

Editorial

A look back over 2010



The forthcoming year-end provides an opportunity to pause and take stock of the important events and developments which have taken place over the past twelve months:

The most important event at the beginning of the year was the “Berner Tage” with a record attendance of over 120 railway lawyers. It drew up the “Appeal from Bern”

addressed to the EU, OTIF, UNECE and the OSJD, appealing to them to coordinate and harmonise international railway legislation in the interests of legal coherence and certainty. There is reason to think that the appeal has not gone unheard.

Russian Railways (RZD) taking up membership of the CIT during 2010 represents a further step in the development of traffic by rail between Europe, Russia and Asia. The participation of RZD’s Vice-president, Avtandil Gorgiladze, in the CIT General Assembly underlined the importance RZD attaches to it. Participation of Chinese Railways (CR), Mongolian Railways (MRA) and Kazakhstan Railways (KTZ) in the Steering Group for the project to make the CIM and SMGS legally interoperable for the first time was particularly significant.

Over and above the day to day work, the conclusion of the negotiations with RailNetEurope (RNE) on the European General Terms and Conditions of use of railway infrastructure (Eur. GTC) should be mentioned. Now, finally, there are standardised and balanced rules available within the legal relationship between railway undertakings and infrastructure managers to define liability. The Eur. GTC are based on the CUI but do not require the CUI to apply as a precondition. It is nevertheless to be hoped that the Eur. GTC will be accepted and used quickly and quite independently of the application of the CUI in EU Member States.

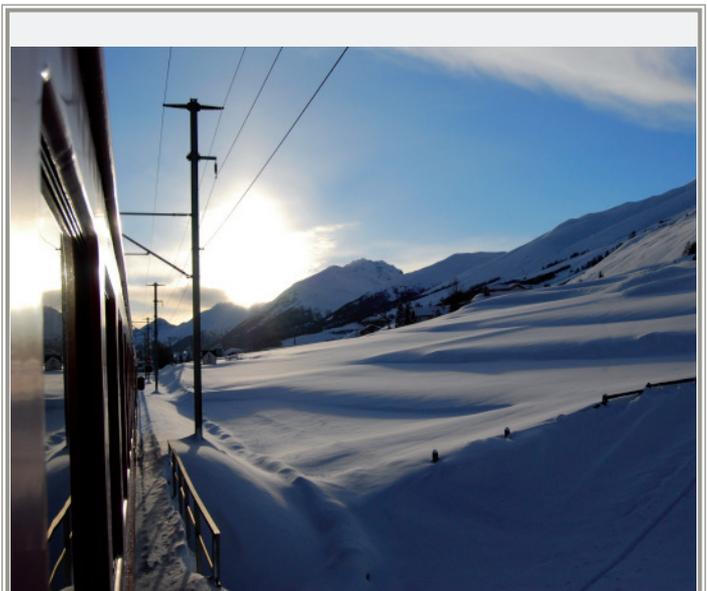
Last but not least, we must put the railway community’s smooth implementation of the Passengers’ Rights Regulation on record. The application of Regulation (EC) No 1371/2007 represents a major feat for the CIT and its members. Now, the not-altogether-easy task is to design a fair and efficient system to divide up the compensation paid out to passengers between the participating undertakings.

At the end of this busy year, the CIT would like to thank all those who have contributed to the various work and projects. Special thanks go to the Chairman of the CIT, Professor Dr Rainer Freise, who will take well-earned retirement at the end of this year. He has led and influenced the CIT with great care for several years. We offer him our sincere thanks and warm appreciation.

Thomas Leimgruber
Secretary General to the CIT

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The CIT sends its best wishes for the New Year.

We would also like to take this opportunity to thank you for all your support and commitment over the past year and look forward to being able to work closely together in the future.

Finally, we wish you an enjoyable festive season.

Your CIT Team

Transport Law and Policy

Recast of the First Railway Package: impact on the contractual relationship between infrastructure managers and railway undertakings

In September 2010, the European Commission published its proposal for a *Directive establishing a single European railway area* (COM/2010/475). The recast of the First Railway Package has been awaited for some years; it impinges on issues that are crucial to the development of the rail mode such as the financing of infrastructure, the separation between infrastructure and operations, the calculation of charges for the use of infrastructure, access to services to be provided to railway undertakings, the role of regulatory authorities, etc. It likewise contains several points which directly affect the contractual relationship between carriers and infrastructure managers. The CUI Committee had already started to look into these points at its most recent meeting on 26 October 2010.

Exchange of information

The European Commission would like to improve transparency in the market by demanding more specific information in the network statement. The CIT supports this objective not only for the pre-contractual phase but also during the contractual phase, i.e. during the use of the infrastructure. Information on traffic restrictions is not currently exchanged across Europe in the most satisfactory way (for example, restrictions following from unplanned work on the infrastructure or following from instructions from the authorities restricting the access of freight trains carrying dan-

gerous goods over a section of line). The legislation may contain a general principle for the exchange of information during the period in which the infrastructure is being used.

Performance regime

The European Commission would like to standardise the various different national performance regimes by imposing similar parameters for the operation of all the systems. However, every parameter for the operation of a system follows from strategic and commercial decisions which form part of a whole: the definition of the causes of delays and their attribution to the various players, the method of allocating secondary delays and the delay-minutes recovered by the various actors, the inclusion or exclusion of external delays, the method of calculating penalties, the thresholds for delay before delayed trains are taken into account in the system, etc. Everything is linked. It is the job of the players in such a system to agree on the most appropriate criteria to improve the quality of the infrastructure being used. Performance regimes must not be obstructed by legislation.

The CIT will monitor these two points in the recast and will pass its views on to the CER.

Isabelle.Oberson(at)cit-rail.org
Original: FR

A new main focus for the Brussels Project for a European Contract Law

On 1st July 2010, the European Commission adopted a Green Paper,¹ which suggests seven options. The objective of the Commission Recommendation is a structure for a European contract law which is to the furthest extent possible coherent:

1. Elaboration of non-binding sample contract clauses for the internal market;
2. A common frame of reference (toolbox), which can be drawn on by lawmakers in the Member States when drafting their own laws.
3. Recommendations on contract law, which the lawmakers can implement into the national laws of the Member States.
4. An optional European contract law, which applies alongside national contract law and which consumers and businesses can make free use of.
5. The harmonisation of contract law in individual States by means of EU Directives, which are directed at the EU Member States.
6. The harmonisation of contract law in individual States by means of EU Regulations, which apply directly in the Member States and which envisage independent rights and obligations for consumers and businesses.
7. A European Civil Code, which takes the place of contract law in the Member States.

The Expert Group for a Common Frame of Reference which was appointed in the Spring has set itself the ambitious objective of henceforward tackling the development of an optional European

contract law (Option 4), despite the fact that a political decision is still outstanding.

According to a Communication from the Commission², a change is looming for the work on European contract law insofar as the "soft law" for a common frame of reference (option 2) is no longer preferred, but rather the "hard law" of an optional European contract law (option 4). These optional regulations will apply as an alternative to the existing contractual legal systems in the Member States. They can be applied selectively only in cross-border contractual relationships or exclusively in domestic ones.

The public consultation will run until 31st January 2011. The CIT is following this important preparatory work for the harmonisation of contract law at the European level attentively, because it could also have an effect on the embodiment of contracts of carriage. We are reporting regularly on the subject.³

Erik.Evtimov(at)cit-rail.org
Original: DE

¹ Commission Green Paper on policy options for progress towards a European Contract Law for Consumers and Businesses, COM 2010 0348 final, dated 1st July 2010 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF>). For a more detailed appraisal of the subject see Klaus Tonner: *The Commission Green Paper on European Contract Law for Consumers and Businesses – on the role of consumer contract law within European contract law*; *European Journal of Business Law (EJBL)* 20/2010, p. 767 et seq.

² Communication of 14th September 2010.

³ See also CIT-Info 2/2010, p. 4.

SBB conference on rail regulation held in Bern

The SBB held a conference on railway regulation in Bern on 11 November 2011. Speakers included Edward Christie (CER), Ueli Stüchelberger (Swiss Federal Department of Transport), Andreas Schwillig (Roland Berger Strategy Consultants), Frank Miram (Deutsche Bahn) and Gunnar Alexandersson (Association of Swedish Train Operating Companies). In the keynote speech, Andreas Meyer, CEO of SBB, pointed out the importance of regulation for the railway and emphasised the advantages of integrated systems.

The development of regulation in the EU and in Switzerland

The first part of the event was dedicated to current regulatory developments in Switzerland and Europe. Edward Christie dealt with the changes to European regulation planned as part of the recast of the First Railway Package. He clarified details of the requirements which national train path pricing systems would have to satisfy and pointed out the importance of both adequate state investment in infrastructure and a healthy financial structure for the rail system. Ueli Stüchelberger's presentation provided a summary of the past and forthcoming steps in railway reform in Switzerland. In addition, he sketched out the work being planned in the context of the ongoing discussions on the organisation of rail activities (in the context of the creation of an independent expert group on the future organisational structure for railway infrastructure management) and the financing of infrastructure by the confederation.

Integrated or separated structures for railways?

The second part of the event concentrated on the topic of the integrated railway. In his presentation, Frank Miram from DB AG provided an overview of the integrated railway model in Germany and emphasised its compatibility with free competition. Andreas Schwillig presented the results of a study commissioned by SBB on options for structural models for Switzerland. The study recommended keeping the integrated railway model given the background that the Swiss network is heavily-used. According to the findings of the study, the current model offers the advantage of closer coordination in the planning of investment, in technical development and in construction of the timetable; compared with that a change of system threatens a loss of quality and higher transaction costs. Lastly, Gunnar Alexandersson put the Swedish rail system forward as an example of a separated model. The separation of traffic and infrastructure in Sweden in the 1980s was based on the road model; it was only later that competitive elements were added. In the course of these developments local authorities were persuaded to invest in public transport and an increase in traffic levels for both freight and passenger traffic was achieved. The speaker thought however that the total costs of the system in the course of this development had risen and that the greater complexity in the system required significant additional coordination and cooperation between the various players.

Markus.Kern(at)sbb.ch
Original: DE

The UIRR celebrates its fortieth birthday

The International Union of combined Road-Rail transport companies (UIRR) celebrated the fortieth anniversary of its founding at a conference on 21 October 2010. The event brought two hundred representatives from every stakeholder-group in road-rail combined transport together.

Today the UIRR has eighteen members whose transport networks span the entire European continent. One freight train in four carries combined traffic. Combined freight traffic has grown at an average rate of seven per cent per annum during the last ten years.

Whilst the economic and financial crisis of the last few years also affected combined transport, wiping out roughly three years of development, since the beginning of 2010, traffic has started to grow dynamically once again. Thanks to the low carbon footprint of electric traction, combined transport by rail stands in the forefront of modal shift, attracting road tonne-kilometres onto rail, and thus reducing CO₂ emissions by up to 60% pro-rata!

Etienne Schouppe, Belgian Secretary of State for Mobility and Transport and President of the Transport Council declared at the conference "I strongly hope that the landmark decision of the Transport Council on 15 October, when we adopted the amendment to the Eurovignette Directive will mark the beginning of the process of creating a fair competitive environment between the various modes of transport".

"If the proper conditions are there", remarked Rudy Colle, UIRR's Executive Chairman, "by which I mean that terminal capacities are expanded, the rail infrastructure is enhanced, and interoperability achieved, Combined Transport is certainly capable of a seven percent annual growth over an extended period of time."

The CIT is delighted with the excellent working relationship between the UIRR and the CIT. The CIT reaffirms the UIRR and its members its warmest wishes for a prosperous future on this anniversary.

Henri.Trolliet(at)cit-rail.org
Original: FR

Passenger Traffic

Political aspects of passengers' rights

The CER have been busy with new and old topics in the passenger and transport policy areas, and others too.

The CER Passenger Working Group meeting in October 2010 gave particular attention to the following issues from the current EU work plan:

- the consultation of rail organisations on the interpretation of particular clauses in *Directive 2007/58* on the liberalisation of international traffic by rail;
- the draft *Consumer Rights Directive* to which some 1 600 amendments have been proposed. It is important for the rail mode that contracts of carriage by rail do not fall within the scope of such a directive given that passengers are already protected by the *Passengers' Rights Regulation (EC) No 1371/2007*;
- the action to be taken in crisis situations even though ash clouds are not regularly recurring events. Action to be taken in circumstances exceptional for rail traffic is also being considered in the UIC Security Platform;
- the liberalisation of transport by bus and coach represents a new challenge. Several CER members operate bus and coach routes of various lengths. The first draft of a CER position paper is being sent to an ad-hoc group for brainstorming;

- the work of the conciliation committee for the regulation on bus and coach passengers' rights (*Bus/Coach PRR*). Differing views held by the Council and Parliament on the criteria for allowing derogations;
- the sea and inland waterway passengers' rights regulation (*Maritime PRR*) on the other hand has been agreed but not yet published. It will come into effect in about two years.

In October the CER also acted as host to the second meeting of consumer representatives (European Passengers' Federation (EPF), European Disability Forum (EDF), European Older People's Platform (AGE) and the European Blind Union (EBU)) and railway trade associations (CER, CIT and UIC). The meeting provided the opportunity for a frank and direct exchange of views on all the topics mentioned above including the implementation of the Regulation on rail passengers' rights ((EC) No 1371/2007) (*Rail PRR*). The European Passengers' Federation presented several examples of international journeys where passengers considered they had not been treated satisfactorily. The CIT briefed consumer representatives on the revision of the agreement concerning cooperation between railway undertakings (AIV) designed to help the various carriers' different customer services work together. In addition, railway undertakings will continue to arrange staff training. The CIT is also planning a new workshop on passengers' rights in June 2011.

Max.Krieg(at)cit-rail.org
Isabelle.Oberson(at)cit-rail.org
Original: DE/FR

"Tickets from A to Z" workshop

The CIT will hold a workshop in Bern on 2 & 3 February 2011 on the production of paper pre-printed with the security background and on issuing techniques for paper tickets.

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Paper in the age of e-tickets? Yes, an overview of future needs indicates we still have to assume that there will be a requirement for paper tickets during the next few years.

The workshop is designed for those staff of CIT members who organise the issue of tickets in sales offices and on trains (equipment, standing instructions, procurement). It would also be appropriate for the companies which CIT members use for the supply of the various items of equipment and materials (paper and ink manufacturers, printers, manufacturers of printers and suppliers of printed matter).

Dependencies within the whole chain will be identified and highlighted and contacts between those ordering the materials and their potential suppliers encouraged. In addition to general presentations, there will also be the opportunity to explore some technical issues in small groups and then to present the results to the plenary session at the end.

The programme and registration form may be downloaded from www.cit-rail.org.

Max.Krieg(at)cit-rail.org
Original: DE

Freight Traffic

CIM/SMGS from Europe through to China

According to information given by the Coordinators at the meeting in Berlin at the end of November 2010, at the present time over 50 regular transport links in four trans-European Corridors (TEN) are being operated using the CIM/SMGS single consignment note. The practical evaluation of the project was introduced and examined by a group of some 60 participants.

For the first time in Berlin, Chinese Railways (KZD), Mongolian Railways (MTZ) and Kazakhstan Railways (KZH) were also represented. Moreover, the fact that a number of customer representatives from these countries, as well as from Kühne+Nagel, Express Interfracht and InterRail, took an active part in the meeting of Coordinators speaks for the genuine global positioning of the CIT/OSJD "CIM/SMGS Legal Interoperability" project



Beneficial evolution of traffic in Europe

The coordinators determined that overall, more than half of the CIM/SMGS traffic volumes were being transported under the cover of CIM/SMGS single consignment notes. Transit traffic (wagons and containers) through Poland using the CIM/SMGS consignment note in the first half of 2010 accounted for over 50% of the total. More than two thirds of these traffics were container movements; the proportion of single wagonload traffic lies below 1%, which also serves to confirm the general trend of falling figures for single wagonload traffic within European rail freight operations.

In parallel traffics via the Ukraine, over 63% are running using the CIM/SMGS consignment note; at the same time it should be emphasised that the entire container traffic to and from the Ukraine is also operated using the CIM/SMGS consignment note.

From Slovak, as a country of departure, 30% of traffics are generated using the CIM/SMGS consignment note.

Supported by these positive and practice-oriented experiences, the project sponsors CIT and OSJD recommended the planning, organisation and carrying out of pilot transport movements from the Urümqi region in Western China to Europe/Germany.

As is well known, a new industrial centre is being built in the West of China, close to the Kazakhstan border and which lies around 5,000 kilometres from the nearest Chinese port. This means that exports from this region to Russia and Europe will choose the overland route.

On 27th October 2010, the Mongolian Ministry of Transport enabled the use of the CIM/SMGS consignment note over the entire railway network. As a follow-up to this, Kazakhstan Railways (KZH) advised of pending approval (by the end of 2010) for the transit routes and other important traffic axes for imports. Rail freight traffic in transit through Kazakhstan constitutes the shortest link with Western China. The future expansion of the area of application of the CIM/SMGS single consignment note to Tadzikhistan, Uzbekistan and Turkmenistan is also to be expected.

The representatives of the Peoples Republic of China provided information on the swift evaluation and approval of three main traffic axes towards Russia, Mongolia and Kazakstan, which is commensurate with the statements of Chinese customers regarding evolving freight flows.

A uniform legal framework for Eurasian rail freight traffic

The rapid implementation of the CIM/SMGS single consignment note in Central Asia and the Peoples Republic of China and the new positioning of the railways in the Eurasian zone confirms the requirement for a uniform railway transport law. The CIM/SMGS Steering Group, which met on 26th November 2010 after the meeting of Coordinators, therefore mandated the CIM/SMGS Legal Group to finalise proposals for harmonised CIM/SMGS liability in the relationships between customers and carriers and between carriers and carriers.

Approval was also given to the work in progress on the new Annex 10 to the CIM/SMGS hand book, which realises this harmonised liability in the relationship with the customer. The regulation which has been developed is limited in the initial stage to the harmonisation of liability for loss of or damage to the goods and on the one hand places the customer in a better position compared with the current CIM, but on the other hand is consistent with the SMGS.

On the basis of a presentation by the representative of the United Nations Economic Commission for Europe (UNECE), a debate of principles took place regarding the development of Special Conditions of Carriage for CIM/SMGS rail freight traffic (SCC CIM/SMGS). It is intended that these should not only govern liability, but rather all the principal elements of the contract of carriage and should be an integrated component of a Memorandum of Understanding (MoU) between the Ministers of Transport and the Chairmen of the railway companies. In 2011, UNECE initiates practical steps. The CIT is close behind.

Erik.Evtimov@cit-ail.org
Original: DE

Further development of the CIT's freight documentation

Checklist for drawing up after-sales claims handling agreements

Handling individual claims for loss and damage in transit is very time-consuming and costly; it cries out for rationalisation. A small CIT group of experts prepared a checklist for after-sales claims handling agreements and submitted it to the meeting of the CIM Working Group held on 19 & 20 October 2010 for its approval. Such agreements improve the quality of transport services and indeed of customer service in general and also allow savings in the costs of handling claims.



Aftersales Agreements Group of Experts

New customs requirements

Customs law will make it necessary to put information on the CIM consignment note to ensure that carriers at EU external frontiers or at the end of a customs procedure can complete customs formalities in accordance with the regulations. The infor-

mation in question primarily relates to the nature of accompanying customs documents together with their movement reference numbers (MRN).

Incoterms

Incoterms, managed by the International Chamber of Commerce (ICC), have helped economic operators to avoid misunderstandings since 1936 in that they clarify charges and risks in sales contracts and allocate the various obligations between buyer and seller. A new version of the Incoterms comes into effect on 1 January 2011. It reflects developments and changes which have taken place in international trade and trade practices.

Accordingly, the comments made in the GLV-CIM on the payment instructions to be shown on the consignment note will have to be amended.

Other work done by the CIM Working Group

In addition, topics such as the provision of NHM codes for combined transport, a review of the burden of proof in the event of damage to goods, the role of the customer as a forwarding agent, showing accompanying documents on the consignment note and monitoring of user-satisfaction with CIT documentation were also considered at the most recent meeting.

The proposals for amendments drawn up by the working group together with the checklist for claims handling agreements will be submitted to the CIM Committee for its approval at its next meeting (on 29 March 2011). Following approval, these amendments will come into effect on 1 July 2011. We will keep readers informed of further developments.

Nathalie.Greinus(at)cit-rail.org
Original: DE

RAILDATA celebrates its fifteenth birthday

RAILDATA was founded in Florence in 1995 as a "special group" of the UIC. RAILDATA applications allow information about consignment notes and wagons to be assembled and exchanged with partner railway undertakings. In the near future, these applications will be enhanced to include train monitoring and wagon distance-run data. RAILDATA will also be a partner in the TAF-TSI test scenario for the Common Interface. Seventeen leading European railway undertakings already use RAILDATA services.



The celebrations for the fifteenth anniversary were held on 24 November last in Florence in the presence of all the members and representatives of the UIC and CIT. In his speech, Rainer Wilke, the Chairman of RAILDATA reminded the group of the numerous

Rainer Wilke, Chairman of RAILDATA, speaking at the fifteenth birthday celebrations.

successes, ISR ("Get information about your transport – anytime and anywhere"), and ORFEUS ("The future of electronic consignment notes") in particular, as well as the important role it plays in the implementation of TAF-TSI.

The Assistant Secretary General to the CIT welcomed the excellent working relationship which has been developed between RAILDATA and the CIT, more particularly in the context of the e-RailFreight project. He took the opportunity to appeal to those railway undertakings which have not yet committed themselves to implement e-RailFreight. He pointed out that by deciding to implement electronic consignment notes they will reduce their long-term costs and improve their standing in the market.

The CIT would like to take this opportunity to reaffirm its best wishes for a prosperous future to RAILDATA and to its members.

Henri.Trollet(at)cit-rail.org
Original: FR

Use of the Infrastructure

The new CUI Uniform Rules

As we reported in the last CIT Info (No 5, page 8), three revised appendices to the Convention concerning International Carriage by Rail (COTIF 1999) entered into force on 1 December 2010. These are the *Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI)*, the *Uniform Rules concerning the Validation of Technical Standards (APTU)* and the *Uniform Rules concerning the Technical Admission of Railway Material (ATMF)*. Member undertakings of the CIT are particularly concerned that the CUI should enter into force since it provides for an international standard basis for liability for the use of railway infrastructure.

Revision of these COTIF appendices was necessary because individual provisions were regarded as being incompatible with EU law and because EU Member States deposited reservations against their application at the request of the Commission. A working group composed of equal numbers of EU and OTIF representatives was set up. The working group subsequently succeeded in removing all the points of contention effectively and constructively.

The most important changes

The changes affect some of the definitions, the contents and form of the contract of use, some obligations of the parties to the contract and the arbitration procedures. The new Article 5bis CUI is central to the revised provisions. It gives precedence to national law and EC law for the contents and form of the contract of use (Article 5), for the special obligations of the parties to the contract (Article 6), for the termination of the contract of use (Article 7), for liability (Articles 8 & 9) and for the arbitration procedures (Article 22).



DB AG/Ralf Kranert

The Passengers' Rights Regulation makes application of the CUI both important and urgent.

For liability, precedence is only given to EC law and not national law. The objective of that distinction is to facilitate EC Regulations on making infrastructure charging dependent on performance (performance regime) and on arrangements to compensate customers (e.g. passengers' rights).

In conclusion, railway undertakings may be satisfied with the formulation which was decided. We can also confirm that, in so far as the mutual liability of infrastructure managers and railway undertakings to each other in the future is concerned, legal consistency and legal certainty appear to have been guaranteed. In the CIT's view, the key issue is that all the problems standing between CUI law and Community law have now been removed and nothing more stands in the way of EU Member States rapidly withdrawing their reservations.

The prospect of delays

Recently however, the European Commission has asked Member States to wait until issues linked to the accession of the EU to COTIF are clarified before withdrawing their reservations. The CIT and CER are disquieted by this development because it will lead to further delays in the application of international law for the use of infrastructure.

Although it is not appropriate for railway trade associations to express a view on the accession of the European Union to COTIF, the CUI Uniform Rules are required so urgently to facilitate international traffic by rail that the trade associations have called on the European Commission, the Council of Europe and OTIF not to hold them up until other issues (not linked to the law for the use of infrastructure) are clarified.

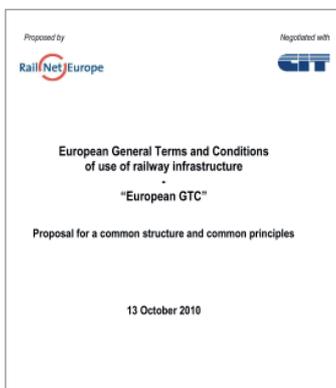
Also important for passengers' rights

The CIT, as the association for railway undertakings, and RailNetEurope, as the association for infrastructure managers, have recently been able to agree general terms and conditions for the use of infrastructure (Eur. GTC). These GTC are based on the CUI Uniform Rules and members of the two associations are being recommended to apply them. The Eur. GTC were approved by the appropriate committee on behalf of the CIT, for the RNE the approval process is still in progress.

The importance of the Eur. GTC lies not least in the fact that they cover recourse for compensation payments made in accordance with the Passengers' Rights Regulation (EC) No 1371/2007. For as long as the CUI Uniform Rules remain unapplied, it is not certain that the Eur. GTC will be applied. This is all the more problematic in that the demands made on railway undertakings in respect of passengers' rights are rising significantly and the undertakings rely on being able to have recourse against infrastructure managers for the costs of the delay and disruption they cause. Application of the CUI within the EU is therefore important and urgent so that the demands which the Passengers' Rights Regulation place on railway undertakings and infrastructure managers are fairly distributed in practice.

Thomas.Leimgruber(at)cit-rail.org
Original: DE

Agreement on the European GTC of Use of Railway Infrastructure



The negotiations between the CIT and RailNetEurope (RNE) over the general terms and conditions which should be applied to all contracts of use of infrastructure in Europe have been spread over a period of more than five years. The CER, UIC and EIM have all provided support. On 13 October 2010, the two associations agreed on principles to resolve the last two points in the *European GTC of*

of an accident but also in the event of delays caused by the infrastructure manager. This represents a significant advance for carriers; they get a right of recourse for compensation paid out in accordance with *Regulation (EC) No 1371/2007 on rail passengers' rights*.

The liability regime likewise provides a clear framework to deal with railway accidents involving several parties or undertakings (infrastructure managers, carriers, wagon keepers, customers, third parties). This legal framework is sorely lacking at present and leads to carriers always having to pay up front for the costs of accidents, even if they are not responsible for them.

Use of Railway Infrastructure (Eur. GTC). These last two points concerned:

- the financial consequences of the cancellation of train paths or restrictions in their use;
- liability for delays and disruption.

Standardisation of the contractual structure

The great virtue of the *European GTC* is to make the rules applicable to contracts for the use of infrastructure standard across Europe. Currently, the law which applies to these contracts is very fragmented since the CUI Uniform Rules only apply in fifteen OTIF Member States. In consequence, contracts for the use of infrastructure are mainly subject to national law. The outcome is a kaleidoscope of statutory and contractual approaches which gives rise to not-inconsiderable legal uncertainty for railway undertakings wanting to take advantage of the liberalisation of the market for international carriage by rail.

Balanced regime for liability

The second advantage of the *European GTC* is that they are based on the liability regime defined in the *CUI Uniform Rules* and extend it further to domestic traffic. The *European GTC* contain two distinct chapters on liability:

- Chapter 4: liability for delays and disruption
- Chapter 6: liability for accidents

These two chapters guarantee the carrier a right of recourse against the infrastructure manager (IM) for compensation paid out to passengers or freight customers, not only in the event

Standardisation of rights and obligations

Chapter 2 of the *European GTC* covers several substantive aspects of the contractual relationship between carriers and infrastructure managers, including:

- availability of railway infrastructure
- use of rolling stock
- obligations incumbent on train crews and the infrastructure manager's staff
- the arrangements for exchanging information
- the rules applicable in the event of disruption
- the arrangements for cancelling train paths
- the financial consequences of the cancellation of train paths and restriction of their use

As far as we know, this is the first time that legal standardisation in this area and this thorough has been achieved on a European scale. Of course, parties to the contract of use of infrastructure remain free to agree other terms in their contracts. Contractual freedom is not reduced by having the *European GTC*, it is just given shape.

Approval by the trade associations

The CUI Committee approved the Eur. GTC on behalf of the CIT in its meeting on 26 October 2010. On RNE side the procedure for approval is underway. The CIT will inform its members in due time of the result of this procedure.

Isabelle.Oberson(at)cit-rail.org
Original: FR

Law in practice

In this section, we publish details of legal decisions concerning rail transport and related areas of law, statements from public authorities and legal advice from the CIT General Secretariat on the practical legal issues that arise in daily life.

Does a forecast hailstorm represent a circumstance which the carrier was unable to avoid and the consequences of which he was unable to prevent?

During a national rail transport movement in France, a hailstorm which had been forecast by meteorologists caused damage to Renault vehicles which were being carried on a train which was stabled at Nîmes marshalling yard. Over 300 vehicles were damaged and the resulting amount of the damage was ca. €400,000.

The Cour d'Appel de Versailles has decided in the second instance, having regard to article 133-1 of the Commercial Code, amongst other things, that the carrier cannot claim relief on the basis of force majeure, as the damage to the vehicles was both foreseeable and avoidable, as the railway company could have moved the wagons out of the hailstorm area on a special train, or could at least have fitted protective covers over the vehicles. With rationale based on foreseeability and avoidability, this interpretation of French law is consistent with COTIF law, according to which relief of liability then results if the damage is

caused “by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent” (Art. 23 § 2 CIM). It has to be emphasised, though, that the Commercial Code foresees no preferential grounds for release from liability in the sense of the CIM Uniform Rules, such as e.g. carriage in open wagons (Art. 23 § 3 lit. a CIM).

Above and beyond this, the Cour d’Appel ruled that the carrier cannot rely on contractually agreed limits of liability due to his gross negligence. International railway transport law also includes a similar regulation in Article 36 CIM, according to which the carrier loses his right to limited liability *ex lege* – pursuant to

Article 33 CIM – having behaved recklessly and with knowledge that such loss or damage would probably result. The deciding factor in this case is the fact that the damage would not have occurred had the carrier’s duties been properly fulfilled (Article 36 *in fine* CIM and tenor 1 of the verdict of the Cour d’Appel, Versailles of 2nd July 2009).¹

Erik.Evtimov(at)cit-rail.org
Original: DE

¹ Excerpts printed in the OTIF Bulletin of International Carriage by Rail 1/2010, p. 17 et seq. for the English version.

CIT Itself

General Assembly 2010

Amongst the more noteworthy events at the CIT General Assembly (which was held on 18 November last) were the election of Jean-Luc Dufournaud as the new Chairman of the CIT, the first participation of RZD (Russian Railways) in the meeting and the final debate on the challenges to be addressed by the CIT in future. Participants were also briefed on the work that the association has currently in hand; this included briefings on the work being done on COTIF issues, the carriage of passengers and freight and the use of infrastructure.



Executive Committee 2010 from left to right: K. Kirkova (BDZ); E. Trapazzo (Trenitalia); C. Filipescu (CFR Calatori); J.-L. Dufournaud, Vice-Chairman; R. Freise, Chairman; Th. Leimgruber, Secretary General; M.-G. Hénuset (SNCF/NMBS); M. Killmeyer (ÖBB); M. Urbanska (PKP).

COTIF

Four states still haven’t ratified COTIF 1999: Italy, Ireland, Morocco and Sweden. The solution devised by the CIT for the problems this presents, i.e. applying the CIV and CIM Uniform Rules on a contractual basis, has allowed this situation to be remedied, at least in part. However, in the interests of legally certainty, the importance of which has been demonstrated by recent accidents such as that in Viareggio, it is important that these four states ratify COTIF quickly.

Passenger traffic

The number of payments for compensation for delay made since the Regulation on passengers’ rights and obligations (PRR) came into effect on 3 December 2009 has increased to such an extent that it is now necessary to revise the AIV. The work that this entails should be finished by summer 2011.

Another major task awaits the CIT in 2011: assisting in the creation of new general conditions of carriage for traffic between the states which apply the CIV Uniform Rules and those which apply

the SMPS. The new conditions which are planned will allow that traffic to be provided with a legal structure which is more certain and transparent.

Freight traffic

Now that the implementation phase has been reached, responsibility for the e-RailFreight project has passed to the UIC. The CIT is therefore essentially just involved in looking for solutions to facilitate the development of the system in the long term. One initiative will involve drawing up proposals to amend the CIM Uniform Rules in order to replace the principle of functional equivalence between the electronic and paper consignment notes (a principle which is sometimes complex and demanding to apply in practice) by substantive provisions. These substantive provisions will have the effect of reducing the interface with national law.

A new CIT document will see the light of day at the beginning of 2011: the checklist on “After-sales Claims Handling Agreements”. It will allow members of the CIT to handle loss and damage in transit simply, quickly and economically as well as preventing such loss and damage. This applies particularly to bulk traffics where unfortunately repeated loss and damage occurs.

The annual conference of claims departments is enjoying increasing popularity. The next event will be held on 26 May 2011. We shall take the opportunity to look at current issues again: these will include liability arising from the contract of use of infrastructure and the principal problems encountered in the application of the CIM Uniform Rules and the AIM. New topics will also be considered, such as the way airlines handle claims and computer assisted claims handling.

Making the CIM and SMGS legally interoperable

More than 50% of all CIM-SMGS traffic is now moved under the cover of a CIM/SMGS consignment note. Since September 2010 use of the CIM/SMGS note has been permitted over the whole of the Russian Railways (RZD) network, some 85 000 route kilometres and 5 000 stations. In 2011, the emphasis will be on its use on traffics to and from Central Asia and China as well as movements which use the train-ferry services in the Baltic and Black Sea.

New standard provisions for liability for loss and damage were drawn up in 2010. Consideration will now be given to drawing up special conditions of carriage for CIM-SMGS traffic with the objective of being able to consign this traffic using a single contract of carriage. This work may subsequently provide the basis for drawing up a new body of law for Eurasian transport.

Use of infrastructure

Negotiations with the RNE on the general terms and conditions for use of infrastructure (Eur. GTC) have been seen through to a successful conclusion. The two points left in abeyance were resolved in an even-handed way. These two points were: the legal consequences of the cancellation of train paths and liability in the event of delay and operational disruption. The Eur. GTC have been approved by the CUI Committee on behalf of the CIT. On RNE side the procedure for approval is underway.

Russian Railways (RZD) membership of the CIT – a significant point in the statutory business



Vice-president of RZD, Mr. Avtandil Gorgiladze

Russian Railways membership of the CIT as a full member took effect on 1 May 2010. Avtandil Gorgiladze, the Vice-president of Russian Railways gave an impressive presentation of his railway at the General Assembly.

The meeting also approved the admission of the following full members:

- Raaberbahn Cargo GmbH (Austria),
- GYSEV Cargo (Hungary),
- Niroo Rail (Iran),
- Arenaways (Italy),
- Nuovo Trasporto Viaggiatori (NTV), (Italy),
- Montecargo (Montenegro),
- NSB (Norway),
- Kombinovani (Serbia),
- LTE Slovakia (Slovakia),
- METRANS (Slovakia).

Since Iraqi Republic Railways (IRR) had paid all their outstanding membership subscriptions their membership was reactivated.

Membership of the CIT is now 131 full members and 5 associate members.

In addition the General Assembly approved the Annual Accounts for 2009 (which showed a profit of CHF 27 000), the work programme and the budget for 2011 as well as several changes to the statutes of the CIT (referring to membership criteria, the obligation to comply with decisions of the association and the calculation of subscriptions).

Jean-Luc Dufournaud, new Chairman of the CIT

Rainer Freise, current Chairman of the CIT, will retire on 31 December 2010 – see the tribute to him at the end of this edition of CIT Info. The General Assembly unanimously elected the current Vice-chairman, Jean-Luc Dufournaud, Deputy Legal Director of SNCF, as his successor. The General Secretariat is looking forward to being able to work even more closely than before with Jean-Luc Dufournaud. We shall return to his election in the next edition of CIT Info.



From left to right: Jean-Luc Dufournaud, new Chairman and Rainer Freise, retiring Chairman of the CIT

The General Assembly likewise unanimously elected Kounka Kirkova (BDZ) as the new Vice-chairman. Marie-Ghislaine Hénuset's (SNCF/NMBS) period in office was renewed and Maria Sack (DB) made her return to the Executive Committee. With effect from 1 January 2011, its composition will now be:

- Jean-Luc Dufournaud (SNCF), Chairman
- Kounka Kirkova (BDZ), Vice-chairman
- Carmen Filipescu (CFR Calatori)
- Marie-Ghislaine Hénuset (SNCF/NMBS)
- Martin Killmeyer (RCA)
- Maria Sack (DB)
- Enrico Trapazzo (Trenitalia)
- Maria Urbanska (PKP Cargo)

The mandate of the chairmen of the committees was also renewed:

- CIV Committee Enrico Trapazzo (Trenitalia)
- CIM Committee Christian Heidersdorf (DB)
- CUI Committee Thomas Leimgruber (Secretary General)

Challenges to be addressed in the future – role of the CIT

The second part of the General Assembly was devoted to a debate on the challenges of the future and the role the CIT would have in addressing them. Eminent speakers provided new insights, identified the key challenges the future will bring and summarised the conclusions succinctly:

- Henriette Chaubon, Legal Director, SNCF
- Jean-Luc Dufournaud, Chairman-designate of the CIT
- Rainer Freise, retiring Chairman of the CIT
- Marianne Motherby, Legal Director, DB
- Matteo Mussini, Adviser, CER
- Stefan Schimming, Secretary General, OTIF.

The main conclusions are below. To a great extent they are based on the priorities set out by the CIT Chairman-designate for his period in office. We will return to these in CIT Info 1/2011.

These were the main conclusions:

Role of the CIT:

- The CIT must press for simple standard legal rules which are comprehensible and easy to apply. If legal regimes overlap within the meaning of the "Appeal from Bern" (launched during the "Berne Tage" in 2010), the association must monitor that their legal rules are consistent.
- It must provide its members with documents and services which correspond to the needs of the market; users must be closely involved with the development of these documents and services.



The speakers of the panel from left to right: S. Schimming (OTIF); H. Chaubon (SNCF); J.-L. Dufournaud, Vice-chairman; R. Freise, Chairman; M. Motherby (DB); M. Mussini (CER).

Activities and priorities:

- Implementing COTIF and other statutory material on a European and Eurasian scale. Building and improving relationships with the organisations responsible for the legislation and the states members of those organisations.

- Developing interoperability between the laws of carriage in Europe and Asia for freight and passenger traffic moving between them.
- Monitoring developments in the passenger field (consumer rights, liberalisation of the market) and alignment of CIT documentation.
- Making a contribution to the development of intermodality (statutory law and transport documents), taking a global perspective rather than just limiting the contribution to the European dimension.
- Continuing to develop rules of the game which are clear, objective and balanced properly between the various parties in the rail mode (between railway undertakings and infrastructure managers in particular).
- Developing paperless transport documents (tickets and electronic consignment notes).

Henri.Trolliet@cit-rail.org
Original: FR

New members



ARENAWAYS SPA is an Italian railway undertaking based in Alessandria. The undertaking was founded in October 2006 and has had a licence for the Italian network since 2007. However, the organisation only became operationally

active at the beginning of 2010. It became a member on 1 October 2010.



AD MONTECARGO JSC Podgorica has its headquarters in Podgorica, in Montenegro. The undertaking was founded on 15 June 2009 as a result of the split up of Montenegro

Railways JSC (ZCG) into infrastructure, passenger and freight divisions. It also became a member on 1 October 2010.



LTE Logistik a Transport Slovakia s.r.o. is a subsidiary of the Austrian LTE Logistik- und Transport GmbH. It was founded in 2003 and was the first private railway undertaking in Slovakia. Its principal activity is the movement of freight traffic in Central Europe. It became a member on 1 December 2010.



METRANS Danubia a.s. started out in business in 1991 to offer services for the transport of containers by rail and road in the former Czechoslovakia. It sent its first container block train to/from Hamburg in February 1992. Further terminals were opened (in Zlín in 1995 and in Dunajská Streda in 1999) and these also served as portals for combined traffic in south Slovakia and Hungary. It became a member on 1 December 2010.

Katja.Siegenthaler(at)cit-rail.org
Original: DE



Tetyana Payosova

New staff member

Since the project to make the CIM and SMGS legally interoperable will reach a decisive phase in 2011, the General Secretariat of the CIT has decided to employ an additional staff member who speaks Russian on a temporary and part-time basis.

Tetyana Payosova completed her first Masters degree in jurisprudence at the University of Odessa. In Bern she was awarded a Master in International and European Law. She is currently

writing her doctoral thesis under Professor Thomas Cottier at the Institute for European and International Economic Law at the University of Bern.

We would like to wish Miss Payosova all success and useful experience in her work with the CIT.

Thomas.Leimgruber(at)cit-rail.org
Original: DE

On the retirement of Rainer Freise



Professor Dr Rainer Freise will retire at the end of the year.

At the end of this year Professor Dr Rainer Freise (DB AG) will take well-earned retirement. On his retirement, his period in office as the Chairman of the CIT will come to an end.

Rainer Freise has worked in the railway industry since 1973; from 1993 to 1998 as German Railways most senior lawyer and subsequently as the Managing Director of DB AG's insurance brokerage. He took part in the proceedings to reform the Convention concerning International Carriage by Rail (COTIF) in the period from 1993 to 1999 as a technical expert. In addition, he taught German and international transport law as an Honorary Professor at the Goethe University in Frankfurt am Main. For many years Rainer Freise was also a member of the International Union of Railway's (UIC) Legal Group and its chairman from 1995 to 1999.

Professor Freise is the author of many articles and book reviews on transport law. His most important work is a commentary on the CIM and CUV Uniform Rules which was recently published in the Munich Commentary on the commercial code (Volume 7, fourth book, commercial transactions, §§ 407-475 transport law). It is certain that this work will become a classic in international rail transport law.

Rainer Freise has been a real godsend for the CIT. He has led and influenced our association over the last few years with a steady hand and great technical skill. If the work of the CIT is now highly regarded and universally recognised, it is largely thanks to him.

We thank Rainer Freise for his commitment and wish him well for the future.

Thomas.Leimgruber(at)cit-rail.org
Original: DE

CIT Diary of Events

Date	Event	Location
2/3 February	Workshop "Tickets from A to Z"	Bern
23/24 February	CIV Working Group	Bern
29 March	CIM Committee	Bern
14 April	Executive Committee 1/2011	Bern
15 April	CIV Committee	Bern

Events with CIT participation

Date	Event	Location	CIT contact
11 January	UIC Leaflet 471-1	Paris	Isabelle Oberson
13 January	Meeting of GCU Experts	Paris	Henri Trolliet
13 January	UNECE Preparatory Meeting	Geneva	Erik Evtimov
19/20 January	CEN-TS Indirect Issuing	Thun	Max Krieg
3 February	UIC Wagon Users Study Group	Paris	Henri Trolliet
10 February	CER General Assembly	Brussels	Henri Trolliet
14-17 February	UIC Ticketing Action Group and TAP Maintenance and Development	Paris	Max Krieg
23 February	e-RailFreight Steering Group and Project Managers	Paris	Henri Trolliet
1-3 March	UNECE Inland Transport Committee	Geneva	Erik Evtimov
22 March	UIC Global Team of Experts	Prague	Erik Evtimov
23-25 March	3 rd International Conference, Exhibition and Award on Railway Cargo Transports between Asia and Europe	Prague	Erik Evtimov
31 March	UIC Freight Steering Committee	Paris	Henri Trolliet

Produced by:
International Rail Transport Committee (CIT)
Secretariat General
Weltpoststrasse 20
CH-3015 Berne

Phone +41 31 350 01 90
Fax +41 31 350 01 99
E-Mail info(at)cit-rail.org
Internet www.cit-rail.org