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Position of Germany

**Revision of the Uniform Rules concerning the Contract of Use of Infrastructure
in International Rail Traffic
(CUI – Appendix E to the Convention)**

**Position of the delegation of Germany on the Secretary General's proposals
of 29 January 2016 (document A 91-01/501.2016)**

A. Preliminary remark

In view of the fact that within the EU, the conditions for access to the railway infrastructure are regulated in great detail, and as Article 5^{bis} of CUI makes very clear, these regulations take precedence over CUI, the question arises as to what CUI is actually needed for. From our point of view, the need to legislate seems doubtful for the following reasons:

- Since they were adopted, CUI have apparently had little significance. This is shown particularly by the fact that there is a complete lack of clarity in terms of their scope of application and that there is no case law concerning them.
- For good reasons, CIT has criticised the liability provisions foreseen in the CUI. The Secretary General's proposed amendment to Article 8 CUI does take this criticism into account, but does not help to unify the law: this is because according to these proposals, in order to answer the question of the extent to which the party against which a right of recourse is being exercised is liable, it first has to be checked to what extent the party having a right of recourse is liable to third parties. In order to answer this question, one has to look to the articles of the contract of carriage concluded by the party having a right of recourse and/or the torts act. As the substantive law that applies can be very different, the party against which a right of recourse is being exercised cannot foresee the extent of his liability when he concludes the contract of use. The CUI do not establish legal certainty in this respect.
- In view of the fact that the basic conditions for a contract of use are already mandatory under the provisions of public law, a particular need to protect a contracting partner is not apparent. We do not therefore understand why further mandatory law is required.

B. With regard to the rules of CUI

Article 1

The proposals to amend Article 1 § 1 CUI raise a number of questions. In particular, the question arises as to what is meant by the wording "contract of use ... by a train for international railway traffic". The use of the word "for" is not clear. The particular question that arises is whether the contract should specify which trains are intended for international railway traffic. This would hardly seem possible in practice.

There is also the question of why, according to the proposed amendment to Article 1 § 1 CUI, it is required that the contract must concern use of the railway infrastructure "between different States", because if the train is intended for "international railway infrastructure", the international element already exists.

Lastly, there is the question of why the contract has to involve use of the railway infrastructure "in a Member State" and why international railway traffic has to involve traffic between States, at least one of which is a Member State. This dual link to a "Member State" seems superfluous.

For the reasons set out above, the following new version of Article 1 § 1 is proposed:

- § 1 These Uniform Rules shall apply to any contract of use of railway infrastructure **in a Member State in international railway traffic.**

Article 3

It is proposed to delete Article 3 f). Use of the term “licensing” in Article 5^{bis} provides sufficient assurance that the requirements for “licensing” arise from public law which, as Article 5^{bis} specifically says, remains unaffected.

In addition, the following new versions are proposed for Article 3:

- aa) **“international railway traffic” means traffic which involves the use of an international train path or of a national train path which follows one or more national train paths, at least one of which is situated in another State and is coordinated by the infrastructure managers concerned;**

...

- c) **“user” means the person who has concluded a contract of use with the manager;**
- d) “auxiliary” means the servants or other persons whose services the manager **or user** makes use of for the performance of the contract when these servants or other persons are acting within the scope of their functions;
- e) “third party” means any person other than the manager, the **user** and their auxiliaries;
- g) “safety certificate” means the document attesting, in accordance with the laws and prescriptions in force in the State in which the **railway** infrastructure is located, that so far as concerns the **user**,
- the internal organisation of the undertaking as well as
 - the personnel to be employed and the vehicles to be used on the **railway** infrastructure,

meet the requirements imposed in respect of safety in order to ensure a service without danger on that **railway** infrastructure.

aa)

The aim of the amendment to the definition of the term “international railway traffic” proposed by the Secretary General of OTIF is to simplify the rule on the scope in Article 1 § 1.

c)

The new version of c) aims to clarify who the contracting partners are: the manager and the user. The aim of replacing the term “carrier” currently used in CUI is to make clear that the user is not the same as the “carrier” in the sense of Article 3 a) of CIM and CIV. Further-reaching rules, as currently contained in c), are not necessary in view of the fact that public law remains unaffected.

d), e) and g)

Using the term “user” instead of the term “carrier” entails consequential amendments in d), e) and g). In addition, replacing the term “infrastructure” by “railway infrastructure” takes account of the fact that the term “railway infrastructure” is already used in Article 1.

Article 4

The question arises as to whether it is necessary to make the rules mandatory. In view of the fact that a number of public law regulations exist for the use of infrastructure, which cannot be waived, it would not appear necessary to have mandatory rules for the contract of use. In addition to this, contractual freedom is already ensured in many places (Article 7 §§ 3 and 5, Article 8 § 4, Article 9 § 4, Article 20, 22 and 24 CUI).

Article 5

It is proposed to delete Article 5.

As a result of the proposal to introduce the term “user” into Article 3 c), the differentiation between the carrier and other persons in § 1 is no longer necessary. Moreover, § 1 (“person entitled to enter into such a contract under the laws and prescriptions in force in the State in which the infrastructure is located”) is ambiguous. If this means that the user must comply with the laws and prescriptions in force in the State in which the infrastructure is located, it is superfluous. This is because according to Article 5^{bis}, the provisions of public law remain unaffected in any case.

§ 2 seems meaningless. It is up to the contracting parties to decide which issues they wish to cover in the contract of use.

§ 3 is superfluous. In effect, this provision says that the contract is not subject to any formal requirements. In this case, there is no need for a regulation.

Article 5^{bis}

As a result of the proposal to delete Article 5 and for editorial reasons, the following consequential amendments are necessary:

- § 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 have to meet under the laws and prescriptions in force in the State in which the railway infrastructure is located including, where appropriate, the law of the European Union.~~
- § The provisions of Articles 8 and 9 shall not affect the obligations which the parties to the contract of use of railway infrastructure have to meet in an EU Member State or in a State where European Union legislation applies as a result of international agreements with the European Union.

Article 6

The following new version of Article 6 is proposed:

Article 6 Special obligations of the user

- § 1 The user must notify the manager of any event which might affect the validity of his licence, his safety certificates or other elements of proof.
- § 2 The manager may require the user to prove that he has taken out a sufficient liability insurance or taken equivalent measures to cover any claims, on whatever grounds, referred to in Articles 9 to 21. Each year, the user must prove, by an attestation in due form, that the liability insurance or the equivalent provisions still exist; he must notify the manager of any modification relating to them before it takes effect.
- § 3 The parties to the contract must inform each other of any event which might impede the execution of the contract they have concluded.
- § 4 The manager may refuse to allow the user to use the railway infrastructure if he fails to meet his obligations in accordance with §§ 1 to 3.**

Justification

In the heading, the words “and of the manager” should be deleted, as this provision does not deal with the manager’s obligations. The term “carrier” should be replaced throughout the text with the term “user”.

§ 1 has been deleted. The current § 1 sentence 1 would be obsolete if the term “carrier” is replaced by the term “user” as proposed here. In view of Article 5^{bis}, the current § 1, first and second sentences, seem superfluous.

The other amendments to existing §§ 2 to 4 – now §§ 1 to 3 – are consequential amendments.

In contrast, the last paragraph (§ 4) is new. It would make sense to clarify what the manager’s rights under the contract of use are if the user does not comply with his obligations.

Article 7

It is proposed that Article 7 §§ 1 and 2 should be amended as follows:

- § 1 The manager may rescind the contract forthwith when
- a) the user no longer **meets his obligations in accordance with the laws and prescriptions in force in the State in which the railway infrastructure is located**;
 - b) the user is in arrears with payment, that is to say
 1. for two successive payment periods and for an amount in excess of the equivalent of one month’s use, or
 2. for a period covering more than two payment periods and for an amount equal to the value of two months’ use;

- c) the **user** is in clear breach of one of the special obligations specified in Article 6 §§ 1 and 2.

- § 2 The **user** may rescind the contract of use forthwith when the manager loses his right to manage the infrastructure.

It is also proposed to delete § 5.

Justification

The aim of rewording § 1 a) is to make clear that there is an immediate right of termination if the requirements of public law are not complied with. In view of this, the current § 1 b) is no longer necessary. The other amendments in §§ 1 and 2 are consequential amendments.

It is not clear why § 5 is needed. It does not make much sense to limit the possibility of concluding an agreement that departs from § 1 a). If the contract has to be terminated in accordance with public law - which is reserved by means of Article 5^{bis} - this results directly from public law and does not require an – additional – rule in § 5. For the purposes of CUI, it would not appear necessary to restrict contractual freedom.

Article 8

It is proposed that Article 8 should be amended as follows:

Article 8 Liability of the manager **to the user**

- § 1 The manager shall be liable **to the user in accordance with the contract of use** for
- a) bodily loss or damage (death, injury or any other physical or mental harm) **and**
 - b) loss of or damage to property (destruction of, or damage to, movable or immovable property), caused to the **user** during the use of the **railway** infrastructure and having its origins in the infrastructure.
- § 2 The manager shall be relieved of this liability
- a) in case of bodily loss or damage,
 1. if the incident giving rise to the loss or damage has been caused by circumstances not connected with the operations of the manager which he, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent,

2. to the extent that the incident giving rise to the loss or damage is due to the fault of the **user**,
3. if the incident giving rise to the loss or damage is due to the behaviour of a third party which the manager, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

b) in case of loss of or damage to property,

when the loss or damage is caused by a fault of the **user**, an order given by the **user** which is not attributable to the manager or by circumstances which the manager could not avoid and the consequences of which he was unable to prevent.

§ 3 If the incident giving rise to the loss or damage is due to the behaviour of a third party and if, in spite of that, the manager is not entirely relieved of liability in accordance with § 2, letter a), he shall be liable in full up to the limits laid down in these Uniform Rules but without prejudice to any right of recourse against the third party.

§ 4 The parties to the contract may agree whether and to what extent

a) the manager shall be liable for the loss or damage caused to the **user** by delay or disruption to his operations, **and**

b) the user has a right of recourse against the manager.

Justification

The heading

It should be made clear in the heading and text that Article 8 governs the manager's contractual liability to the user.

§ 1

Letter c should be dropped. The current rule, according to which only certain pecuniary losses are compensated, seems too narrow. The amendment proposed by the Secretary General raises some concern, because "pecuniary loss" cannot occur "during use of the infrastructure", as stipulated in the postscript in § 1. In addition, the wording "train performing ... railway traffic" is linguistically awkward. In view of the fact that it is rather difficult to draft a rule that limits liability for pecuniary loss, it is proposed that it be left up to the contracting parties to agree on the conditions and extent of any right of recourse for pecuniary loss. A corresponding provision appears in Article 8 § 4 b) (new).

In the last part of the sentence, the reference to auxiliaries has been deleted. This is because Article 8 only governs the manager's contractual liability to the user under the contract of use.

§ 2

For the reasons mentioned in connection with § 1, the reference to “pecuniary loss” in § 2 should also be deleted. This is because § 2 only governs relief from the liability dealt with in § 1, so it cannot go further than § 1.

§ 4

Owing to the complexity of the possible recourse scenarios, it would seem relevant to inform users and managers that in terms of the existence of and arrangements for a right of recourse, they should agree these themselves.

Article 9

It is proposed that Article 9 should be amended as follows:

Article 9
Liability of the user to the manager

- § 1 The user shall be liable to the manager under the contract of use for
- a) bodily loss or damage (death, injury or any other physical or mental harm) and
 - b) for loss of or damage to property (destruction of or damage to movable or immovable property),
- caused, during the use of the railway infrastructure, by the user, a means of transport used by him or by the persons or goods carried
- § 2 The user shall be relieved of this liability
- a) in case of bodily loss or damage,
 1. if the incident giving rise to the loss or damage has been caused by circumstances not connected with the operations of the user which he, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent,
 2. to the extent that the incident giving rise to the loss or damage is due to the fault of the manager,
 3. if the incident giving rise to the loss or damage is due to the behaviour of a third party which the user, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;
 - b) in case of loss of or damage to property,

when the loss or damage is caused by a fault of the manager, an order given by the manager which is not attributable to the user or by circumstances which the user could not avoid and the consequences of which he was unable to prevent.

§ 3 If the incident giving rise to the loss or damage is due to the behaviour of a third party and if, in spite of that, the **user** is not entirely relieved of liability in accordance with § 2, letter a), he shall be liable in full up to the limits laid down in these Uniform Rules but without prejudice to any right of recourse against the third party.

§ 4 The parties to the contract may agree whether and to what extent

a) the **user** shall be **liable** for the loss or damage, caused by the manager by disruptions to his operations, **and**

b) **the manager has a right of recourse against the user.**

Justification

The heading

It would seem worthwhile to make it clear in the heading (and in the subsequent text) that, as mirrored in Article 8, it concerns the user's contractual liability to the manager.

§ 1

As mentioned in connection with Article 8 § 1, it would not seem appropriate to refer to the auxiliaries. The amendment proposed by the Secretary General raises some concern: as Article 9 governs the user's liability, § 1 can only cover loss or damage to the manager, but not to the carrier (i.e. to the user, using the terminology suggested here). Added to this is the fact that the proposed amendment leaves it open as to who the originator of the loss or damage was.

§ 4

It is not clear why a rule on the user's liability for the manager's pecuniary loss should not also be included. It is at least conceivable that a third party makes a claim against the manager for loss or damage caused by defects in the infrastructure, but which also have their origin in the user's behaviour. In view of the fact that it is rather difficult to draft a rule that limits liability for pecuniary loss, it is proposed that this be left up to the contracting parties.

Article 10

It is proposed that Article 10 §§ 2 and 3 should be deleted and Article 10 should be amended as follows:

Article 10 Concomitant causes

If causes attributable to the manager and causes attributable to the **user** contributed to the loss or damage, each party to the contract shall be liable only to the extent that the causes attributable to him under Article 8 and 9 contributed to the loss or damage. If it is impossible to assess to what extent the respective causes contributed to the loss or damage, each party shall bear the loss or damage he has sustained.

Justification

As CUI only governs contractual liability, it does not make sense to include rules dealing with the liability of third parties. §§ 2 and 3 do not fit into the system and should therefore be deleted.

Article 13

It is proposed that Article 13 should be amended as follows:

Article 13
Compensation for other bodily harm

National law shall determine whether and to what extent the manager or the user must pay damages for bodily harm **above and beyond what its stipulated in Article 8 or 9** and other than that provided for in Articles 11 and 12.

Justification

National law should also be referred to insofar as it prescribes increased liability for bodily harm than that specified in Articles 8 and 9.

Article 15

It is proposed that Article 15 should be amended as follows:

Article 15
Loss of right to invoke the limits of liability

The limits of liability provided for **in the contract of use and** in these Uniform Rules as well as the provisions of national law, which limit the compensation to a certain amount, shall not apply if it is proved that the loss or damage results from an act or omission, which the author of the loss or damage has committed either with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

Justification

It would also appear necessary to prohibit appeals against limits of liability agreed in a contract when the loss or damage has been caused by gross negligence.

Article 17

In Article 17, it is proposed to replace the word “carrier” by “user”. This is a consequential amendment resulting from Article 1 § 1.

Article 18

It is proposed that Article 18 should be amended as follows:

Article 18
Liability for auxiliaries

The manager and the **user** shall be liable for their auxiliaries **when these persons are acting within the scope of their functions.**

Justification

The rule on attribution seems too far-reaching. This rule should be worded along the lines of Article 40 CIM.

Article 19

It is proposed to delete Article 19. This is because also applying these rules to non-contractual claims seems questionable. There does not seem to be any need for this to be regulated.

Article 21

It is proposed to delete Article 21. There is no need within CUI to deal with non-contractual claims by the manager's or user's auxiliaries. In particular, there is no need to protect the manager or user in order to limit such claims.

Article 23

It is proposed to delete Article 23. The effect of a judicial decision on a defendant should be a matter for the rules of the applicable procedural law.

C. Article 62^{bis} CIV and Article 50^{bis} CIM (new)

It is questionable whether a rule on recourse should be included in CIV and CIM. The conditions for recourse should be dealt with in the contract of use. In any event, the rules must be worded in such a way that there is no contradiction with CUI. According to Article 62^{bis} CIV and Article 50^{bis} CIM proposed by the Secretary General of OTIF, the manager does not have the possibility of invoking (contributory) negligence on the part of the carrier, the behaviour of a third party or unavoidable circumstances. This absolute liability causes some concern.