

Position Paper

REVISION OF COTIF – UR CUI (Appendix E) Main aspects

28th November 2014

Introduction

The OTIF – Intergovernmental Organisation for International Carriage by Rail – is reviewing the Convention on International Carriage by Rail (COTIF) and its Appendices, including Appendix E which specifically concerns the contract for use of the Infrastructure.

The *Appendix E* (“CUI”¹) governs the contract for the use of the railway infrastructure between the infrastructure manager and the carrier.

The OTIF issued a scoping note² about the issue of a revision of the CUI.

The OTIF Revision Committee also agreed to set up a working group – together with the European Commission, representatives from the Member States and industry stakeholders – to propose amendments to the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (UR CUI).

This paper covers the following questions brought forward by the OTIF’s scoping note:

1. The scope of application: the legal definition of the scope of application on the one hand and the question of service infrastructure on the other hand;
2. The liability system, with a specific focus on indirect liability.

1. The scope of application

1.1. Legal definition of the scope of application

The question concerns the current definition of the scope of application of the UR CUI, and more precisely its original linkage to the purpose of the use of the infrastructure, as set forth by Article 1 of the CUI.

Recommendations:

- **The UR CUI shall not exceed international carriage, and thus shall not cover domestic carriage.**
- **Any option considered shall be evidently compliant with the COTIF.**
- **Defining “international carriage” within the meaning of the UR CUI on the basis of “the use of international train paths” could be further explored.**

Justification

The scoping note states that the criterion of “international carriage” has to be maintained for the CUI, as it is for the other Appendices to COTIF. The CUI shall thus not cover domestic

¹ Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI – Appendix E to the COTIF)

² Scoping note of the working group « CUI UR » – CUI 1/2, 09.10.2014

carriage, since the latter falls within the jurisdiction of the States and furthermore on contractual freedom. In this regard, Article 28 of the recast Directive 2012/34/EU sets forth that any railway undertaking, engaged in rail transport services, shall conclude the necessary agreements under public or private law with the infrastructure managers of the railway infrastructure used.

Defining “international carriage” on the basis of “the use of international train paths” is suggested by the scoping note. The train path, to this extent, is the mere object of the contract for the use of the infrastructure.

1.2. The question of service infrastructures

The question concerns the application of the UR CUI to all services associated with the use of the railway infrastructure.

Recommendation:

- **The scope of UR CUI shall not be broadened beyond its current scope in relation to service infrastructure”. In addition, this is linked to the debate above in relation to international carriage.**

Justification

Service infrastructures are managed locally according to national legislation. This has to be carefully taken into account when keeping the scope of UR CUI within the lines set forth by COTIF.

2. Liability

2.1. Liability for indirect damages³

The question relates to the liability regime for the loss or damage caused by the infrastructure and for which the carrier is liable to its customers under UR CUI within the scope of international carriage.

The UR CUI currently provides for a right of appeal of the carrier towards the infrastructure manager related to the damages paid by the carrier to its customers on the basis of CIM⁴ (Art. 40) and CIV⁵ (Art. 51).

³ Articles 8 and 9 of the CUI

⁴ Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to COTIF)

⁵ Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV – Appendix A to COTIF)

The scoping note considers a broadening of the provisions of UR CUI which are the base for the carrier's right of appeal regarding the damages that it has paid based on national law. According to the scoping note, 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 of goods carried in domestic carriage in "International" trains. The scoping note explicitly targets EC Regulation 1371/2007 (rail Passenger Rights Regulation).

Recommendation:

- **The provisions of the UR CUI in terms of liability for indirect damages shall not be broadened.**

Justification

A broadening of the provisions would result in the UR CUI dealing with national law, which goes beyond the scope of international carriage in COTIF. This would also lead to a fragmentation of the applicable law, which is strictly opposite to the purpose of the COTIF of unified law. In this regard, if such a situation arises, it would certainly result in imposing another national law than his⁶ on the infrastructure manager.

The infrastructure manager is subject to tight regulation on prices on the basis of EU law⁷. As a principle, the price for the use of the infrastructure is the costs directly incurred as a result of operating the train service. Consequently, the rail IM is unable to incorporate the operational risks in its prices, as a regular company would do.

This is especially true with regards to Regulation EC 1371/2007, which imposes the payment of compensation to passengers on the carrier – in case of e.g. delay or cancellation, etc. – as a percentage of the ticket price. The carrier is free to set the ticket price and moreover to set a higher price in order to include the cost of operational risk⁸.

The scoping note considers the UR CUI to cover the recourses for compensation paid by the carrier in accordance to legal texts other than CIV/CIM UR.

Recommendation:

- **The financial equilibrium of the IMs, ensured by the obligation imposed by EU Law on Member States, shall be safeguarded.**

⁶ Art. 8§3 of the COTIF states: "National law" means the law of the State in which the person entitled asserts his rights, including the rules relating to conflict of laws". The carrier's customer (e.g. passenger) would claim for damages to the carrier of the basis of its national law. Then the carrier would afterwards exercise its right of appeal to the infrastructure manager, possibly established in another country and thus subject to another national law.

⁷ As the scoping note rightly stressed, EU is public order law.

⁸ Except in the case of a Public Service Contract (PSC).

Justification

The infrastructure manager has no influence on the price policy of a railway undertaking, therefore it has no influence on the amount of compensation either. If the UR CUI had to cover the recourses for compensation paid by the carrier in accordance to legal texts other than CIV/CIM UR, this would make the rail IMs dependent on railway undertakings' price policies.

The infrastructure manager has therefore no control over (and may not even be aware of) the amount of this compensation that it might have to bear.

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EIM, the association of European Rail Infrastructure Managers, was established in 2002 to promote the interests and views of the independent infrastructure managers in Europe, following the liberalisation of the EU railway market. It also provides technical expertise to the appropriate European bodies such as the European Railway Agency. EIM's primary goal is promoting growth of rail traffic and the development of an open sustainable, efficient, customer orientated rail network in Europe.