international transport chain of a CIV/CIM contract of carriage. This requires that a consistent and unified legal framework for recourse to the infrastructure manager(s) be available to the railway undertaking (hereinafter referred to as RU) for the entire transport chain of a contract of carriage should it be made liable for a infrastructure manager if the requirements of Article 8 CUI are met.

1.2 CIT suggestions for amendments to Article 1 CUI of April 2014

1.2.1 *Need for clarification of Article 1 CUI and former common position on its interpretation by the CIT and OTIF*

In the application of the CUI UR currently in force, there is room for a different interpretations. This is due in part to the fact that contracts of use of railway infrastructure have been developed on the national level and that Article 1 CUI attempts to cover different areas at the same time:

- a) unified liability regimes for the liability between the carrier and his auxiliary, the "infrastructure manager", along the entire transport chain of the CIM/CIV contract carriage, and
- b) harmonised rules that affect the contract as a whole (e.g. applicable law, termination of the contract), or affect one or all trains, or one or all train paths or the contract for the use of the infrastructure as a whole.

The main weakness of the current wording of Article 1 CUI is that the scope of application focuses primarily on liability. The question regarding the application of the CUI UR generally offers no problems as it mostly is to be answered in an "ex post" view. What is more problematic in practice, however, is the application of the more "general rules" of the CUI UR and the application in an "ex ante" view to whole trains (e.g. for commercial risk management by the parties to the contract), where the question as to the application of the CUI UR has to be answered before it can be known if the train that will use the infrastructure will effectively be used to carry out one or more CIM/CIV contract(s) of carriage.

The question as to how to assess the application of the CUI UR before the carriage is actually performed has been answered to the interpretation of the CIT formerly supported by OTIF, according to which the CUI UR is to be applied to all contracts of use of railway infrastructure for capacity for trains that are open to be used for the performance of a CIM/CIV carriage service (which corresponds to the CIM/CIV UR).

1.2.2 *The CIT's suggestion to clarify Article 1 CUI by integrating the former common interpretation of Article 1 CUI by explicit mention of domestic carriage (trains)*

As a result of differences with infrastructure managers regarding the interpretation of the scope of application, that became evident during the work on the harmonised European GTCs for contracts of use of railway infrastructure (E-GTC-I), the CIT has attempted to come up with more clearly defined wording for the scope of application. Since the CIT did not want to make changes to the current starting point for the application of the CUI UR, the CIT has merely suggested that "domestic carriage" be added to the aim of the contract of use, in order to make it clear that domestic trains can also be used for the purpose of providing a CIM/CIV carriage service and that **the CUI UR are to be applied to all contracts of use of railway infrastructure that form the legal basis for all trains used of the international carriage.**

Thus, the CIT's aim for the suggestion was never an extension of the scope of application but a clearer wording for the scope of application already in force.

The CIV and CIM UR leave the carriers and their customers free to choose the transport services they would like to use for performing the carriage (i.e. they also allow them the choice of

using one several domestic trains to fulfill the international contract of carriage). E.g. this means that a passenger holding a CIV ticket can travel on a domestic train for the final leg of the journey or can use several domestic transport services for an international journey (similar to CIM transport services, e.g. for transporting general cargo and wagon load services). In order to maintain consistency with the CIV/CIM UR, in such cases also the contract for the use of the railway infrastructure for the domestic train used for the CIM/CIV carriage (e.g. a regional express train) is to be made subject to the liability rules of the CUI UR.

Accordingly, when rewording the scope of application of the CUI Uniform Rules, care should be taken to ensure that, **in particular with regard to the liability** of the infrastructure manager, restrictions of the CUI UR on certain transport services are avoided. Otherwise, this could ultimately result in various forms of international rail operations (various cooperation models, open access, etc.) being subject to different liability systems (e.g. domestic trains that are used for international carriage being excluded from the unification of the law by the CUI UR).

Since various references were made in the discussion to the fact that national criteria for the scope of application were to be avoided in Article 1 CUI, the CIT would like to point out that the **criterion for the starting point of the application of the CUI UR**, as indicated in its original suggestion of April 2014, would continue to be an international one: the **performance of an international carriage within the meaning of the CIM/CIV UR** - even if a “domestic train” (or the national contract for the use of the infrastructure as its legal base) is submitted to the CUI UR.

2. Remarks and the CIT’s suggestions to the preliminary draft submitted by the OTIF SG on 30 April 2014

The CIT welcomes the options provided by removing the scope of application of the CUI UR from the contract of carriage and the statement made by the OTIF GS at the first meeting of his CUI WG, according to which the scope of application of Articles 8 and 9 CUI will not be restricted.

The paragraphs below are to be understood also as **comments to the CIT’s suggestions regarding the proposed wording for Article 1 CUI in the Appendix.**

2.1 Terminology: international train / international transport services (Article 1 § 1 and 3 of the OTIF SG’s proposal)

As a matter of principle, the CIT is open to cut the link to the contract of carriage as the starting point for the application of the CUI UR and welcomes the associated options for further harmonisation of chosen contents of the contracts of use of railway infrastructure in future, in particular for rail freight corridors.

The CIT is critical of the term “international transport services“, particularly in connection with the restrictive criterion of the “principal purpose” (cf. Item 2.2 below).

From the carriers viewpoint, the scope of application should cover all current “international trains“, regardless of the diversity of current forms of rail operations, of form of cooperations of the carriers and of the legal relationships in international transport services, in order to reduce the amount of administrative effort and costs for a flood of successive contracts of use of railway infrastructure with different contractual rules for the carriers.

This would not be the case, for example, if the CUI UR in future are only applicable to contracts of use of on a part of the transport on a European rail freight corridor (hereinafter referred to as RFC), but not on the contracts for feeder and outflow lines, where diverse national laws would be applicable. The result of such a solution would even lead to an increase instead of a decrease in complexity: in this case, three legal systems would be applicable to the respective contracts of use of the infrastructure:

- CUI UR (RFC sub-section in countries A and B -> “international service “)
- national law in country A (sub-section country A)
- national law in country B (sub-section country B).

The CIT's suggestions (cf. Appendix)

- The CIT favours the term “train“, as it has no implications to existing definitions. Thus, the term is open to independent interpretation within the meaning of COTIF and can be interpreted in a way that is compliant with the applicable law, without leading to the use of definitions of EU law that were established for another regulatory purpose.
- What is necessary from the carrier's viewpoint, therefore, is at least to submit the contracts of use for all trains with an international train run under the CUI UR. In its suggestions to the draft suggestion for Article 1 CUI, the CIT proposes adding additional criteria (cf new Article 1 § 1c in the Appendix).
- The CIT also proposes that reference be made to the “scheduled“ train in the sense of the “*train entered in the timetable (incl. any subsequent re-allocations of train paths changed)*“, in order to avoid any interpretation problems in the event that the transport service could not be provided as scheduled and allocated.

2.2 “The purpose of the contract“ or “principal purpose of the transport service” as the criterion used to define a train in Article 1 CUI § 1 and § 1c as proposed by the OTIF

The CIT expresses considerable concern regarding the new and restrictive criterion of the “principal purpose of the train/transport service“ and suggests deleting it. In addition, the CIT proposes changes to the meaning of the term “purpose“ in Article 1 CUI currently in force.

2.2.1 The “purpose“ in Article 1 CUI currently in force

The wording “contract [...] for the purpose of international carriage“ used in Article 1 CUI currently in force is misleading. The purpose is (quite rightly for discrimination reasons) not a criterion when concluding a contract of use.

In terms of the comments on the regulatory objectives of the CUI UR included at the beginning of this document, the mention of “purposes“ in the current Article 1 CUI is to be understood more in the sense of “*the rail infrastructure in question (as one of the factors in rail operations along the enter transport chain) used to fulfil a CIM/CIV contract of carriage*“. In the CIT's view, the “purpose“ is to be understood as meaning that each contract of use of railway infrastructure that is necessary for performing a CIV/CIM carriage is to be submitted to the CUI UR in the interest of unifying the law.

Neither the CIM, nor the CIV contain a restriction stipulating that only specific trains may be used for CIM/CIV carriage services, which is why, in the CIT's view, there is no demand, nor is there any basis in the CUI UR for imposing restrictive requirements on transport services that may be used to fulfil CIM/CIV contracts of carriage.

2.2.2 The “principal purpose of the train/service“ in the draft proposal for amendments submitted by the OTIF SG

The criterion of the “principal purpose“ leads - particularly with regard to the terminology for “international transport services“ – directly to the principle of market access rights and to interpretation in the light of EU Regulation Regulation (EU) No 869/2014². This Regulation governs **market access** and thus the **acquisition** of rights of use of the infrastructure. These are to be governed by public law and represent a law remaining unaffected within the meaning of Article 5bis CUI UR. In no way do the **CUI UR govern** the acquisition of rights, **only the exercise of the rights of use**. In the CIT's view, therefore, there is no reason to make an issue of the acquisition of rights or market access within the scope of application of the CUI UR.

² [Commission implementing Regulation \(EU\) No 869/2014 of 11 August 2014 on new rail passenger services](#)

Moreover **the criterion of the “principal purpose” could lead to an enormous restriction³ of the scope of application of the CUI UR**, which would be inconsistent with the objectives of COTIF.

What would result from placing such a restrictive demand on the definition of an “international train“ would be a very narrow scope of application of the CUI Uniform Rules, so that, for international transport services, no unified liability regime with infrastructure managers involved would be available to the carriers. This would probably lead to increased costs for legal management for the carriers, to additional liability risks and to legal uncertainty (notably for carriers that are operating their international services in open access in various States).

The CIT’s suggestions (see Appendix)

- The CIT expresses considerable concern regarding the new and restrictive criterion of the “principal purpose of the train/transport service“ and suggests deleting it.
- It also proposes changes (based on its understanding of the term “purpose” in Article 1 CUI currently in force) to Article 1 § 1 and § 1c CUI of the draft submitted by the OTIF SG.

2.3 Suggestion for a new Article 1 § 2 CUI with an independent scope of application for the application of Article 8 CUI only

The CIT welcomes the statement made by the OTIF SG to the effect that the current scope of application for the liability in Articles 8 and 9 CUI should be kept, regardless of the changes to Article 1 CUI.

As stated in Items 1 and 1.2 above, a consistent liability system between the appendices of COTIF is of fundamental significance for the carriers. In particular for recourse to the infrastructure manager for damages caused to the carrier and having its origin in the infrastructure, which a carrier must bear as a result of the CIV and CIM UR, it is necessary that the CUI UR covers the entire transport chain of a contract of carriage within the meaning of the CIV or CIM UR.

Following in-house discussions and clarification, the CIT has come to the conclusion that cutting the link to the contract of carriage could lead to difficulties and differing interpretations of the relationship between Article 1 and Article 8 CUI. The CIT considers an specific and independent scope of application to be necessary in order to provide legal certainty for the application of Article 8 CUI, so as to ensure consistency with the contract of carriage within the meaning of the CIV and CIM UR.

The CIT’s suggestions (see Appendix)

The CIT suggests including a new paragraph 2 in Article § CUI to provide a specific basis for the **scope of application of Article 8**, which would **remain linked to the CIM/CIV contract of carriage**.

2.4 Suggestion for a discussion on the parties of the contract of use

The CIT would like to suggest for a later phase of the work of the CUI WG of the SG OTIF regarding the definitions of Article 3 CUI to examine if and how the CUI UR are applied to applicants that are not carriers themselves. We could imagine this discussion in relation to the question on the parties of the contract of use (Article 3 § 1c CUI).

³ Article 8 § 3 of the Regulation (EU) No 869/2014 requires for the “principal purpose of an international passenger transport service an threshold of up to 50% of the turnover of the service (according to the business plan). It is to note in this respect that according to the European Commission the threshold of international passenger services in Europe is 6%.

3. Remarks and suggestions regarding the draft of a new Article 5 § 4 CUI (see Appendix)

The CIT welcomes the draft of a new Article 5 § 4 and suggests adding a supplement to the effect that in those areas where the CUI UR allows the parties to the contract to deviate from the otherwise mandatory (and final) liability regimes negotiations are to be required. To ensure that these are non-discriminatory (e.g. direct negotiations with some individual railway undertakings), the negotiations should be take place between the international advocacy organization of the railway undertakings and infrastructure managers⁴.

The background to this suggestion is that, in practice, the infrastructure managers decide all conditions of use of their network alone. This is neither consistent with the purpose of the CUI Uniform Rules, which permits "contractual agreements", nor does it serve to provide a unified legal regime for international carriage services.

The railway undertakings as the weaker party to the contract have no possibility of influencing the unilaterally imposed conditions (as long as they apply equally to everyone), even if they are of disadvantage to (all!) railway undertakings or they are not appropriate for the need of international carriage services.

The CIT would kindly ask you to include its suggestions in the current revision work in an appropriate form and would be delighted to provide more detailed information on the suggestions at any time.

With kind regards



Cesare Brand
Secretary General

Appendix: Suggestions of the CIT for the SG OTIF's first draft proposal for changes to Art. 1 CUI

⁴ *It is evident that it should be made sure that all interested RU could access the procedures of the RU organisation(s) when taking their positions for the negotiation with the IM organisation(s).*

Appendix

Suggestions of the CIT for changes to

The first proposal of the SG OTIF for changes to Article 1 of the CUI Uniform Rules of 30 April 2015

Article 1: Scope

§ 1 These Uniform Rules shall apply to **any** contract of use of railway infrastructure **needed to run** an international **train**⁵. Within the meaning of these Uniform Rules an “international **train**” is a **train that is scheduled**⁶ to:

a) cross **at least one** Member State’s border and

b) **to provide international** carriage within the meaning of the CIV or CIM Uniform Rules⁷

regardless whether an international or national train path, allocated by one or different infrastructure managers or Allocation Bodies and under the condition that the train path request/order contained information on the planned international train run⁸.

[The train may be **scheduled to be** joined and/or split, and the different sections may have different origins and destinations.]⁹

[Within the meaning of these Uniform Rules, an “international **train**” is a **train run according to information in** the train path order according to which the train will cross **at least one** Member State’s border.]¹⁰

§ 2 “**The Article 8 of these Uniform Rules shall apply to any contract of use of railway infrastructure needed to run an international train carrying out a contract of carriage according to the Uniform Rules CIV or CIM.**”¹¹

§ 3 These Uniform Rules shall apply regardless of whether, for an international **train**, one or several contracts of use of railway infrastructure have to be concluded, each one in accordance with the national law applicable on the territory of each State concerned.

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

§ 4 Subject to Article 21, these Uniform Rules shall not apply to other legal relations, such as in particular:

a) the liability of the carrier or the manager to their servants or other persons whose services they make use of to accomplish their tasks;

b) the liability to each other of the carrier or the manager on one hand and third parties on the other.

⁵ with these changes, the § 3 (former §2) could be deleted

⁶ The consensus of the contract of use is the scheduled train (the allocated path(s) as ordered). The planned/scheduled train should therefore be the reference to grant legal certainty (e.g. for the rules on the applicable law or on the termination of the contract the applicable law must remain the same whether the train runs or not).

⁷ the CIT suggests to add in the Explanatory Report that empty trains are also to be covered by the CUI UR

⁸ The last requirement provides for fair conditions to the IM – the RU has to inform the IM in about the (international) train run when he orders the path (which for the RU is a basic condition for the path request)

⁹ This paragraph could be inserted in the explanatory report, if needed.

¹⁰ This paragraph could be inserted in the explanatory report, if needed.

¹¹ The additional paragraph is needed to avoid legal insecurities and conflicts between the Articles 1 and 8 for the application of Article 8 and keeps the today existing range for redresses of the carrier up

New § 4 in Article 5¹²:

§ 4 The international organisations of infrastructure managers and the international organisations of railway undertakings may agree general terms and conditions of use of infrastructure and provide a harmonized contract of use model in accordance with all relevant mandatory prescriptions in force in States in which the infrastructure to be used under these harmonized conditions is located. Where these Uniform Rules allow agreeing on special or additional liability rules, they shall be negotiated by international organisations of the infrastructure managers and of railway undertakings. All negotiations have to be balanced and non-discriminatory.

¹² if the suggested §4 is rejected, the CIT suggests to insert this text in the Explanatory Report to make clear that the CUI UR allow to draft harmonised T&C to the contract of use.