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**DIPLOMATIC CONFERENCE TO ADOPT A
RAIL PROTOCOL TO THE CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT**

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EXPLANATORY REPORT
of the
DRAFT PROTOCOL
ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK

(submitted by the UNIDROIT Secretariat)

together with

AN OVERVIEW OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(Extract of the Official Commentary of Prof. Sir Roy Goode)

and

**AN OVERVIEW OF THE DRAFT RAIL PROTOCOL - A SIGNIFICANT STEP FORWARD FOR THE RAIL
INDUSTRY**

(prepared by Mr Howard Rosen, Chairman of the Rail Working Group)

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AN OVERVIEW OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(EXTRACT OF THE OFFICIAL COMMENTARY OF PROF. SIR ROY GOODE)

Objectives

8. The principal objective of the Convention is the efficient financing of mobile equipment. Such financing will assist in the development of cost-effective modes of transport and space assets utilising modern technologies. The Convention system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost. A sound, internationally adopted legal regime for security, title-retention and leasing interests will encourage the provision of finance and reduce its cost.

9. The financing of aircraft objects, as with railway rolling stock and space assets [...], takes three principal forms: a loan secured by a security interest in the object; a sale under an agreement (title reservation agreement) in which the seller reserves ownership until payment in full; and a lease, which may be either a finance lease or an operating lease and may or may not include an option to purchase. These financing instruments need to be underpinned by a sound legal regime if they are to function efficiently so as to induce the assumption of risk and the release of funds by the private sector. The huge outlays involved in the financing of objects of the kinds covered by the Convention make it essential for the creditor (the financier, seller or lessor) to be able to have confidence that if the debtor defaults in payment or other performance the relevant legal regime will respect the creditor's contractual and proprietary rights and provide the creditor with efficient and effective means to enforce those rights.

10. Traditional conflict of laws rules apply the *lex rei sitae* as the law governing proprietary rights, but such a principle is unsuited to items of mobile equipment which are constantly moving from one country to another or, in the case of space assets, are not on earth at all. Different legal systems adopt differing approaches to the determination of the applicable law in this situation. Moreover, even if it were possible to devise a uniform conflicts rule, this would not overcome the disadvantage of dependence on national laws, which vary widely from one country to another and which in some jurisdictions are highly supportive of security interests while in others they are more hostile or restrictive. This may discourage potential financiers from extending credit or may lead to substantially increased credit costs. Hence the need for an international set of rules governing security, title-retention and leasing interests in such equipment which will provide creditors with the necessary safeguards, while at the same time incorporating measures for the protection of debtors.

11. The Convention and its supporting Protocols are designed to fulfil five key objectives:

- To facilitate the acquisition and financing of economically important items of mobile equipment by providing for the creation of an international interest which will be recognised in all Contracting States;
- to provide the creditor with a range of basic default and insolvency-related remedies and, where there is evidence of default, a means of obtaining speedy interim relief pending final determination of its claim on the merits;

- to establish an electronic international registry for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and the debtor's insolvency administrator;
- to ensure through the relevant Protocol that the particular needs of the industry sector concerned are met;
- by these means to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

Detailed though they are, the Convention and the Protocol have very specific objectives and do not seek to cover the whole field of asset-based secured financing, much of which will continue to be governed by national laws and the agreement of the parties. Moreover, the Convention itself allows considerable scope for party agreement on a range of issues, including default remedies and jurisdiction.

The two-instrument approach and the relationship between the Convention and the Protocol

12. As stated above, the Convention is not equipment-specific. Its provisions will in principle apply equally to any of the three categories of mobile equipment to which it relates. However, the Convention does not come into force as regards any category of equipment until a Protocol has been made relating to that equipment and takes effect subject to the terms of that Protocol, so that in the case of any inconsistency it is the Protocol that prevails. This two-instrument approach was seen to have a number of advantages. It results in a uniform set of rules for those provisions of the Convention that do not attract equipment-specific considerations, instead of having separate, stand-alone conventions for each class of equipment. This avoids duplication and inconsistency between the non-equipment-specific provisions of one convention and those of another, and allows a uniform interpretation of such provisions, regardless of the type of equipment involved. The two-instrument approach also avoids cluttering up the text of the Convention with detailed equipment-specific rules, and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved. However, to meet the needs of those concerned with aircraft finance and their advisers the Joint Secretariat of the Conference (namely the Secretariats of ICAO and UNIDROIT) has produced a user-friendly Consolidated Text which reproduces the combined effect of the Convention and the Aircraft Equipment Protocol. As stated earlier, this is not a legally operative document but a convenient text for use by those involved in aircraft equipment finance and leasing.

Underlying principles

13. The Convention and Aircraft Equipment Protocol are governed by five underlying principles:
- **Practicality** in reflecting the salient factors characteristic of asset-based financing and leasing transactions;
 - **Party autonomy** in contractual relationships, reflecting the fact that parties to a high-value cross-border transaction in equipment of the kind covered by the Convention will be knowledgeable and experienced in such transactions and expertly represented, so that in general their agreements should be respected and enforced;

- **Predictability** in the application of the Convention, a feature which is specifically mentioned in the interpretation provisions of Article 5(1) and is reflected in the concise and clear priority rules, which give pre-eminence to certainty and simplicity and a rule-based rather than standards-based approach;
- **Transparency** through rules which provide for registration of an international interest in order to give notice of it to third parties and which subordinate unregistered international interests to registered international interests and to the rights of purchasers;
- **Sensitivity** to national legal cultures in allowing a Contracting State to weigh economic benefits against established rules of national law to which it attaches importance, and to make declarations (a) to exclude, wholly or in part, select provisions of the Convention it considers incompatible with such principles (for example, the exercise of certain interim remedies) or (b) to opt into select provisions which it considers will reinforce those principles (for example, the preservation of rights of arrest or detention of an object for payment for services in respect of that object).

Definitions

14. Article 1 of the Convention contains a long list of definitions, and these are supplemented by definitions in the Aircraft Equipment Protocol. It is important to keep these in mind at all times when reading the Convention and Aircraft Equipment Protocol, because ordinary words are sometimes given a special meaning, such as “agreement,” “creditor” and “debtor,” while a number of phrases have been specially coined for the two instruments, such as “associated rights”, “internal transaction”, “national interest”, and “non-consensual right or interest”, and therefore can be understood only by reference to their respective definitions.

Sphere of application

15. The Convention provides for protection of five different categories of interest:

(1) **International interests**, that is, interests granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing agreement, other than interests arising under an internal transaction in respect of which a State has made a declaration excluding the application of certain aspects of the Convention (see (3) below). The international interest is the primary category of interest with which the Convention and the relevant Protocol are concerned.

(2) **Prospective international interests**, that is, interests intended to be taken over identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective international interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest.

(3) **National interests**, that is, interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions (as defined in the Convention) in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of limited effect. In the first place, the national interest remains governed by the

priority rules of the Convention, not those of national law, and by various other provisions of the Convention. Secondly, while it cannot be registered as an international interest, notice of it can be registered in the International Registry, thereby securing its priority in the same way as if it were a registered international interest.

(4) **Registrable non-consensual rights or interests arising under national law.**

A Contracting State may make a declaration under Article 40 that non-consensual rights or interests arising under its law may be registered in the International Registry, and any such right or interest that is so registered is then treated for the purposes of the Convention as a registered international interest. Possible examples are a judgment or order affecting equipment of a category to which the Convention applies and a legal lien in favour of a repairer or warehouseman.

(5) **Non-consensual rights or interests arising under national law and given priority without registration.** A Contracting State may make a declaration under Article 39 specifying those categories of non-consensual right or interest which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual rights or interests are not themselves registered.

The Convention covers not only interests within one or other of the above categories but also “associated rights”, that is, rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Purely personal contractual rights not secured on an object are outside the scope of the Convention, though Article 39(1)(b) preserves the efficacy of contractual as well as legal rights of arrest or detention under the law of a State for sums due to a provider of public services, to the extent declared by that State under the Convention.

16. In order for the Convention to apply the following conditions must be satisfied:

(1) The parties have entered into a security agreement, a conditional sale agreement or a leasing agreement (Article 2(1), (2)).

(2) The agreement relates to equipment which, as defined by the relevant Protocol, is:

- (a) an airframe, an aircraft engine or a helicopter,
- (b) railway rolling stock, or
- (c) space assets (Article 2(3)).

(3) The equipment falls within a category designated in the relevant Protocol and is uniquely identifiable (Article 2(2),(3)).

(4) The agreement is constituted in accordance with the formalities prescribed by the Convention (Articles 2(2), 7).

(5) The debtor is situated in a Contracting State at the time of conclusion of the agreement creating or providing for the international interest (Articles 3, 4). [...]

17. Most legal systems outside North America distinguish sharply between security agreements and title-retention and leasing agreements, treating a conditional seller or lessor as the full owner. By contrast in North American jurisdictions, and more recently in New Zealand, the law adopts a functional and economic approach, treating title reservation agreements and certain types of leasing agreement as forms of security and the title of the conditional seller or finance lessor as limited to a security interest. Given these widely contrasting approaches it was recognised at an early stage that it would not be possible to reach agreement on a uniform Convention

characterisation. Accordingly the solution adopted was to leave this to be dealt with under the applicable domestic law as determined by the rules of private international law of the forum State (Articles 2(4), 5(2),(3)). Where the applicable law is the *lex fori* itself the national court will be able to apply its own law to determine the characterisation issue.

18. [...]

19. The ingredients of mobility and internationality are not expressly prescribed by the Convention but are considered inherent in the nature of the equipment. The Convention thus leaves open the possibility of taking and registering an international interest in equipment which never leaves its State of origin. However, the creditor needs to be able to protect itself against the possibility of such movement and is usually not well placed to know whether or not it has taken place. Article 50 of the Convention nevertheless allows Contracting States, in respect of purely internal transactions, to exclude certain provisions of the Convention relating to the rights of the parties between themselves.

20. The provisions of the Convention describing the three categories of equipment to which it is applicable are qualified in important respects by the relevant Protocol, for example, by giving definitions which are designed both to describe the type of object covered and to limit the coverage to equipment of high unit value, and by specifying the method or methods by which the requirement of unique identifiability may be satisfied, e.g. in the case of aircraft objects the manufacturer's serial number, manufacturer's name and model designation of the object. Registration is effected against an object so identified. Accordingly the Convention does not apply to future property or to proceeds other than insurance and other loss-related proceeds.

Constitution of international interest

21. All that is needed to constitute an international interest is an agreement which conforms to the simple requirements of Article 7. This is so whether or not the international interest has any counterpart in national law or fulfils the requirements for the creation of an interest under national law. In this sense the international interest is autonomous, being derived from the Convention itself. But whether an agreement exists at all is to be determined by the applicable law, which will thus govern questions such as capacity to contract, the existence of a *consensus ad idem*, and the like. However, the formal requirements for the agreement are determined by the Convention itself. Under Article 7 an interest is constituted as an international interest where the agreement creating or providing for⁵ the interest satisfies four conditions:

(1) *Writing*

The agreement must be in writing. "Writing" is defined in broad terms in Article 1(nn) to cover not only documents but also an electronically held record of information which is capable of being reproduced in tangible form on a subsequent occasion. Whether the agreement is in paper or electronic form, it must indicate by reasonable means a person's approval of the record.

(2) *Power of disposal*

The agreement must relate to an object of which the chargor, conditional seller or lessor has power to dispose. The word "power" is not synonymous with "right". An unauthorised disposition may nevertheless be effective to pass ownership or some other interest because of a rule of law to that

⁵ A security agreement creates an international interest, whereas a conditional sale or lease agreement merely "provides for" an international interest, since the title retained by the seller or lessor does not derive from the conditional sale or leasing agreement but is acquired independently of (and usually before entry into) that agreement.

effect, for example, where an agent, though not having actual authority to dispose of its principal's property, sells it when having ostensible authority to do so. A power to dispose may arise either under the applicable law or under the Convention itself as a consequence of its registration and priority rules. See Comment 5 to Article 7.

(3) *Identifiability*

The agreement must enable the object to be identified in conformity with the relevant Protocol. Identifiability is a crucial requirement because the registration system is asset-based. It is thus not sufficient that (as in the common case of security over future property) the asset can be identified as falling within the scope of the security agreement. It is necessary that the object be specifically identified in the agreement itself. It is left to the relevant Protocol to determine the identification criteria, since these are likely to be equipment-specific. [...]

(4) *Obligations secured*

In the case of a security agreement, this must enable the secured obligations to be determined; in other words, it must be possible to ascertain from the agreement what obligations it is securing. However, it is not necessary to state a sum or maximum sum secured, nor is it necessary to identify each particular obligation; a general description suffices. It was felt that to require the statement of a maximum sum or specificity in the statement of secured obligations was neither practicable nor desirable, for in many cases the agreement will secure future obligations whose nature and quantum will not be known in advance. If the secured party had to specify a maximum sum it would simply choose a figure higher than anything it would conceivably advance.

Relationship with national law

22. The Convention does not exclude the creation of security interests under national law. In most cases a security, title-retention or leasing interest created under national law will simultaneously constitute an international interest, so that the two will co-exist. However, the international interest will usually give the creditor stronger rights than a purely domestic interest. In particular a registered international interest has priority over (a) a domestic interest which is neither registered under the Convention (even if it is of a kind not capable of registration) nor covered by a declaration under Article 39 and (b) a national interest notice of which is not so registered.

Default remedies

23. The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously. Chapter III of the Convention provides a chargee with a set of basic remedies in the event of the debtor's default. For this purpose it is not necessary for the international interest to have been registered, since registration is required only to give notice of the international interest to third parties and to protect the priority of the international interest. A distinction is drawn between the rules governing the remedies of a chargee, which are specified in Articles 8 and 9, and those applicable to the remedies of a conditional seller or lessor, which are the subject of Article 10 and are less detailed, reflecting the fact that vis-à-vis the conditional buyer or lessee the conditional seller or lessor is the owner of the equipment⁶ and may deal with

⁶ The conditional seller or lessor is not necessarily the owner; often it will be an intermediate party itself holding the equipment under a conditional sale agreement or lease. But in its relations with the conditional sub-buyer or sub-lessee its position is analogous to that of an owner.

the equipment as it pleases once the agreement has come to an end. Article 12 ensures the availability of additional remedies under the applicable law, including any remedies agreed by the parties, so far as not inconsistent with the mandatory provisions of Chapter III.

24. Article 8 empowers the chargee, to the extent that the chargor has at any time so agreed, to:

- take possession or control of any object charged to it;
- sell or grant a lease of any such object;⁷
- collect or receive any income or profits arising from the management of the object.

Alternatively, the chargee may, with or without the agreement of the chargor, apply for a court order authorising or directing any of the above.

25. Article 9 empowers the chargee to take ownership of the object in satisfaction of the debt. However, the chargor and other interested persons, such as subsequent chargees and guarantors, are provided with a number of safeguards. Extra-judicial remedies are required to be exercised in a commercially reasonable manner. Notice of a proposed sale or lease must be given to interested persons. Vesting of ownership in satisfaction of the debt can occur only with the consent of all the interested persons or on an order of the court and, in the latter case, only if the court is satisfied that the amount of the secured obligations to be discharged is commensurate with the value of the object. The parties may agree on the events that constitute default or otherwise give rise to the remedies set out in Chapter III. In the absence of such agreement the default must be substantial. Additional remedies permitted by the applicable law, including any remedies agreed by the parties, may be exercised to the extent that they are in conformity with the mandatory provisions listed in Article 15.

26. In the case of a conditional sale agreement or leasing agreement, the only remedies designated (by Article 10) are termination of the agreement, possession or control of the object or a court order authorising or directing either of the above. As mentioned in paragraph 23 the provisions are much simpler because in contrast to the chargee, who has merely a security interest, the conditional seller or lessor is the owner. However, in the United States, most of the Canadian jurisdictions and New Zealand conditional sale agreements and certain types of financial leasing agreement are characterised as security agreements, so that a court in such a jurisdiction will apply the Convention rules governing security agreements.

27. Article 13 provides the creditor who adduces evidence of default with the right to speedy relief, pending final determination of its claim, in the form of an order for preservation of the object or its value, possession, control or custody of the object, immobilisation of the object or lease or management of the object and the income from it but not sale and application of the proceeds of sale (although the Aircraft Equipment Protocol adds these remedies as regards aircraft objects). Certain safeguards are provided for the debtor. By Article 55 a Contracting State may make a declaration excluding Article 13, wholly or in part.

The registration system

28. The registration system lies at the heart of the Convention's system of priorities. Registration gives public notice of an international interest or a prospective international interest and enables the creditor to preserve its priority and the effectiveness of the international interest in insolvency proceedings against the debtor. Registration is not, however, proof of the existence of

⁷ But a Contracting State may, by a declaration under Article 54, exclude the power to lease equipment while on its territory.

an international interest and is of no effect if the purported international interest has not been validly created. Rather registration ensures that if an international interest validly created is registered priorities are determined on a simple, objective, first-to-register basis. Registration is against the individual object, not against the debtor; hence the requirement that the object must be uniquely identifiable and the restriction of proceeds claims to insurance and other loss-related proceeds. It is envisaged that there will be different registration systems for different types of equipment. The International Registry will be administered by a Registrar under the superintendence of a Supervisory Authority, which (insofar as it does not already have it) will be a body having international legal personality and immunity from process. By contrast the Registrar will be strictly liable for compensatory damages for loss suffered from errors, omissions or system malfunction, subject to certain very limited defences. [...]

29. The registration provisions are predicated on the assumption that the system will be electronic and available on-line, so that the checking of registration applications, registration itself and responses to searches will be effected automatically by computer and will not involve human intervention. The provisions of the Convention and Protocol will be supplemented by regulations governing the operation of the International Registry and procedures for effecting registrations and searches. [...]

30. The registration system will accommodate registrations of international interests, prospective international interests, and registrable non-consensual rights and interests (explained in paragraph 45), as well as assignments and prospective assignments, subordinations, and the acquisition of international interests by legal or contractual subrogation under the applicable law. The system will also receive registrations of notices of national interests, that is, interests registered in a national register and arising under a purely local transaction (i.e. where all the parties and the object are in the same Contracting State) and which the Contracting State in question has, pursuant to Article 50(1), declared will not be governed by the Convention. Where such a declaration has been made a national interest may not be validly registered as an international interest, but notice of the national interest may be registered under Article 16(1)(d) and by virtue of Article 50(2) this will give the national interest the same priority as if it were a registered international interest, so that, as stated earlier, the effect of a declaration under Article 50(1) is limited. The detailed requirements for registration are prescribed by the relevant Protocol and by regulations to be made under it. Article 20 states whose consent is required to effect, modify or discharge a registration.

Priorities

31. The priority rules are set out in Article 29 and are few in number and for the most part simple. A registered interest has priority over a subsequently registered interest and over an unregistered interest. This priority applies even if the holder of the registered interest took with actual knowledge of the unregistered interest, a rule necessary to avoid factual disputes as to whether a holder did or did not have knowledge. There are three exceptions to the general priority rules. First, since the interest of an outright buyer is not registrable, [...]⁸ Article 29(3) provides that the buyer takes free from an international interest not registered prior to the buyer's acquisition of its interest. Secondly, there is a special priority rule in Article 29(4) relating to certain conditional buyers and lessees. This is explained in paragraph 32 below. Thirdly, the priority rules may be varied by agreement between the holders of competing interests (Article 29(5)).

32. Article 29(4) deals with priority as between a conditional buyer or lessee and the holder of a registered interest (by which, of course, is meant a holder other than the conditional buyer's or lessee's own conditional seller or lessor). One of the cases envisaged is a conflict between the

⁸ [...]

conditional buyer or lessee and a person to whom the conditional seller or lessor has charged the goods under a security agreement. The basic principle reflected in Article 29(4) is that parties shall not be affected by anything which is not on the register. It would be unfair to a chargee from the conditional seller or lessor to subordinate the charge to the interests of a conditional buyer or lessee which the chargee could not discover by a search in the International Registry. The interest of the conditional buyer or lessee is not itself registrable. However, registration of the interest held by the conditional seller or lessor will give notice of the existence of the conditional sale agreement or lease and thus of the interest of the conditional buyer or lessee thereunder. Accordingly the effect of the rule laid down in Article 29(4) is that the priority of the conditional buyer or lessee vis-à-vis the chargee is determined according to whether the international interest held by its conditional seller or lessor was registered before the chargee registered its interest. If it was, then the chargee takes its interest subject to the rights of the conditional buyer or lessee. If, on the other hand, the chargee registers its interest before the conditional seller or lessor has registered its own interest the chargee has priority over the conditional buyer or lessee, whose existence the chargee will not have been able to discover from a registry search. Article 29(5), which permits the variation of competing priorities, and the registration thereof binding third parties, applies to the foregoing rules. Moreover, Article XVI of the Aircraft Equipment Protocol extends the concept of conditional buyer and lessee rights, linked to time of registration, to confer a right of quiet possession on the conditional buyer or lessee against a chargee over whom the conditional buyer or lessee has priority under the rule described above. This Article too permits of contractual variation.

33. By Article 29(6) any priority extends to proceeds. However, the term “proceeds” is confined by Article 1(w) to insurance and other loss-related proceeds. General proceeds, such as receivables arising from the sale of an object, are not covered. So long as proceeds as defined by Article 1(w) are identifiable in the hands of the debtor the creditor has the same priority in relation to them as it had in relation to the object itself prior to its loss. Whether proceeds which have left the debtor’s hands or have become commingled with other assets of the debtor remain traceable is answered not by the Convention but by the applicable law. Article 29(7) is designed to ensure that rights in an item (other than an object) created under the applicable law are not lost by installation of the item on an object and that new rights may be created in an installed item, where so permitted by the applicable law. [...] By “item” is meant any article which is not an airframe, aircraft engine or helicopter, a railway wagon or railway engine or a space asset. The term covers such articles as spare parts which are not themselves aircraft engines, modules affixed to engines, computers, audio and visual systems, and the like.

34. Finally, where a prospective international interest is registered and later becomes a completed international interest it is deemed to have been registered at the time of registration of the prospective international interest and ranks for priority accordingly (Article 19(4)). Until the time of completion the prospective debtor has the right to have the registration discharged unless the prospective creditor has given value or committed itself to so doing (Article 25(2)). What constitutes value is determined by the applicable law.

Effect of insolvency

35. The general rule is that in insolvency proceedings against the debtor an international interest is effective if registered prior to the commencement of the proceedings (Article 30(1)). “Effective” means that the property interest will be recognised and the holder of the international interest will have a claim against the asset for obligations owed, and will not be limited to a *pari passu* sharing with unsecured creditors. However this provision does not impair the effectiveness of an international interest which is effective under the applicable law (Article 30(2)). In other words, the rule in Article 30(1) is a rule of validity, not of invalidity. If under the applicable law the

international interest is effective in the insolvency even if it has not been registered prior to the commencement of the insolvency proceedings, or, indeed, at all, then its efficacy in those proceedings is not affected by the Convention. Under Article 30(3) the general rule does not protect a registered international interest from rules of insolvency law relating to the avoidance of preferences and transfers in fraud of creditors or from rules of insolvency procedure relating to the enforcement of rights to property under the control or supervision of an insolvency administrator, for example, rules which, with a view to facilitating a reorganisation of the debtor, suspend or restrict enforcement of a security interest.

Assignments

36. Chapter IX of the Convention deals with the effect, formal requirements and priority of assignments of associated rights and related international interests, and with subrogation. "Assignment" is broadly defined so as to cover both transfers and charges or pledges. "Associated rights" are defined in Article 1(c) as all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object. Associated rights therefore do not include (a) rights to performance by a third party or (b) rights to performance by the debtor under another contract or engagement (including the engagement embodied in a promissory note), unless in either case the debtor undertakes in the agreement to perform the obligations of the third party or of itself under the other contract or engagement.

37. Associated rights may be one of two kinds: those that are related to the financing or leasing of an object in the sense of Article 36(2), for example, rights to payment of the price of the object, repayment of an advance for the purchase of the goods, or related obligations of the debtor under the transaction (such as indemnities and loan breakage costs resulting from an unwinding of funding arrangements because of premature termination of the agreement for default), and those that are not so related, for example, rights to repayment of a non-purchase money loan in an unrelated transaction which may have as an element security over the object but has nothing to do with its financing, rental or associated obligations. The distinction between the former category and the latter is relevant to the priority of competing assignments of associated rights under Article 36, discussed in paragraph 43 below.

38. An earlier draft of the Convention had focused on the assignment of international interests and had provided that this should also transfer the associated rights, that is, all rights to payment or other performance by a debtor under an agreement which are secured by the object (in the case of a security agreement) or associated with the object (in the case of a conditional sale or leasing agreement) (Article 1(c)). Though contrary to the normal rule that a security interest is accessory to the obligation secured, this had a certain logic in that the Convention is concerned with international interests, not with assignments of receivables as such. In the end, however, it was considered that the normal rule should be applied. Accordingly Article 31(1) provides that, except as otherwise agreed by the parties, an assignment of associated rights made in conformity with the prescribed formalities also transfers to the assignee the related international interest and all the interests and priorities of the assignor under the Convention. For the position where the assigned international interest has not been registered see Comment 4 to Article 35. The debtor may assert against the assignee all defences and rights of set-off available to him under the applicable law unless he has waived them by an agreement in writing. Under the Convention such a waiver is binding except where it purports to bar defences arising from fraudulent acts of the assignor (Article 31(3), (4)).

39. It is open to the parties to agree to assign the associated rights without transferring the related international interest, and this will be the effect anyway if the assignment does not conform to the requirements of Article 32, but in either case the Convention does not apply to the

assignment (Article 32(3)) and the effect is left to be determined by the applicable law. What the parties cannot do is assign an international interest without also assigning at least some of the related associated rights, for an international interest has no significance except in the context of the obligations which it secures or with which it is associated. A purported assignment of an international interest under a security agreement without inclusion of some or all of the associated rights is not valid (Article 32(2)).

40. Partial assignments of associated rights are permitted and it is then for the parties to agree as to their respective rights concerning the related international interest, but not so as adversely to affect the debtor without its consent (Article 31(2)). The parties could, for example, agree that the international interest is to be recorded as assigned into their joint names so as to secure their respective interests or that it is to remain in the sole name of the assignor (in which case the assignment will not be registered and the assignee will not benefit from the Convention's priority rules as against a subsequent assignee) with an undertaking by the assignor to enforce its rights on behalf of the assignee at the assignee's request or to subordinate its own rights as regards the part retained to the rights of the assignee as regards the part assigned. A partial assignment may adversely affect the debtor, as by requiring him to incur expense in paying two parties instead of one. In that case the parties to the partial assignment must obtain the debtor's consent if this has not already been given. Failure to do so does not, however, affect the validity of the assignment as between assignor and assignee.

41. Under Article 32 the formal requirements that have to be satisfied if an assignment of associated rights is to transfer the related international interest track those applicable to the creation of an international interest. The assignment must be in writing, must enable the associated rights to be identified under the contract from which they arise, and in the case of a security assignment must enable the obligations secured by the assignment to be determined in accordance with the relevant Protocol but without the need to state a sum or maximum sum secured. Where this has been done the debtor has a duty to make payment or give other performance to the assignee provided that the debtor has been given notice in writing of the assignment by or with the authority of the assignor and the notice identifies the associated rights (Article 33). [...]

42. Under Article 34, the default remedies available to an assignee under a security assignment follow, *mutatis mutandis*, the rules applicable to the international interest itself.

43. The priority of competing assignments is a little complex. The starting position is that where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply *mutatis mutandis*, so that a registered assignment has priority over an unregistered assignment and a later assignment. It is, of course, necessary that at least one of the assignments includes the related international interest, for otherwise neither assignee would have a right to register its assignment, since the function of registration is to record interests in equipment, not interests in associated claims in isolation, and as noted earlier an assignment of associated claims alone is outside the Convention (Article 32(3)). It is also necessary that the assigned associated rights retain a linkage with an international interest (see Comment 2 to Article 35). Similarly it is necessary that at least one of the assignments should be registered, for Article 29 does not regulate priorities between competing unregistered assignments, this being left to the applicable law. Article 36 qualifies in two respects the priority that would otherwise be conferred by Article 35. First, it is confined to cases where the contract under which the associated rights arise states that they are secured by or associated with the object. This is to deal with the situation where, for example, an agreement secures not only the obligations for which it provides but obligations arising under a later agreement and the later agreement does not refer to the security, so that a subsequent assignee of the associated rights under the later agreement has no way of knowing

that the obligations under the later agreement are secured on or in any way connected with the equipment and ought not, therefore, to be subject to the Convention priority rules. Secondly, the priority of the first assignment is given only to the extent that the associated rights are related to an object as specified in Article 36(2), which broadly covers obligations for the repayment of purchase-money loans and the payment of the price and rentals of objects, together with all ancillary obligations under the financing transaction documents. Priority in cases falling outside these limits – for example, a priority involving an assignee of associated rights as security for a non-purchase money loan – is left to the applicable law, including (where applicable) the United Nations Convention on the Assignment of Receivables in International Trade (“the UN Convention”) opened for signature on 12 December 2001.

44. On the assignor’s insolvency Article 30 applies as if the references to the assignor were references to the debtor (Article 37). Rights of legal or contractual subrogation are in general unaffected (Article 38). Article 38(2) permits parties to vary priorities between themselves along the lines of Article 29(5).

Non-consensual rights or interests

45. A Contracting State may specify the types of non-consensual right or interest which, under that State’s law, have priority over an interest equivalent to that of the holder of the international interest (“an equivalent interest”) and are to have priority even over a registered international interest (Article 39). Basically, a State may retain or restrict its nationally preferred rights and interests arising by law, but may not use the Convention to expand these preferred rights. Typical examples are preferential claims for taxes and for wages due from an insolvent employer and statutory or other liens ranking in priority. Rights or interests covered by a declaration under Article 39 have priority over a registered international interest even though not themselves registrable. It will not be necessary for a Contracting State to list all such types of non-consensual interest individually. It could simply make a declaration that all claims having priority over an equivalent interest under its existing law or acquiring such priority in the future are to enjoy priority over a registered international interest. But it is for the Contracting State to decide which of such claims should have priority over a registered international interest. The categories covered by its declaration could be fewer than the categories which under its national law have priority over equivalent interests. Rights of arrest or detention under national law, so far as not covered by a declaration under Article 39(1)(a) (e.g. because they are contractual and therefore outside Article 39(1)(a)), may be preserved by a declaration to the extent provided by Article 39(1)(b), which applies both to contractual rights of arrest or detention and to rights given by law [...].

46. A Contracting State may also make a declaration that specified categories of non-consensual right or interest shall be registrable as if they were international interests (Article 40). One might envisage, for example, the registration of a judgment debt or an attachment by an execution creditor or a repairer’s lien. Registration of such a non-consensual interest would give it the same priority as an international interest.

Extension to outright sales

47. The Convention does not apply to outright sales, for these do not involve a debtor or the assertion of any security or proprietary interest vis-à-vis the debtor. However, Article 41 provides for the possibility of an extension of the Convention to outright sales as provided for in the relevant Protocol, thereby enabling outright buyers to take advantage of the registration machinery to register their acquisitions. [⁹]

⁹ [...]

Jurisdiction

48. Articles 42 to 45 contain rules as to jurisdiction which may be summarised as follows:

(1) Except in relation to the grant of interim relief under Article 13 or the making of orders against the Registrar, exclusive jurisdiction for any claim brought under the Convention is given to the courts of a Contracting State chosen by the parties except where they agree that the jurisdiction is to be non-exclusive. The chosen forum need not have a connection with the parties or the transaction. The agreement must be in writing or otherwise in accordance with the formal requirements (as opposed to substantive requirements) of the *lex fori* (Article 42).

(2) The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have concurrent jurisdiction to make orders requested by the creditor for relief pending final determination, other than orders for the lease or management of the object and the income from it (Article 43(1)). It is not competent to the parties to exclude the concurrent jurisdiction of courts of the *situs* of the object.

(3) The courts of the territory on which the debtor is situated have concurrent jurisdiction, pending final determination of the claim, (a) to make orders for the lease or management of the object and income from it under Article 13(1)(d) and (b) to grant any other interim relief available under the *lex fori* by virtue of Article 13(4), in either case as requested by the creditor, though the jurisdiction is limited to orders which by their terms are enforceable only in the territory concerned. Again, the parties cannot exclude the concurrent jurisdiction courts of the place where the debtor is situated.

(4) The courts of the place in which the Registrar has its centre of administration have exclusive jurisdiction to award damages against the Registrar (e.g. for loss caused through error or failure of the registration system) and to make orders against the Registrar (Article 44(1)). As regards the latter, two specific cases are mentioned: orders requiring a registration to be discharged where the person under a duty to procure the discharge cannot be found or has ceased to exist (Article 44(2)) and orders directing amendment or discharge of a registration where a person fails to comply with an order of a court of a State having jurisdiction under the Convention, for example, an order to procure the amendment or removal of a registration improperly made, or, in the case of a national interest, a court of competent jurisdiction (Article 44(3)). But Article 44(1) should be interpreted broadly as conferring (by analogy with Article 44(3)) a residual jurisdiction on the court where the Registrar has its centre of administration to make an order for amendment or discharge of a registration where a party has failed to comply with an order of a court having jurisdiction under the Convention, or with an order of any other court of competent jurisdiction, requiring that party to procure the amendment or discharge of the registration. Article 44(1) also confers exclusive jurisdiction on the Registrar's court to make orders to enforce the Registrar's duties and obligations under the Convention, for example, its duty (a) to issue a search certificate to a person making a search in due form and paying the requisite fee; and (b) to comply with directions properly given to it by the Supervisory Authority under Article 17 of the Convention. Jurisdiction in relation to claims against the Registrar outside the Convention, for example, claims arising from contracts entered into by the Registrar with the Supervisory Authority or with suppliers of goods and services, will be determined by the domestic law of the State in which the Registrar has its centre of administration.

(5) Chapter XII confers no jurisdiction in relation to insolvency proceedings, which are a matter for the relevant insolvency jurisdiction.

In applying rules (2) and (3) above it is necessary to have regard to Article 52(5) where the relevant Contracting State has made a declaration which has the effect of excluding from the Convention one or more territorial units in which different systems of law are applicable with reference to a Contracting State. In such a case the debtor is not considered to be situated, or the object to be located, in a Contracting State, if situated or located in a territorial unit excluded by such a declaration.

Relationship with other Conventions

49. Article 45 *bis*¹⁰ provides that the Convention is to prevail over the UN Convention. This simply makes explicit what was implicit in Article 38(1) of the UN Convention. The main potential cause of conflict lies in Article 36 of the present Convention, relating to the priority of assignments of associated rights. However, as noted above, Article 36 is limited in scope and in relation to associated rights the two Conventions adopt broadly similar concepts. The relationship between the Convention and the 1988 UNIDROIT Convention on International Financial Leasing (“the Leasing Convention”) is left to the Protocol. [¹¹]

Final provisions

50. Chapter XIV of the Convention sets out final provisions. Some of these are standard, others reflect special elements and objectives of the Convention, including the two-instrument structure and the prospect of future Protocols.

(a) Regional Economic Integration Organisations

The Convention is open for signature, acceptance, approval or accession, not only by sovereign States but also by a Regional Economic Integration Organisation (“REIO”) which is constituted by sovereign States and has competence over certain matters governed by the Convention. A particular example is the European Community, which was involved in negotiations over the text at the Diplomatic Conference in relation to the provisions on which the Community claims exclusive external competence. Under Article 48 of the Convention any Regional International Economic Organisation will have to make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation.

(b) Entry into force; controlling effect of Protocol

The Convention itself requires only three ratifications and enters into force three months after deposit of the third instrument of ratification but, as regards a category of object to which a Protocol applies, only as from the time of entry into force of that Protocol, subject to the terms of that Protocol and as between States Parties to the Convention and that Protocol (Article 49). It follows that the Convention does not apply to a category of objects until the Protocol is in effect, and the Protocol controls where it modifies the Convention in respect of that category. So in the case of aircraft objects the Convention first applies when the Protocol is in force, and the general provisions of the Convention are modified in various respects by the Aircraft Equipment Protocol to meet the particular needs of the aviation industry. The Aircraft Equipment Protocol requires eight ratifications (Article XXVIII), so that in relation to aircraft objects the Convention itself does not enter into force until the lapse of three months from the deposit of the eighth instrument of ratification. There are, however, provisions that are not object-related. They include Article 47

¹⁰ Inserted subsequent to the Diplomatic Conference pursuant to an Annex approved by the Conference. This does not form part of the published documents, its effect being exhausted after the insertion was made.

¹¹ [...]

(signature, ratification, etc.), Article 48 (Regional Economic Integration Organisations), Article 51 (arrangements for extension to future Protocols), Article 52 (territorial units), Article 59 (denunciations), and Article 62 (Depositary and its functions). These final clauses came into force on 16 November 2001 pursuant to Article 24(4) of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"). Accordingly Article 49 merely states the need for ratification of the Convention itself, a point emphasised by Article XXVI(5) of the Aircraft Equipment Protocol, which provides that a State may not become a party to the Protocol without becoming a party to the Convention.

(c) *Internal transactions*

Though in principle the Convention applies even where all the elements of a transaction are located in one jurisdiction, Article 50 permits a Contracting State, when adopting the Protocol, to make a declaration excluding the application of the Convention to a transaction which is internal in relation to that State, that is, where the centre of the main interests of all parties to the transaction is situated, and the relevant object located, in that State at the time of conclusion of the transaction and the national interest created by the transaction has been registered in a national registry in the declaring State (Article 1(n), (r)). However, the effect of this exclusion is limited. In general terms, Article 50 disapplies most of the default provisions in Chapter III, but not the basic system for perfecting and prioritising interests. The default provisions in Articles 8(4) and 9(1) restricting sale of an object or vesting of ownership of it in the creditor apply to a national interest. The national interest may be protected by notice in the International Registry, and is then given the same priority as a registered international interest. The priority of an assignment of a national interest notice of which has been entered in the International Registry is controlled by the provisions governing the priority of an assignment of a registered international interest. Finally, in the case of a Contracting State which has territorial units in which different systems of law are applicable and that State has made a declaration under Article 52 which has the effect of excluding the application of the Convention to one or more of those territorial units, a transaction will not be an internal transaction unless the centre of the main interests of all the parties is situated and the object is located in the same territorial unit and the territorial unit is one to which the Convention applies.

(d) *Procedure for additional Protocols*

Protocols on railway rolling stock and space assets are specifically provided for in the Convention (Article 2(2),(3)). Article 51 provides a procedure for the preparation of other Protocols and their adoption at Diplomatic Conferences.

(e) *Transitional provisions*

Article 60 contains important transitional provisions. The general principle is that unless otherwise declared by a Contracting State a pre-existing right or interest, that is, a right or interest created before the effective date of the Convention (Article 1(v)), is not affected by the Convention and retains its pre-Convention priority (Article 60(1)). By "effective date" is meant the time when the Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later (Article 60(2)(a)). A Contracting State may make a declaration specifying a date not less than three years after the declaration when the Convention and Protocol will become applicable to a pre-existing right or interest for the purpose of determining priority, including the protection of any existing priority, where the right or interest arises under an agreement made at a time when the debtor was situated in a Contracting State (Article 60(3)). So the holder of a pre-existing interest affected by a declaration will have at least three years in which to protect its pre-Convention priority by registration in the International Registry. While the holder's re-perfection of the interest by registration in the International Registry is necessary to preserve its priority against subsequent interests, the declaration should

provide that as against prior interests the holder retains its pre-Convention priority. A declaration under Article 60 is limited to priority issues, so that in relation to a pre-existing interest a Contracting State may not apply the provisions of the Convention relating to relations between the debtor and the creditor or the provisions concerning insolvency. Of course, there is nothing to prevent a debtor and creditor from voluntarily replacing their agreement with a new agreement made after the effective date of the Convention, to which the Convention will then apply, though the creditor will then lose its pre-Convention priority as against earlier interests.

System of declarations ¹²

51. Certain provisions of the Convention are dependent on policy decisions by States. For these provisions the Convention provides a system of declarations allowing Contracting States to make choices. Declarations are equipment-specific in that they cannot be made independently of a Protocol. They are of four kinds: opt-in declarations, opt-out declarations, mandatory declarations and other declarations.

(1) Opt-in declarations

These are declarations which a Contracting State is required to make if a particular provision of the Convention, as applied by a Protocol, is to have effect within that State. Provisions triggered only if a declaration is made are:

Article 39	Non-consensual rights and interests having priority without registration
Article 40	Registrable non-consensual rights or interests
Article 60	Application of Convention priority rules to pre-existing rights or interests.

A declaration under Article 39 may be general or specific and may be expressed to cover future categories as well as existing categories.

(2) Opt-out declarations

These are declarations which a Contracting State is required to make in order to exclude the application of a particular Convention provision, as applied by a Protocol, in that State. Opt-out declarations are required to exclude:

Article 8(1)(b)	Power to lease a charged object while in the declaring State's territory (Article 54(1))
Articles 8(1), 9(1), 10	Extra-judicial remedies (Article 54(2))
Article 13	Interim relief (Article 55)
Article 43	Jurisdiction under Article 13 (Article 55)
	Application of the Convention to internal transactions (Article 50(1)).

(3) Mandatory declarations

These are declarations which a Regional Economic Integration Organisation or a Contracting State is required to make in every case. Such declarations are required under:

¹² A declarations matrix is contained in Annex X showing all declarations required or permitted under the Convention and Aircraft Equipment Protocol and identifying which declarations are opt-in and which opt-out. The Depository, UNIDROIT, will be publishing a guide to the declarations system, *The system of declarations under the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment: an explanatory memorandum for the assistance of States and Regional Economic Integration Organisations in the completing of declarations* (UNIDROIT 2002 DC9/DEP Doc. 1).

Article 48(2) Specification by a Regional Economic Integration Organisation of matters governed by the Convention in respect of which competence has been transferred to the Organisation by its Members

Article 54(2) Whether remedies may be exercised only with leave of the court.

(4) *Other declarations*

There are two declarations within this category, namely :

Application of the Convention to one or more territorial units (Article 52(1))

Article 53 The relevant "court" for the purposes of Article 1 and Chapter XII.

The effect of the declaration system is that a Contracting State *must* make a declaration if:

- (a) it wishes to *adopt* an opt-in provision, i.e. under Article 39, 40 or 60;
- (b) it wishes to *exclude* an opt-in or modifying provision, i.e. under Article 8(1), 9(1), 10, 13 or 43;
- (c) the declaration is mandatory, i.e. under Articles 48(2) and 54(2); or
- (d) it wishes to define the relevant court under Article 53.

In all other cases the Contracting State need take no action. All declarations other than those made under Article 60 may be modified or replaced by subsequent declarations under Article 57 or withdrawn under Article 58.

[...]

These declarations are to be distinguished from reservations, which the Convention does not permit. A reservation is a unilateral declaration by a State purporting to exclude or modify the legal effect of certain provisions of a Treaty in their application to the reserving State (Article 2(1)(d) of the Vienna Convention). Unless otherwise stated in the Treaty, a reservation does not bind another State unless accepted by that State. By contrast the contents of a declaration are expressly provided for in the Treaty and a declaration does not require acceptance to bring it into force. The technique of declarations has been regularly employed in international conventions for many years.

Articles 39, 40 and 60(1), all of which are optional, provide that declarations may be made under them at any time. Articles 50, 52, 53, 54 and 55 provide for declarations under them to be made at the time of ratification, etc. However, it is open to a Contracting State that does not do this to make a declaration subsequently under Article 57, so that the effect is the same as in the phrase "at any time". By contrast, declarations under Articles 48(2) and 54(2) are mandatory and must be made at the time of ratification, etc., though they may be supplemented or replaced by a subsequent declaration under Article 57, the Depository being notified of any changes in the distribution of competence as provided by Article 48(2).

AN OVERVIEW OF THE DRAFT RAIL PROTOCOL:

A SIGNIFICANT STEP FORWARD FOR THE RAIL INDUSTRY

(prepared by Mr Howard Rosen *, Chairman of the Rail Working Group)

1. INTRODUCTION

After eight years of preparation, the Cape Town Convention on International Interests in Mobile Equipment was signed at a Diplomatic Conference on 16th November 2001. The Convention provides a mechanism for recognising and recording international security interests created in high-value moveable equipment, usually overriding local title interests or claims. At a time when business and its financing is increasingly international, this Convention is opening the door to more sophisticated cross-border and domestic financing of moveable assets in situations where otherwise banks, lessors and other financiers funding assets not in their possession would risk losing their security position, especially if it moves across a jurisdictional border. By providing more security to the private sector, the Convention is reducing the cost of borrowing and in certain cases, facilitate such borrowing where otherwise it would not be possible in the absence of a strong Government guarantee.

The Convention provides a basic framework that is applied to various industry sectors through the adoption of a protocol designed specifically for such sector. An Aviation Protocol to the Convention was signed at Cape Town in 2001 applying the Convention to aircraft equipment and came into force on 1 March 2006. The Final Act signed at the Diplomatic Conference contained a specific resolution mandating the speedy development and adoption of a parallel Railway Rolling Stock Protocol for the rail industry.

A Rail Working Group had been established in 1996 at the invitation of UNIDROIT, one of the Convention's sponsoring organisations. The Group has been responsible for drafting and then commenting on a working draft of the Rail Protocol, involving various parts of the rail industry wherever possible. A draft Rail Protocol has already been considered in detail by Government Experts at three separate meetings and UNIDROIT, OTIF and the Rail Working Group have organised a number of seminars about the Protocol.

2. CREATING INTERNATIONAL SECURITY INTERESTS AND A GLOBAL REGISTRY

The Convention recognises as International Security Interests the property rights of:

- a secured lender
- a vendor selling with reservation of title
- a lessor under a lease

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in relation to high-value moveable equipment covered by a Protocol to the Convention. The interest will be assignable and it will be possible also to register a prospective interest to protect the secured party in advance of completion of a financing. The possibility of extending the Convention to recognition of transfers of title is being actively considered in the run up to the Rail Protocol Diplomatic Conference. This option has already been taken in the Aircraft Protocol.

The Convention provides for a world-wide asset registry for each type of asset to which it applies, accessible via the Internet 24 hours a day, 7 days a week, through which any funder can check if any other party claims a right in the equipment to be financed. The funder will be able to register its interest which will then, in almost all cases, take precedence over any other unregistered security interest and over any subsequently registered interest. It will also take priority over any third party rights asserted in a bankruptcy of the possessor. The Registry will be operated by an independent organisation and will be overseen by a Supervisor, an international (possibly inter-governmental) body, appointed under the individual Protocols.

3. IMPROVED ACCESS TO PRIVATE CAPITAL MATTERS FOR THE RAIL INDUSTRY

The rail sector is deceptively large. It covers not only passenger and freight wagons, locomotives and specialist rail equipment, but also light rail and city underground rail and tram transportation systems. Although it is estimated that some US\$ 25 billion is already spent annually on railway rolling stock worldwide, the rail industry urgently needs more capital investment. In Europe, for example, the *average* life of freight rolling stock in circulation is close to its recommended useful life. In general the rail sector is unable to offer consistently modern rolling stock to customers despite a commercial need to do so and in many countries there is a critical lack of capacity. At the same time, manufacturing plants are being closed for lack of orders, losing valuable expertise, as more traffic shifts to the roads. Another competitor, operators in the aircraft sector, have traditionally had a much more flexible financing model, enhanced by the coming into force of the above mentioned Aviation Protocol. In many cases, operators are state-owned (national or local government), and as a result, resources are often limited and privatisation is not always a politically acceptable option.

The answer is for operators to access the private capital markets, with lenders providing funds without recourse to government guarantees or support. For both state-owned and private railways, this is often only practicable if lenders have security in the assets being financed, namely an unequivocal recognition of their property rights and a clear mechanism for repossession on default. In the aircraft sector, a competitor, leasing and other financing techniques have led to solid growth of investment in the last 25 years due to the lender/lessor being secured through registration of title or mortgage interests. By contrast, capital investment in the rail sector has been stagnant and worldwide there is no national public registry where lenders or lessors can register their interests in assets financed or treaty system recognising certain property rights. The Convention, when implemented for the rail sector by the rail Protocol will provide a new, highly effective mechanism for both private and public sector rail operators to utilise the private capital markets cost-effectively and on similar terms to the aircraft sector, facilitating, in turn, a better service for the customer and a vital means of recovering market share from the road and air sectors in freight and passenger transportation.

4. CREATING NEW SECURITY SYSTEM FOR THE RAILWAYS

The rail sector was chosen as one of the first sectors to be covered by the Convention due to the additional risk that international financiers have in relation to assets which by their nature can cross borders. In addition, even in relation to rolling stock which does not cross borders, because most States have no domestic system to register liens on rolling stock, the Convention will create additional security for lenders financing rolling stock, even if just financed as a part of a domestic transaction. This should make domestic as well as international financing of rolling stock considerably simpler. Moreover once the Cape Town Convention applies to various categories of assets, it opens the way for sophisticated high volume and lower cost multi-asset securitisation and other financings with equivalent security for each asset type. This should also work directly to the benefit of the rail industry.

5. BENEFITS FOR RAILWAY OPERATORS

Even for state-owned railways, the Convention will bring considerable benefits by increasing the sources of capital available for investment in new rolling stock without the need for direct state support (financed by borrowing or taxation), indirect support (e.g. Eurofima), or guarantees. This will occur due to the reduction of risk that a funder will be required to take, and will also open up possibilities for non-recourse securitisation and other financings. It will give both publicly and privately owned railways more independence as to how they develop their equipment requirements, and facilitate future capital investment – as well as secure funding for state-owned operators as governments gradually withdraw from the sector, either through partial or full privatisation, or through by refusing to guarantee future debt incurred by the railways. Investment will be driven by requirements and economics and not limited by political considerations. For the private operator, access to the capital markets, directly or through banks and leasing companies, will be essential to their entry into the rail sector, and this in turn will be a key element in the renaissance of the rail industry in the new century. In each case, the more private sector capital there is available and the lower the risk a funder is required to take, the cheaper that capital will be.

The Convention will bring more flexibility in the use of financed rolling stock and encourage the development of both finance and operating leases (due to the new protection afforded to the lessor) and a secondary market, significantly reducing the capital commitments required by the operator (or permitting it to offer more new and efficient rolling stock to customers without increasing its equity). The availability of operating leasing for aircraft has been a key factor in the development of the aircraft sector. Investors and lessors will be prepared to take more residual value risk due to the increased certainty that can be given to a lessor or investor in retaining its interest in the asset against local legal challenges.

Operators themselves constantly lease or sublease rolling stock to other operators as they cross borders. In the former case, registration of the lessor interest will allow the asset to cross borders without the lessor operator worrying that its title or lease interest could be overridden by local operators or their creditors. In the latter case, if the owner's interest under the lease is already registered, that would already put any foreign innocent third party on notice of the prior rights of the lessor.

Lastly, debt financing for rolling stock at present means voluminous documentation – especially in relation to security issues as well as extensive legal opinions and continuing legal uncertainty for all parties. By significantly reducing the uncertainty, and by developing a universal interest, to cover

assets used in various jurisdictions, the Convention should also result in much simpler security documentation, more modest legal opinions, and considerably reduced transaction costs.

6. ADVANTAGES FOR MANUFACTURERS OF ROLLING STOCK

Providing finance to a customer is an excellent means of maintaining a business relationship. At times this can then be a condition for being considered as a supplier. It offers a “one-stop shop” solution to customers. On the other hand, a manufacturer cannot always carry financed assets on its own books since this will have adverse balance sheet and cash flow implications. The solution is finance from third parties with recourse only to the assets financed. By enhancing the ability of a funder to secure its loans/leases, the Convention will encourage funders into the market to support manufacturers. Even if the manufacturer does not provide finance directly but in partnership with a bank or other funder, the improved security position will expand the sources of competitive funding available to the customer and encourage more investment. The enhanced security system will also allow investors in manufacturers to leverage their investment as well as making it easier for manufacturers to finance work in progress.

However, manufacturers will, in certain circumstances, wish to lease rolling stock to customers on a short-or long-term basis and carry the risk on its own balance sheet. It may be so as to provide interim solutions to customers but leasing can also include the provision of maintenance services thereby assisting in the development of another part of the typical manufacturer’s business. The Convention will give manufacturers direct protection of their interests in leased assets, thereby allowing them to give more comfort to banks providing their working capital credit lines and to demand more flexibility in using owned assets for such purposes (where they are possibly pledged as security for such credit line).

Many of the advantages set out in section 5 above will be applicable, either directly or indirectly, also to manufacturers. Since the Convention should also release even state-owned railways from government spending constraints, it should considerably increase the resources available to buy new rolling stock. In this context, it is interesting to note the example of the UK where years of minimal rolling stock investment has given way to unprecedented levels of new post-privatisation equipment orders, with funding almost exclusively coming from the private markets.

7. SUPPORT FOR BANKS AND LESSORS

Many of the advantages set out above will be applicable, either directly or indirectly, to banks and lessors. Any bank involved in financing rolling stock which can cross national boundaries will be acutely aware of the costs and risks involved. Even if a bank can rely today on a state guarantee of a long-term commitment from an operator, this could easily change in relation to current commitments and create considerable credit issues if such support is not as readily available, as seems likely, in the future. Lessors/pledgees will have significantly improved legal positions by placing third parties on constructive notice of their interest due to operation of the Convention.

As with the aircraft sector, financing of rolling stock is ideal for securitisation and other international financial instruments as well as, in certain cases, cross-border equity investment programmes. In each case, the Convention should increase the comfort and number of prospective investors, thereby lowering direct and indirect costs.

8. THE IMPORTANCE TO GOVERNMENTS

“Between 1970 and 1998 the share of the goods market carried by rail in Europe fell from 21.1% to 8.4% (down from 283 billion tonnes per kilometre to 241 billion), even though the overall volume of goods transported rose spectacularly.” - **European transport policy for 2010: time to decide**, European Commission White Paper, 2001

Generally the rail sector has lost out in recent years to other modes of transport. By contrast, freight movement by road has boomed.

In the coming years, for environmental, social and capacity reasons, the only practical way to expand the transportation sector in many countries, will be through the development of railways. This needs to be financed at a time when the competing needs for government funding support are ever more intense. The Convention will encourage more private capital investment into the rail sector, creating the means by which the development can be financed without state support. It will open up valuable areas of private sector finance and in turn import market disciplines on operations without the need to privatise. It will also encourage new entrants into the market and support an “open rails” strategy. Further, more investment will mean more skilled jobs in the manufacturing side of the industry and ultimately a better product offered to the consumer. It will also increase the value of the state-owned operators. Their owned rolling stock will be easier to use or lease to third parties. The procurement of other rolling stock through operating leases or other secured finance mechanisms “off balance sheet” will be easier, thereby increasing the operator’s return on capital. Lastly in Europe, the adoption of the Rail Protocol will be totally compatible and complementary to the new European Railway Agency and the objective of common safety standards and interoperability of rolling stock across Europe.

For many Governments there is also another consideration. The Rail Protocol will be a valuable new tool in relation to provision of aid to developing countries. Many of these countries have inherited a rail system from colonial times that is now badly run down, and the rolling stock is outdated and inefficient. And yet the rail system is essential infrastructure for economic development and is also a highly effective mechanism for delivering food aid. Precious aid however is often prioritised elsewhere. No private sector lender will finance the investment urgently required. By providing security to private sector lenders, the Rail Protocol will open up, for the first time, the possibility of finance from the capital markets for rolling stock even where the operator has a poor credit rating. This is because the financier can now lend against the asset with confidence. As a result:

- the local rail manufacturing and maintenance industry will be stimulated;
- international aid can be focused on paying lease rentals, resulting in lower immediate cash commitments, with the monies paid directly to the lessor;
- a market for operating leases for second user rolling stock (for example, coming from more prosperous countries) is opened up;
- it creates a mechanism whereby the private sector can monitor the efficient usage of certain capital investments taking a load off government and intergovernmental agencies;
- it encourages more prosperous countries, even within a developing area, to lend, lease or permit the use of its rolling stock in other less prosperous and developed parts of the region.

9. A VITAL BOOST TO THE FUTURE OF THE RAIL INDUSTRY

The Rail Protocol to the Cape Town Convention will encourage significant capital investment in the rail sector. It will also allow the rail industry to compete more effectively with other parts of the transportation sector for funding, such as the aircraft sector, as well as drive down private sector funding costs and facilitate the development of a true operating lease market. It will also bring major benefits to operators, manufacturers, funders and Governments.

Unlike the aircraft sector, there are few national registry systems in place to give funders (limited) protection. Further, the prevalence of direct or indirect state support for significant operators has discouraged funders from entering into the business (due to fine margins) and encouraged current lenders to ignore the security due to the quality of the credit. On the other hand, there is very limited private sector finance for investment in rolling stock where there is no government guarantee. However, public sector support of the rail industry will decline further in the future and new operators will be needed in the market. In the aircraft sector, that change has already occurred, with generally very positive results. With the introduction of broader and easier private sector funding, the aviation sector has seen unprecedented success, innovation and growth. We can expect a similar development in the next 10 years in the rail sector. We must anticipate and facilitate that change now.

New sources of funding should stimulate substantial additional investment in the rail sector through the involvement of the private capital markets. We have a unique opportunity to influence an exciting and highly practical change in private international law. This will fundamentally affect the way that the rail industry develops in the new millennium.

**DRAFT PROTOCOL ON MATTERS SPECIFIC TO
RAILWAY ROLLING STOCK**

TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

and

EXPLANATORY REPORT

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the Convention on International Interests in Mobile Equipment (hereinafter referred to as *the Convention*) as it relates to railway rolling stock, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance,

HAVE AGREED upon the following provisions relating to railway rolling stock:

Comment

The Preamble reflects the primary purpose of a Protocol, which is to adapt the Convention to the particular requirements of the industry sector affected while otherwise leaving it unchanged. The Protocol, like the Convention, is based on the policy of a high degree of party autonomy and the need to provide the creditor with adequate safeguards in the event of default. However, it also incorporates provisions enabling a Contracting State to balance its legal philosophy and public policy considerations against the economic advantages of particular provisions and to make a declaration excluding such provisions, wholly or in part.

CHAPTER I

GENERAL PROVISIONS

Article I

Defined Terms

- 1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.**

- 2. In this Protocol the following terms are employed with the meanings set out below:¹**
 - (a) “guarantee contract” means a contract entered into by a person as guarantor;**

¹ The Official Commentary to Article 7(b) of the Convention makes clear that the “power to dispose” includes the power to permit the use of any object. The Drafting Committee considers therefore that neither a definition nor a similar provision should be added in this Protocol to confirm this position.

(b) **“guarantor”** means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(c) **“insolvency-related event”** means:

(i) the commencement of the insolvency proceedings; or
(ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

(d) **“primary insolvency jurisdiction”** means the Contracting State in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;

(e) **“public service rolling stock”** means railway rolling stock habitually used for transporting the public on scheduled services, together with locomotives and ancillary railway rolling stock habitually used to provide such services;

(f) **“railway vehicle”** means a vehicle moveable on or directly above a fixed railway track or guideway, or fixed superstructures or racks installed or designed to be installed on such vehicles, including all traction systems, engines, brakes, axles, bogies, and pantographs, and in each case including accessories and other components, equipment and parts installed or incorporated therein or attached thereto;

(g) **“railway rolling stock”** means railway vehicles and all operating and technical data, manuals, notebooks and other records identifiable in relation to a specific railway vehicle.

Comment

Article I provides a series of definitions additional to those provided in Article 1 of the Convention. The following require to be noted:

1. “guarantee contract”, “guarantor” – these terms cover not only suretyship guarantees, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits.
2. “insolvency-related event”, “primary insolvency jurisdiction” – relevant to Articles IX and X.
3. “public service rolling stock” – relevant to Article XXV.
4. “railway vehicle” – defined in such a way as to encompass the main types of vehicles currently in service and to be contemplated for the taking of security under the Protocol.

5. “railway rolling stock” – extends the sphere of application beyond railway vehicles in such a way as to encompass a variety of items required for their operation and identifiable in relation to a specific vehicle.

Article II

Application of Convention as regards railway rolling stock

- 1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.**
- 2. The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock.**

Article III

Derogation

In their relations with each other, the parties may by agreement in writing, derogate from or vary any of the provisions of this Protocol except Article VII(2).

Comment

1. This Article embodies the general principle of party autonomy. It reiterates what is stated in Article 15 of the Convention. The parties are free to exclude or vary any of the provisions of the Protocol except Article VII(2). That provision excludes Article 8(3) of the Convention and states that any remedy given by the Convention in relation to railway rolling stock shall be exercised in a commercially reasonable manner for which in turn it provides a definition.
2. “Writing” is defined in Article 1 (nn) of the Convention.
3. The power of derogation is limited to the relations between the parties who cannot, of course, make an arrangement which affects the rights of third parties. For example, while the parties can vary the priority rules as between themselves (cf. Article 29(5) of the Convention), they cannot by their agreement affect the priority of other parties.

Article IV

Representative capacities

A person may, in relation to railway rolling stock, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention, in an agency, trust or representative capacity on behalf of a creditor or creditors.

Comment

1. This provision must be interpreted broadly. The intent is to permit a person to take any action under the Convention – entering into agreements, enforcing them or registering them with the International Registry – in a representative capacity, whether as agent, trustee or in some other representative capacity. A narrow reading of this Article would lead to illogical results, for example, the ability to enter into an agreement and register an international interest as agent, but not to enter into or register an assignment in the same capacity. The same problems would arise where the interest was to be subordinated, again in that capacity. Accordingly, acts by the representative other than those specified in Article IV should be considered covered by it by analogy. This conclusion is reinforced by the extended definition of registration in Article 16(3) of the Convention.
2. That broad interpretation is consistent with the principle objective of this provision, namely, to simplify matters in the context of multi-party financing.
3. The Article also facilitates the co-ordination of fractional ownership.

Article V

*Identification of railway rolling stock*²

1. For the purposes of Article 7 of the Convention, a description of an item of railway rolling stock is sufficient if: (a) it contains its manufacturer's name, its serial number and its model designation; or (b) it conforms to the method prescribed by the ensuing paragraphs.

2. For the purposes of Chapter V of the Convention, the Supervisory Authority shall, in regulations, prescribe a system for the allocation of identification numbers by the Registrar to enable the unique identification of items of railway rolling stock. The identification number shall either be affixed to the item of railway rolling stock or be associated in the International Registry with a national or regional identification number so affixed.

~~23. A Contracting State may by a declaration state the system of national or regional identification numbers it will use for the purpose of the preceding paragraph.~~ a Contracting State may by declaration state the system of national or regional identification numbers that shall be used [with respect to items of railway rolling stock subject to an international interest created by a debtor situated in that Contracting State at the time of the conclusion of the agreement creating or providing for the international interest]. Such a national or regional identification system shall ensure the unique identification of items of railway rolling stock and compliance with the basic informational requirements of the Convention and this Protocol for the operation of the International Registry.

² At the request of the Joint UNIDROIT/OTIF Committee of governmental experts, the Rail Registry Task Force met after the third session of the Joint Committee to work specifically on the "registry provisions" and a Sub-Committee of the Drafting Committee of the Joint Committee finally proposed the following amendments to this Article.

34. A declaration by a Contracting State according to the preceding paragraph shall be made at the time of ratification, acceptance, approval of, or accession to this Protocol and shall include detailed information on the operation of the national or regional identification system.

45. The Supervisory Authority shall review the national or regional identification system set out in a declaration by a Contracting State pursuant to paragraph **23** and may give advice on the measures to be taken to ensure that the system complies with the conditions set out in paragraph **23**.

56. Every registration in respect of a specific item of railway rolling stock shall be made against the identification number allocated by the Registrar pursuant to paragraph **42**.

67. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph **23** has been made, shall specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol and the time during which each number has applied to the item. The debtor shall, and the creditor may, provide the International Registry with any new national or regional identification number allocated during the currency of the registration of the relevant interest. Any identification number so specified or provided shall be registered in the International Registry by the Registrar. **Failure to comply with any of the above requirements shall not invalidate the registration.**

Comment

1. This article specifies an identification number (or equivalent) as the element necessary to satisfy the requirements of the Convention and the Protocol as to identifiability of an item of railway rolling stock. If that element is lacking no interest is validly constituted under the Convention. The Article reflects that there is, for the time being, no universally used system for the identification of items of railway rolling stock, comparable to the serial number used by aircraft manufacturers. The Article provides, therefore, for a system and a procedure for the allocation of identification numbers.

2. The Article contemplates two alternative means of identification, namely either an identification number that is affixed to the item of railway rolling stock (the "Protocol identification number") or one that is affixed to an item but national or regional in origin (the "autonomous identification number") and associated in the International Registry with the identification number. It is for the Supervisory Authority to prescribe more in detail in regulations the system for the allocation of a Protocol identification number.

3. *Paragraph 3* provides for Contracting States to designate by a declaration the system of national or regional identification numbers they will use as well as for the content of any such declaration and the time the declaration is to be made. It is for the Supervisory Authority to ensure that national or regional identification systems designated by a Contracting State comply with the requirements of unique identifiability under the Convention and the Protocol. The sentence added in this paragraph by the Drafting Committee on the basis of the Rail Registry Task Force's discussions includes a factor to connect the Contracting State making the declaration with the item

of railway rolling stock. But it inserted square brackets because it thought necessary to consider: (a) whether such declarations should be limited to interests created by a debtor; and (b) the application of this provision to circumstances where the debtor is situated in a different State.

4. *Paragraph 6* implicitly reiterates the principle that registration of an interest in the International Registry will be against an identified asset, not against the debtor (cf. Article 16 of the Convention), and goes on to specify that registrations are to be made against the asset's identification number allocated by the Registrar.

5. *Paragraph 7* reflects the fact that national and/or regional identifiers of an item of railway rolling stock may change during the lifetime of the item. It requires that all such national and/or regional identification numbers to which the item has been subject since the entry into force of the Protocol as well as the time during which each number has applied be specified with the registration in the International Registry. The purpose of the provision is to provide any person contemplating to extend credit against an interest in the item as well as any other person making a search with the means to ascertain the legal position of the asset at any given point in time since the entry into force of the Convention regimen.

6. Finally and in pursuance of the aforementioned objective, the Article states the debtor's duty, and the creditor's right, to provide the International Registry with any new national or regional identification number allocated during the currency of the registration of the relevant interest. It is the Registrar's duty to register any such up-dated information.

7. This paragraph imposes two duties and the Committee of governmental experts wondered whether it should also specify the consequence of the failure to comply with one or both of the duties. The last sentence has been added to clarify that failure to comply with the requirements of that article would not invalidate the registration.

Article VI ***Choice of law***

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVII.

2. The parties to an agreement or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

Comment

1. The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum State, which in some jurisdictions may impose certain restrictions, as by excluding selection of the law of a State which has no connection with the parties or the transaction or by requiring that the choice be *bona fide*. Seeking commercial predictability, the present Article, which applies only where a Contracting State has made a declaration to that effect under Article XXVII(1), allows the parties to choose a law without

restrictions of this kind. States that are not prepared to permit an unqualified selection by the parties will not opt into this provision.

2. The law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules. This is in line with the usual conflict of laws approach in international conventions in relation to commercial transactions and avoids problems of *renvoi*.

3. Article VI(3) deals, secondly, with cases where the parties select the law of a territorial unit of a multi-unit State. Although, in contrast to Article 52(1) of the Convention, Article VI(3) is not expressed to be limited to territorial units which have their own system of law, this is inherent in the Article, for otherwise there would be no distinct legal system to consider and the party choice would have to be interpreted as a reference to the law of the State itself. Article VI(3) is not confined to federal States but applies wherever a State has territorial units with different systems of law.

4. In the relations between themselves the parties may apply the selected law to only part of their contract and, in consequence, may apply different laws to different parts or issues (*dépeçage*).

5. Party choice is limited to *contractual* rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor's insolvency, and are outside the scope of this Article.

6. There is no requirement that the agreement on a choice of law be in writing, though in practice it almost invariably will be.

7. The ability to select the governing law on contractual matters applies not only to agreements constituting international interests but also to guarantees and subordinations, as well as to other contracts incorporated by reference into any of the foregoing so as to become terms of them.

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article VII

Modification of default remedies provisions

1. Any court order under Articles 8(1)(a) and (2), 10 and 13(1)(b) of the Convention authorising the creditor to take possession, custody or control of the object may specify the reasonable measures to be taken by the debtor to make it possible for the creditor to exercise its rights in accordance with the order.

2. Article 8(3) of the Convention shall not apply to railway rolling stock. Any remedy given by the Convention in relation to railway rolling stock shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

3. A chargee giving 14 or more calendar days' prior written notice of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the "reasonable prior notice" specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

Comment

1. *Paragraph 1* reflects the railway-specific fact that the creditor, even if entitled under the contract and the Convention to take possession, custody or control of the object and authorised by a court order to do so, may depend on the debtor's co-operation in this respect. In any such circumstances the court order may, in addition to granting the creditor the relief sought, specify in what way the debtor is to co-operate. For example, the court may issue an order requiring the debtor to give the creditor's locomotive access to the debtor's rail network or to provide a locomotive of its own. Moreover, the rail infrastructure may belong to a third party and that third party's rights might be affected by the creditor's action to bring the assets under its control. In such a case the court order may specify the reasonable measures to be taken by the creditor.

2. The Committee of governmental experts wondered whether, for reasons of connection as to the content, the reference to Article 13(1)(b) of the Convention and to custody should be transferred from this provision to a new Article VIII(1).

3. Article 8(3) of the Convention distinguishes according to the creditor's legal position and is confined to the remedies of a chargee under Article 8(1). *Paragraph 2* disapplies that provision for purposes of this Protocol and states that any remedy given by the Convention is to be exercised in a commercially reasonable manner. Consequently commercial reasonableness may flow from the conformity not only with a security agreement but also from the conformity with a title reservation agreement or a leasing agreement.

4. *Paragraph 4* crystallises the meaning of "reasonable prior notice" in Article 8(4) of the Convention. There is a safe-haven of 14 calendar days. Parties may select and rely on that time-period. Alternatively, it is open to the parties to agree to a longer period.

Article VIII

Modification of provisions regarding relief pending final determination

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII and to the extent stated in such declaration.

2. Relief under Article 13(1) of the Convention shall not be dependent upon the agreement of the debtor.

3. For the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

4. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”, and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.

5. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.

6. Judicial relief under Article 13(1) of the Convention may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another State unless its application would contravene an international instrument or an instrument made by a Regional Economic Integration Organisation to which Article XXII(1) of this Protocol applies, being an instrument which in either case is binding on the Contracting State.

Comment

1. This Article strengthens the position of the creditor in certain respects as regards relief sought by a creditor under Article 13 of the Convention (relief pending final determination). However, it applies in a Contracting State only if and to the extent that the Contracting State has made an affirmative declaration to that effect.

2. *Paragraph 2* derogates from Article 13(1) of the Convention that no agreement of the debtor is a precondition for the granting of speedy relief pending final determination.

3. A Contracting State which makes such a declaration is required by Article XXVII(2) to specify a binding time-period for the purpose of *paragraph 3* of the present Article within which the speedy relief sought is to be given. On the principle that a party cannot complain of matters caused by its own acts or omissions, a creditor will not have grounds for complaint if a court fails to give relief within the specified time because, for example, the creditor has not filed the correct documents or followed the proper procedure.

4. *Paragraph 4* adds sale and application of the proceeds of sale to the speedy relief that can be sought under Article 13(1) of the Convention, subject, however, to the requirement that the debtor and the creditor “specifically agree”, that is, agree expressly (though not necessarily in writing) to the court’s ordering a sale and application of the proceeds of sale on the creditor’s application. This agreement may be made at any time. As a corollary, *paragraph 5* of the Article adds provisions matching those of Article 9(5) of the Convention.

5. *Paragraph 6* clarifies that speedy relief pending final determination may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another State. This faculty is, obviously, subject to specific regulation of the matter in other international instruments or instruments made by a Regional Economic Integration Organisation and which is binding on the Contracting State.

Article IX
Remedies on insolvency

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII.

Alternative A

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 6, give possession of the railway rolling stock to the creditor no later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the railway rolling stock if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

4. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

5. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve the railway rolling stock and maintain it and its value.

6. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

7. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

8. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

9. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

10. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

11. The Convention as modified by Articles VII and XXV of this Protocol shall apply to the exercise of any remedies under this Article.

Alternative B

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVII whether it will:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the railway rolling stock, in accordance with the applicable law.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the railway rolling stock but fails to do so, the court may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The railway rolling stock shall not be sold pending a decision by a court regarding the claim and the international interest.

Alternative C

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall within the cure period:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law.

3. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period for such period ending not later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the “suspension period”). No such order shall be made unless the insolvency administrator or the debtor, as applicable, has undertaken to the court to pay all sums and perform all other obligations accruing to the creditor during the suspension period.

4. If an application is made to the court under the preceding paragraph, the railway rolling stock shall not be sold pending a decision by the court. If the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period or any suspension period, it cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement and related transaction documents. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraphs 3 and 4, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

9. Subject to paragraphs 3 and 4, no obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

10. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

11. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in the insolvency proceedings over registered interests.

12. The Convention as modified by Articles VII and XXV of this Protocol shall apply to the exercise of any remedies under this Article.

13. For the purposes of this Article, the “cure period” shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

Comment

1. For a description of the structure of the declarations provision, see paragraph 51 of the Overview of the Convention, in the “Official Commentary” by Professor Sir Roy Goode (reproduced in this document at page 16).

2. Declarations relating to Article IX are opt-in declarations, i.e. declarations which a Contracting State is required to make if a particular provision is to have effect within that State.

3. Work on the Convention and the equipment-specific Protocols identified this provision as the single most significant provision economically. If the sound legal rights and protections embodied in the instruments are not available in the insolvency context, they are not available when they are most needed.

4. This Article, which modifies Article 30(3) of the Convention, is designed to provide in relation to railway rolling stock a special insolvency regime to govern the creditor’s rights where the debtor becomes subject to insolvency proceedings or an insolvency-related event (as defined in Article I(2)(c)) has otherwise occurred. The underlying purpose is to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains from the debtor or the insolvency administrator, as the case may be, the curing of all past defaults and a commitment to perform the debtor’s future obligations.

5. There are three alternatives of this Article, Alternative A, the “hard”, or rule-based, version, Alternative B, the “soft”, or discretion-based, version and Alternative C, a different, debtor-focused rule-based version where the insolvency administrator’s or the debtor’s obligations, subject to certain conditions, may however be suspended by court order. A Contracting State considering making a declaration under Article IX has, consequently, a number of options. It may decide to make no declaration at all, in which case Article IX will not apply and national insolvency law, in its current form, will continue to be applicable. Secondly, a Contracting State may opt to apply Article IX to all types of insolvency proceeding or only to some, and it may apply one of the three Alternatives to some types of insolvency proceeding and another one to other types, or apply one of these alternatives to all or only some types of insolvency proceeding and make no declaration as to others. But to whatever type of insolvency proceeding Alternative A, Alternative B or Alternative C is applied, it must be applied in its entirety. This is because each of the alternatives embodies a set of integrated provisions which make it impracticable to select one or more without the others.

6. If the State having the primary insolvency jurisdiction has opted for one Alternative, at present it is not quite clear what legal consequences this will have for its rolling stock which is located in another Contracting State which did not opt for the same Alternative. The question of continuity and possible duties to co-operate should also be considered.

7. All three alternatives impose obligations on “the insolvency administrator or the debtor, as applicable.” The debtor itself will be the relevant party where there is no administrator, e.g. because the insolvency-related event is cessation of payments and insolvency proceedings cannot be opened or have not yet been opened or where the estate is being administered by a debtor in possession.

8. *Alternative A* requires the insolvency administrator either (a) to give possession of the railway rolling stock within the waiting period specified in the declaration of the relevant Contracting State or (b) within the waiting period to cure all defaults and agree to perform all future obligations under the agreement. Meanwhile the insolvency administrator must preserve the railway rolling stock and its value and, subject to this, may allow its use. *Alternative A* further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor’s consent. Accordingly under this *Alternative* it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over a railway rolling stock, or vary the terms of the security agreement, without the consent of the creditor. The underlying rationale of *Alternative A* is to give railway rolling stock financiers and lessors the assurance of a clear and unqualified rule.

9. *Alternative B* requires the insolvency administrator or the debtor, as the case may be, upon the request of the creditor, to notify the creditor within the time specified in a declaration by the Contracting State whether it will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the railway rolling stock, in the latter case subject to any additional step or the provision of any additional guarantee that the court may require as permitted by the applicable law. “Related transaction documents” is not defined but includes promissory notes given as payment under the agreement or as security for payment, or documents which embody collateral contracts and undertakings forming part of the overall transaction of the parties.

10. *Alternative C* requires the insolvency administrator or the debtor, as the case may be, within the time (cure period) specified in a declaration by the Contracting State to either (a) cure all defaults as defined in sub-paragraph (2)(a) or (b) give the creditor the opportunity to take possession of the railway rolling stock. The insolvency administrator or the debtor, as the case may be, may however seek a court order suspending its obligation under sub-paragraph (2)(b). The provision further establishes the condition which must be met for the court to grant any such order.

11. Paragraph 4 prevents the sale of railway rolling stock pending a decision by the court with respect to the petition under paragraph 3.

12. Paragraphs 5 to 12 make detailed provisions for the respective rights and obligations of the insolvency administrator, the debtor and the creditor. Paragraph 11 addresses the issue of priority including the position of non-consensual rights or interests covered by a declaration pursuant to Article 39(1) of the Convention.

13. Paragraph 12 highlights the special status enjoyed by certain categories of railway rolling stock under Article XXV of the Protocol. The provision moreover cross-refers to the railway-specific modifications of default remedies as set forth in Article VII of the Protocol.

14. The Drafting Committee decided not to move this definition (the “cure period”) to Article I because the definition is only used in this Article.

Article X
Insolvency assistance

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII.
2. The courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX, so far as applicable.

Comment

Article X is an opt-in provision requiring a declaration under Article XXVII(1). It seems clear that the only relevant declaration in any particular case is a declaration by the Contracting State in which the railway rolling stock is situated. Where such a declaration is made foreign courts and foreign insolvency administrators applying Article IX are entitled to call for maximum co-operation on the part of the courts of the declaring State.

Article XI
Modification of assignment provisions

Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

“and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person”.

Comment

The effect of this Article is that, as regards the position of the debtor, he may rely on notice in writing of an assignment. Once an assignee has been identified any subsequent notification of an assignment in favour of another person does not bind the debtor in the sense of Article 33(1) of the Convention.

Article XII
Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:
 - (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and

(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.

2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.

Comment

1. Article XII establishes a quiet possession regime which is based on transparency through use of the International Registry. It applies only where a debtor is not in default within the meaning of Article 11 of the Convention. That Article permits the parties to agree on what constitutes a default. Failing such agreement, the default must be substantial. Assuming no such default, a debtor is entitled to quiet possession, on the terms of the agreement, as against (a) its creditor, (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention.

2. Conversely, a debtor is not entitled to quiet possession as against the holder of any interest to which the debtor takes subject. Yet reflecting the principle of party autonomy, all the foregoing rules may be varied by the agreement of the relevant parties. Where registrations are made reflecting these variations, that is, subordinations, third parties are bound thereby.

3. Quite independently of Article XII, the debtor may have remedies against the creditor for any interference with the debtor's possession which is a breach of the agreement under the applicable law.

CHAPTER III

RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XIII

*The Supervisory Authority and the Registrar*³

1. The Supervisory Authority shall be a ~~body council~~ of representatives, one representative to be appointed by each State Party.

2. The Intergovernmental Organisation for International Carriage by Rail shall be the Secretariat of the Supervisory Authority and shall assist the Supervisory Authority in the performance of its functions.

3. The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3) of the Convention and to the International Registry under Article 27(4) of the Convention.

³ See footnote 2.

34. A decision of the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be made if such State Party or the majority of the group of States Parties also votes in favour of the decision. A decision that could adversely affect the interests of a State Party or a group of States Parties shall have effect in such State Party or group of States Parties if such State Party or the majority of the group of States Parties also votes in favour of the decision.

45. The first Registrar shall be appointed for a period not exceeding [10] years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding [10] years.

Comment

1. In view of the fact that the specialised one of the two sponsoring Organisations, OTIF, is, for the time being, confined to the regions of Europe, northern Africa, and the Middle East, whereas the States participating in the negotiation of the current draft came also from the Americas, western and southern Africa as well as from Asia it was decided that a body consisting of representatives of Contracting Parties was to function as Supervisory Authority (*paragraph 1*).

2. To make sure that the Supervisory Authority is ready to operate when the Protocol comes into effect, appropriate resolutions should be adopted. The role of signatory States during the transition period must be envisaged. Negotiating States may wish to consider whether a Preparatory Commission should be set up and/or what other action is possible and appropriate.

3. The Supervisory Authority will be assisted by a Secretariat, whose functions will be performed by OTIF (*paragraph 2*). In October 2005, the General Assembly of OTIF agreed that the Organisation assumes the role of Secretariat of the Supervisory Authority on condition that (a) the Secretariat of the Supervisory Authority enjoys the usual international immunities from jurisdictional and administrative procedures and exemption from tax, and other privileges provided by agreement with the host State and (b) the fees of the International Registry cover the Secretariat's costs incurred in connection with the fulfilment of these tasks. The detailed conditions for the Secretariat to fulfil its activity will be set out in an agreement between the Administrative Committee of OTIF and the Supervisory Authority of the Rail Registry.

4. *Paragraph 3* has been added by the Drafting Committee after the discussions within the Rail Registry Task Force to provide for privileges and immunities of the Secretariat but it is still for consideration

(a) whether the Supervisory Authority should have the power to waive the exemptions and immunities of the Secretariat, and

(b) whether the Diplomatic Conference wishes to address the State of the seat of the Secretariat in this connection in any way deemed appropriate.

5. There was unanimous agreement within the Joint Committee of governmental experts that the full content of *paragraph 4* would be maintained. In that context, it was also noted that the drafting might be simplified and that technical non-substantive amendments might be required.

6. *Paragraph 5* sets the length of the Registrar's mandate. The number, 10 years, appears twice in square brackets as it is traditionally for the diplomatic Conference to decide. It is however important to stress that this period shall be aligned with Article XVIII(2).

Article XIV
First Regulations

The first regulations shall be made by the Supervisory Authority no later than [three months] prior to the entry into force of this Protocol and shall be made so as to take effect upon the entry into force of this Protocol. Prior to issuing regulations, the Supervisory Authority shall publish draft regulations in good time for review and comment and thereafter consult with representatives of manufacturers, operators and financiers thereon.

Comment

1. Reference is made to the Summary Report of the meeting of the Rail Registry Task Force (UNIDROIT 2005, Study LXXIIH – Doc.17; OTIF/JGR/13), p. 6, paragraph “Registrar Regulations and the Supervisory Authority Rules of Procedure”.
2. By way of information, the “Regulations and Procedures for the International [Aircraft] Registry” are included in the conference documentation as DCME-RP – IP/2.

Article XV
Access to Registry

The centralised functions of the International Registry shall be operated and administered by the Registrar on a 24-hour basis.

Comment

1. The purpose of the provision is to permit users of the Registry – both users that wish to effect registrations and users carrying out searches – to access the Registry at their convenience and independently from their own and the Registry’s respective time zones.
2. By way of information and illustration, reference is made to Section 4 of the “Regulations and Procedures for the International [Aircraft] Registry”, DCME-RP – IP/2.

Article XVI
Designated entry points

A Contracting State may at any time designate an entity or entities as the entry point or entry points through which there may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. Such designation may permit but shall not compel the use of such designated entry point. The various entry points shall be operated at least during working hours in their respective territories.

Comment

Article XVI implements for railway rolling stock Article 18(5) of the Convention. It is for Contracting States to decide whether to make a declaration designating a national entry point for the transmission of registration applications.

Article XVII

*Additional modifications to Registry provisions*⁴

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by regulations of the Supervisory Authority.
2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than 10 calendar days after the receipt of the demand described in such paragraph.
3. Where a subordination has been registered and the obligations of the debtor to the beneficiary of the subordination have been discharged, the beneficiary shall procure the discharge of the registration no later than 10 calendar days after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
4. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall, in respect of each event, ~~be not be less than the amount maximum value of [an item of] railway rolling stock as~~ determined by the Supervisory Authority to be appropriate, having regard to [...].
5. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

Comment

1. This Article is to be read together with Article V. *Paragraph 1* of this article defers the important technical detail of establishing the search criteria to the future regulations to be issued by the Supervisory Authority.

2. Attention is drawn (for information purposes only) to Section 5.3 of the "Regulations and Procedures for the International [Aircraft] Registry" (cf. DCME-RP – IP/2.). It must be pointed out, however, that the factual situation as regards railway rolling stock is fundamentally different, in that a number of legal and operation systems would appear to currently not have any identification criteria that are potentially useful for the new registration system whereas others do have such criteria which were, however, developed regionally.

⁴ Cf. footnote 2.

3. With respect to *paragraph 4* of this article, the Drafting Committee, following the request of the Joint Committee of governmental experts and the discussions within the Rail Registry Task Force, proposed an amendment to provide that the amount of insurance or financial guarantee shall be not less than the amount determined by the Supervisory Authority to be appropriate, although the factors for the Supervisory Authority to take into account are yet to be determined. Reference is also made to the Summary Report of the meeting of the Rail Registry Task Force (UNIDROIT 2005, Study LXXIIH – Doc.17; OTIF/JGR/13), p. 3, paragraph “Liability and insurance”.

Article XVIII
International Registry fees⁵

1. ~~By way of modification of Article 17(2)(h) of the Convention, the Registrar shall, subject to the approval of t~~The Supervisory Authority ~~shall;~~ set and may from time to time amend the fees to be paid in connection with registrations, filings, ~~and~~ searches and other services the International Registry may provide, in accordance with its regulations.

2. The fees referred to in the preceding paragraph shall be determined so as to recover the reasonable costs of establishing and implementing (amortised over [10] years), and operating the International Registry as well as the reasonable costs of the Supervisory Authority and its Secretariat associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention provided that nothing herein shall preclude the service provider operating for profit.

~~3. The fees referred to in paragraph 1 may be amended by the Registrar taking into account changed economic conditions provided that any increase of the fees by more than [10] per cent shall require the approval of the Supervisory Authority.~~

Comment

1. In order to implement this provision, a significant number of policy decisions will have to be made by either the diplomatic Conference or, more likely, the Supervisory Authority.

2. *Paragraph 1* has been amended by the Drafting Committee on the basis of the discussions within the Rail Registry Task Force to reflect the requirement of the Convention that fees be set by the Supervisory Authority, and that fees might be required to be paid in connection with other services provided by the Registry.

3. *Paragraph 2* establishes a period of time for the costs to be amortised and provisionally provides for [10] years. It is for the diplomatic Conference to finally decide of this but it is important to indicate that this period shall be aligned with Article XIII(5).

4. The fees shall be determined so as to recover various costs “provided that nothing herein shall preclude the service provider operating for profit”. The Joint Committee of governmental experts indicated that if the duties are outsourced, it is unrealistic to stipulate that the service is provided without profit. The charges will however be monitored by the Supervisory Authority and

⁵ Cf. footnote 2.

the Committee left it open for Contracting States to decide as a policy issue as to whether the Registrar should be permitted to offer its services at a profit. If the Registrar is a government agency, it is assumed that it will not be operating for profit.

5. The Drafting Committee proposes the deletion of *paragraph 3* of the text adopted by the Joint Committee because of the amendment made in paragraph 1.

6. For a detailed analysis, reference is made to the Rail Registry Task Force's report ((UNIDROIT 2005, Study LXXIIH – Doc.17; OTIF/JGR/13), p.4-6 (and in particular Annex V).

CHAPTER IV

JURISDICTION

Article XIX

Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to railway rolling stock under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. A waiver under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V of this Protocol.

Comment

The reason of this Article is that many rail operators are owned or controlled by States or State entities and while under the law of many States (and some treaties) it is considered an aspect of the State sovereign immunity that a State can waive its immunity, this is not universally true. This Article makes it clear that a waiver of immunity is binding, though only where it is a writing that describes the railway rolling stock. The waiver may relate to immunity from jurisdiction, enforcement or both. The instrument of waiver shall make clear its extent. The general rule of international law, which will be modified by a waiver under this Article, is that waiver of immunity from suit does not itself constitute waiver of immunity from enforcement.

CHAPTER V

RELATIONSHIP WITH OTHER CONVENTIONS

Article XX

Relationship with other Conventions

The Convention and this Protocol shall, for Contracting States which are parties to them, in the event of any conflict, take precedence over

(a) the Rome Convention on the Law Applicable to Contractual Obligations 1980;

(b) the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 (as amended from time to time);

(c) the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1988;

(d) the Inter-American Convention on the Law Applicable to International Contracts 1994;

(e) the Convention Concerning International Carriage by Rail 1980 as modified by the Protocol of modification of 3 June 1999;

(f) the UNIDROIT Convention on International Factoring 1988;

(g) the UNIDROIT Convention on International Financial Leasing 1988;

[(h) the Hague Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 2002; and]

[(i) the European Union Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and the European Union Council regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,]

as they relate to railway rolling stock, to the extent that that convention [or regulation] is in force among them and that the terms of that convention [or regulation] are inconsistent with the provisions of the Convention or of this Protocol.

Comment

1. This Article establishes in a rather traditional way the primacy of the present Protocol as regards matters within its scope over the Conventions enumerated in paragraphs (a) to (g). This solution is based on the general principles of public international law that the more specific and the later rules prevail over the more general and the earlier ones (*lex speciali derogat legi generali* and *lex posterior derogat legi priori*).

2. As regards the 1968 Brussels Convention on Jurisdiction (lit.(b)) that instrument has been “communitarized” and is now Council Regulation (EC) No.44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

3. The Hague Convention whose completion was anticipated in lit. h was subsequently limited as to its scope and became the Hague Convention of Choice of Court Agreements of 30 June 2005.

4. Under EU law, the position regarding primacy of the present Protocol over Council Regulation (EC) No. 44/2001 and Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (lit. i) is not tenable. It reflects views expressed at a very early stage of drafting and requires a thorough review. Discussion of Article XXII will provide the European Commission and delegations from EU Member States an opportunity to fully appraise the Diplomatic Conference of the current position.

CHAPTER VI

FINAL PROVISIONS⁶

Article XXI

Signature, ratification, acceptance, approval or accession

1. This Protocol shall be open for signature in _____ on _____ by States participating in the Diplomatic Conference to Adopt a Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock held at _____ from _____ to _____. After _____, this Protocol shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article XXIII.
2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Protocol may accede to it at any time.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.
5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

⁶ Chapter VI contains “classic” final clauses and provisions dealing with matters of substance. The former (Articles XXI – XXIV, XXVIII, XXXII, XXXIV), being the prerogative of plenipotentiaries, have not been discussed at the sessions of Committee of governmental experts. Conversely, Articles XXV – XXVII, XXIX – XXXI, XXXIII have been discussed and reflect the Committee’s recommendations.

Comment

Paragraphs 1 to 4 contain standard provisions. *Paragraph 5* is a specific provision. Since the Convention entered into force on 1 April 2004 a State will become Party to the Rail Protocol if it has ratified or acceded to the Protocol and the Convention. See further Comment to Article 49 of the Convention (DCME-RP – Doc. 6).

Article XXII

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depository specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depository of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

Comment

This Article enables a Regional Economic Integration Organisation established by sovereign States and having competence on matters within the scope of the Protocol to adhere to the Protocol as if it were a Contracting State. For the corresponding provision in the Convention see Article 48 and Comment thereto (DCME-RP – Doc. 6).

Article XXIII

Entry into force

1. This Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of the [third] instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.

2. For other States this Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Comment

1. *Paragraph 1* deals with entry into force as regards the [three] States whose ratification brings the Rail Protocol into force, *paragraph 2* with States adhering to the Protocol thereafter.

2. The square-bracketed proposal reflects what has become the norm in private law conventions. See further Comment to Article 49 of the Convention (DCME-RP – Doc. 6).

Article XXIV ***Territorial units***

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. Any such declarations are to be notified to the Depository and shall state expressly the territorial units to which this Protocol applies.

3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;

(b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which the Convention and this Protocol apply; and

(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.

Comment

This Article applies to the Rail Protocol the same provisions as apply to the Convention under Article 52, and reference should be made to the Comment to that Article (DCME-RP – Doc. 6).

Article XXV *Public service rolling stock*

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare which and to what extent the following sub-paragraphs shall apply to such Contracting State:

(a) the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to the public service rolling stock specified in its declaration or determined by a competent authority of that State notified to the Depositary;

(b) the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to railway rolling stock as far as it is used for the purpose of providing a service of public importance as specified in its declaration or determined by a competent authority of that State notified to the Depositary;

(c) the Contracting State making a declaration under either of the preceding sub-paragraphs shall take into consideration the protection of the interests of the creditor.

Comment

This provision, which was inserted at the stage of the Joint Committee of governmental experts, has drawn criticism from some quarters. It still needs to be discussed more in depth. In particular, questions of compensation and whether the concerns underlying both its insertion and the criticism may be resolved by contractual arrangement are likely to feature prominently in the discussions.

Article XXVI *Transitional Provisions*

In relation to railway rolling stock Article 60 of the Convention shall be modified as follows:

(a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;

(b) replace paragraph 3 with the following:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

Comment

Reference is made to Comment to Article 60 of the Convention (DCME-RP – Doc. 6).

Article XXVII

Declarations relating to certain provisions

- 1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI and X of this Protocol.**
- 2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article VIII of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article VIII(3).**
- 3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of one of Alternatives A, B and C of Article IX and, if it so declares, it shall specify the type of insolvency proceeding, if any, to which it will apply such Alternative. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article IX under paragraph 3 of Alternative A, paragraph 2 of Alternative B or paragraphs 4 and 13 of Alternative C, as applicable.**
- 4. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.**

Comment

- 1. For a description of the structure of declarations provisions, see paragraph 51 of the “Overview of the Convention” (page 16 of this document).**

2. *Paragraphs 1 to 3* of this Article contemplate opt-in declarations.
3. A declaration opting into Article VI is equal to the full recognition of the principle of party autonomy for the purposes of the Convention and this Protocol. Cf. Comment 1 to Article VI.
4. As regards the significance of a declaration opting into Article X reference should be made to the Comment to that provision.
5. *Paragraph 2* provides for an opt-in declaration with respect to Article VIII. Since Article VIII deals with a range of connected yet distinct issues, the Contracting State is given the right to choose, as it were, from that menu.
6. As regards the options for a declaration identifying the Contracting State's choice of the applicable insolvency regimen, reference should be made to be Comment to Article IX.

Article XXVIII

Reservations and declarations

1. **No reservations may be made to this Protocol but declarations authorised by Articles XXIV, XXV, XXVII, XXIX and XXX may be made in accordance with these provisions.**
2. **Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depository.**

Comment

Reference is made to Comment to Article 56 of the Convention (DCME-RP – Doc. 6).

Article XXIX

Declarations modifying the Convention or certain provisions thereof

1. **Declarations made under the Convention, including those made under Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol unless stated otherwise.**
2. **A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will impose other conditions on the application of Articles VI and VIII as specified in its declaration.**
3. **For the purposes of Article 50(1) of the Convention an “internal transaction” shall also mean, in relation to railway rolling stock, a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant object is only capable, in its normal course of use, of being operated on a single railway system within that Contracting State because of track gauge or other elements of the design of such railway rolling stock.**

Comment

1. *Paragraph 2* is to be reviewed to consider whether the provisions are necessary for each Article referred to and, if so, wording will need to be reviewed to ensure that “conditions” do not create a mechanism for Contracting States effectively to opt out of the Articles concerned but merely assist with implementation of the Articles into local law.

2. *Paragraph 3* was considered by the Joint Committee of governmental experts before the adoption of the Convention. When later examined by the Rail Working Group, it noted that due to the changes made in Cape Town, the definition of “internal transaction” was now restrictive and dependent on a local asset registration system (which did not exist for the rail sector). However, the Rail Working Group noted that some States might wish to exclude certain types of “domestic transactions”. It would discourage this but if this exclusion is required, it is suggested it should be by reference to the object and not its mission. So a standard locomotive which happens to be operating in a closed domestic loop but which could be moved into an open network could not be excluded, but trams and underground trains which are not able to operate outside of a domestic system potentially could be excluded by declaration subject to the general provisions of Article 50(2) of the Convention.

Article XXX***Subsequent declarations***

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

[4. Declarations made pursuant to Articles 39 and 40 of the Convention shall be subject to this Article.]

Comment

Reference is made to Comment to Article 57 of the Convention (DCME-RP – Doc. 6).

Article XXXI
Withdrawal of declarations

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.
2. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such withdrawal had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

Comment

Reference is made to Comment to Article 58 of the Convention (DCME-RP – Doc. 6).

Article XXXII
Denunciations

1. Any State Party may denounce this Protocol by notification in writing to the Depositary.
2. Any such denunciation shall take effect on the first day of the month following the expiration of 12 months after the date of receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

Comment

Reference is made to Comment to Article 59 of the Convention (DCME-RP – Doc. 6).

Article XXXIII
Review Conferences, amendments and related matters

1. The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.
2. At the request of not less than 25 per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

- (a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;
- (b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;
- (c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and
- (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by three States in accordance with the provisions of Article XXIII relating to its entry into force.

Comment

Reference is made to Comment to Article 61 of the Convention (DCME-RP – Doc. 6).

Article XXXIV *Depositary and its functions*

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.
2. The Depositary shall:
 - (a) inform all Contracting States of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) the date of entry into force of this Protocol;
 - (iii) each declaration made in accordance with this Protocol, together with the date thereof;
 - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
 - (v) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;
 - (b) transmit certified true copies of this Protocol to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

Comment

Reference is made to Comment to Article 62 of the Convention (DCME-RP – Doc. 6).

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