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**Groupe de travail « CUI UR »
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Comments on the positions of Belgium, the Netherlands and CIT on the new drafts prepared by the Secretary General of OTIF dated 14.8.2015 (CUI 3/3)
Scope of application of the CUI

I. General remarks

1. The positions show that the problem of why the scope of application of the CUI has to be reformed has not yet been satisfactorily resolved. The CUI are supposed to apply to the use of national infrastructures by *international trains* (even if such a train does not actually cross the border, particularly as the result of an accident). On the other hand, CIT is advocating the comprehensive right of recourse of a carrier who, in accordance with CIV or CIM, has paid compensation for loss or damage caused by the infrastructure manager as the carrier's auxiliary. This right of recourse is to exist irrespective of whether the CIV passenger or the CIM goods have been carried in an international or national train; for CIV and CIM, the defining characteristic is the international nature of the *contract of carriage*, not the nature of the train or the use of infrastructure.
2. The Secretary General's proposal of 14.8.2015 correlates the scope of application of the CUI to the use of railway infrastructure by *international trains*. The carrier continues to be considered as a contracting partner of the infrastructure manager, but in the definition of carrier, the reference to CIV and CIM is deleted so that other types of transport can come under the CUI when they take place in international trains.

II. Comments on the positions of Belgium, the Netherlands and CIT

These positions are only looked at in so far as they concern the text of the CUI provisions. At present, the text of the Explanatory Report can only be considered as provisional.

1. Position of Belgium

For Art. 1 § 1 CUI, Belgium proposes replacing the word "agreed" by "intended", because it is mostly the carrier alone who decides on the international nature of a train and the infrastructure manager just deals with the movement of the train in its State: "In most cases, the contractual agreement between the operator and infrastructure managers has nothing to do with the international aspect of the train." If this is true, then the fundamental concept of the CUI is called into question. According to its title, CUI contains rules for the *contract* of use of infrastructure in *international carriage* by rail. *Both* contracting parties agree on this, otherwise the contract will not come about.

Art. 1 § 1 CUI should therefore convey that the contracting partners' common understanding is that the train is designated for international rail transport. This can be expressed by wording this provision as follows:

"... by a train for which it is agreed that *it is designated* for international railway traffic between two States, at least one of which is a Member State."

I have not dealt here with Belgium's comments on the new Article 1 § 2 CUI proposed by CIT for the 2nd session of the working group, as CIT has since submitted some new proposals (see 3 below).

2. Position of the Netherlands

The proposal to refer to "railway infrastructure in a Member State", rather than "railway infrastructure of a Member State" (likewise CIT) should be taken up.

The concerns expressed by the Netherlands with regard to the word "perform" can be dealt with by the proposal made above. "... by a train for which it is agreed that *it is designated* for international railway traffic between two States, ...".

The questions raised by the Netherlands about the qualification of a train and about the words "agreed" and "any contract of use" must be seen in connection with the fundamental problem of the CUI referred to in I.1 above. The CUI should unify internationally the frequently very nationally understood use of national infrastructures by international trains, particularly with regard to liability. It is not just the word "agreed", but also the words "any contract of use of railway infrastructure" and the title of the CUI that indicate, together with the reference to "international railway transport", that carriers and infrastructure managers have a contractual relationship of an international nature. The current discussion recalls the question raised separately during the 1999 revision of COTIF as to whether the use of national infrastructures for international transport should in fact be dealt with in a separate Appendix to COTIF.

In any case, the aim of the Secretary General's proposal is to focus on the international relationship between the carrier (as the train operator) and the infrastructure manager for the application of CUI, not on the international relationship between the carrier and its customers.

It is doubtful whether the Dutch proposal to define "international railway traffic" in CUI itself should be followed. Under the generic term "international railway traffic", Art. 6 COTIF uses three times the description "*international carriage by rail*" when talking about the carriage of passengers and (dangerous) goods, twice the description "*international rail traffic*" when talking about the use (not the carriage!) of wagons or the use of infrastructure, and twice the description "*international traffic*" (the latter when *railway material* is concerned, so that the relationship to international rail traffic is obvious). It is also foreseen that the Explanatory Report on CUI will refer to Art. 6 of COTIF.

However, the derogation of CUI from Art. 2 § 1 a) No. 1 of COTIF is objectively justified, because it deals with through multimodal contracts of carriage with the focus on international rail traffic.

The point made by the Netherlands that the term “carrier” is too narrow to describe the infrastructure manager’s contracting partner when cross-border trains are not carrying passengers or goods, but are being operated to carry out maintenance or checks, is justified. The term “(infrastructure) user” would be more comprehensive (see my comments in doc. CUI 2/3 Add.6 of 1.6.2015, point 6.a).

The Netherlands’ proposed addition of a paragraph to Art. 1 CUI does not seem necessary; the paragraph proposed seeks to ensure the application of Art. 8 § 1 c) of CUI if the scope of application of CUI were extended to traffic not subject to CIV/CIM. The said extension of CUI does not lead to a restriction in terms of taking CIV and CIM traffic into account in international trains.

3. Position of CIT

For Art. 1 § 1 CUI, CIT suggests wording which would avoid referring to “international traffic” in the scope of application of the CUI. However, this creates confusion and does not help matters as long as the title of CUI and Articles 2 and 6 of COTIF refer to international traffic.

The new Article 1 § 3 proposed by CIT is superfluous (see comment under 2 on the position of the Netherlands) and misleading. Art. 1 § 1 is supposed to avoid any reference to international traffic, but the new § 3 talks about running an international train. In addition, the CIT’s aim of ensuring the carrier’s recourse in accordance with CIV and CIM against the infrastructure manager, including in cases where CIV passengers or CIM goods are being carried in a purely national train, is not achieved.

CIT’s question as to whether a definition of “carrier” will still be required when the scope of application of CUI has been deleted from the contract of carriage, is justified (see under 2. above on the position of the Netherlands).

III. Thoughts on restructuring the right of recourse of CIV/CIM carriers against infrastructure managers

At the first session of the CUI working group on 10.12.2014, it was decided to consider separately the scope of application of CUI on the one hand and the liability system on the other: scope of application first, then liability. However, it is becoming increasingly clear that this separation can no longer be maintained for the final discussion on the scope of application of the CUI. The following therefore looks briefly at the liability and recourse regimes in the carrier/infrastructure manager relationship:

1. Complete coverage of the CIV/CIM carrier’s liability towards his customers on the one hand, and the carrier’s right of recourse against the infrastructure manager responsible for the damage on the other, is probably best achieved in CIV and CIM themselves, where the carrier vouches for the infrastructure manager.
2. If the CIV/CIM carrier’s special recourse against the infrastructure manager is dealt with in CIV/CIM, in its *scope of application* the CUI can be correlated to the use of railway infrastructures by international (= cross-border) trains, irrespective of whether or not

the trains are carrying passengers or goods and whether or not any transport is subject to CIV or CIM. The mutual *liability* of the infrastructure user and infrastructure manager can take account of what damage, costs and expenses have been incurred by one of them as a result of the other's conduct (more details on this can be found in my comments in doc. CUI 2/3 Add.6 of 1.6.2015).

3. In essence, a **regime for recourse** in CIV and CIM could look as follows:

CIV Title VII/CIM Title V
Relations between Carriers **and between Carriers and Infrastructure Managers**

Article 62bis CIV/Article 50bis CIM
Right of recourse against infrastructure managers

A carrier who has paid compensation pursuant to these Uniform Rules shall have a right of recourse against an infrastructure manager insofar as the infrastructure manager caused [the loss or damage/the incident resulting in the carrier's liability] and the carrier is liable for the infrastructure manager in accordance with Article 51 CIV/40 CIM. [In this case, the infrastructure manager shall be treated in the recourse as if it were also directly liable to the person entitled in accordance with these Uniform Rules.]

Article 63 CIV/Article 51 CIM
Procedure for recourse

§ 1 The validity of the payment made by the carrier exercising a right of recourse pursuant to Article 62 **or 62bis** (CIV)/50 **or 50bis** (CIM) may not be disputed by the carrier **or the infrastructure manager** against whom the right to recourse is exercised, ... when the latter carrier **or infrastructure manager**, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. ...

Article 8 CUI
Liability of the manager

.....

§ 5 (new) Articles 62bis and 63 CIV and Articles 50bis and 51 CIM shall remain unaffected.