OTIF

ORGANISATION INTERGOUVERNEMENTALE POUR LES
TRANSPORTS INTERNATIONAUX FERROVIAIRES

ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

PROPOSAL TO AMEND ARTICLE XVII OF THE DRAFT RAIL PROTOCOL

(presented by the Rail Working Group (RWG))

The purpose of this paper is to draw the attention of delegates to the Diplomatic Conference to a specific issue in advance of the Conference without specifically setting out a concrete position.

The principle adopted in Cape Town 2001 was that the Supervisory Authority should have the immunity as an international organisation (see Article 27 of the Convention and Article XVII of the Protocol to the Cape Town Convention on matters specific to aircraft equipment (the Aviation Protocol)) but that the Registrar should have an unlimited liability for losses directly arising from errors and omissions (see Article 28 of the Convention) and that the Supervisory Authority could set the level of insurance required for the Registrar (see Article XX of the Aviation Protocol and the Article XVII (4) of the current working draft of the Rail Protocol).

We understand that the experience now of the running of the registry under the Aviation Protocol has been that

- Companies are reluctant to take on the role of the Registrar with an unlimited liability; certain obvious candidates to run the Rail Registry may refuse to do so if they have to assume unlimited liability.

- The cost of insurance has proved to be much higher than expected with an annual premium of several hundreds of thousands of dollars; this in turn adds to the cost of running the Rail Registry.

- It is unclear as to whether there will be sufficient capacity in the insurance market to cover the rail registrar particularly if that the liability is unlimited.

The banking members of the Rail Working Group ("RWG") would have preferred unlimited liability for the Registrar. But this may be an illusion if the Registrar is a single purpose company and insurance cannot be found for such liability. All members of the RWG are concerned that the cost of running the registry should be as modest as possible and wish to avoid an insurance component which could significantly add to the running cost of the registry. Pragmatically, if companies, otherwise highly qualified to run the registry, refuse to do so because of the assumption of unlimited liability this would weaken the implementation of the project significantly.

Tentatively therefore the RWG has considered that the practical solution will probably be to accept the limitation of liability but set it at a sufficiently high level so as to ensure that parties can still be in a position to recover damages for Registrar errors and omissions commensurate with their actual loss.

If the principle of limited liability for the Registrar is accepted, the second practical question is how one decides the level of liability. This could be set by the Supervisory Authority under regulations. However, we understand that this delegation of authority could cause constitutional difficulties for some states. If an object criterion is selected, this could be set by reference to either the initial purchase cost of the asset or the value of the transaction. Both are imperfect solutions. The asset value may be significantly less than the initial cost of the equipment which value in any event is subject to depreciation. Setting the maximum liability by reference to a percentage of the initial asset value also is somewhat arbitrary and could result in significant over-insurance. Moreover, parties may be reluctant to disclose onto a public record registry the actual cost of the asset concerned. The same considerations apply if the transaction value (for example the present value of the lease rentals or the amount of the loan) is used instead of the initial asset value. Again, aside from confidentially questions, there remains the problem of the value, which is normally reducing over the term of the transaction with the Registrar having no capability of understanding what the reducing level is. Lastly, if the criterion is just a fair market value of the asset (either the cost or a percentage thereof) then again it is impossible for the Registrar to ascertain what that value is, t can be highly subjective and will also cause some significant evidentiary difficulties in the event of a claim.

An alternative model, which we have recently considered, is to allow the parties registering the interest also to register a value which they select and which may or may not have any connection with the value of the transaction or the initial cost of the asset. A component of the registration fee however would be the insurance cost and this would vary in accordance with the declared value. This would have the advantage of creating transparency in the charging of the insurance cost, discouraging over valuation as well as not requiring the disclosure of any confidential information. It does not deal with the issue of the reduction of the risk over time but this perhaps could also be dealt by permitting parties to the deemed transaction adjusting the value on an annual basis if they wanted to reduce the insurance value and cost over time.

For the assistance of delegates, we set out below some possible amendments to Article XVII of the Rail Protocol in turn amending Article 28 of the Convention reflecting the ideas set out above.

Proposed changes to the Draft Rail Protocol

Wording highlighted shows additional proposed changes to the proposals submitted by the drafting committee (markings retained)

Article XVII
Additional modifications to Registry provisions

4 .   Add the following sentence to the end of Article 28 (1) of the Convention:

"Notwithstanding the foregoing, the Supervisory Authority may determine a limitation of Registrar liability hereunder in relation to an error or omission relating to a relevant item of railway rolling stock provided that the aggregate liability to all persons is not less than one [tenth] of the market value of such item calculated as at the time of the loss.

5.   The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority, to be appropriate, having regard to [...] the liability of the Registrar determined by the Supervisory Authority in accordance with paragraph 4.

OR

4 .   Add the following sentence to the end of Article 28 (1) of the Convention:

"Notwithstanding the foregoing, the aggregate liability of Registrar hereunder to all persons in relation to an error or omission relating to a relevant item of railway rolling stock is not more than [[one tenth] of the cost of such item] [the market value of such item calculated as at the time of the loss] [the amount designated by the creditor and debtor on registration of the relevant interest as the transaction value].

5.   The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority, to be appropriate, having regard to the liability of the Registrar determined in accordance with paragraph 4.

6.   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.

- END -

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Pagina 3: [1] Formattato	Howard Rosen	27/11/2006 8.34.00

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Pagina 3: [5] Eliminato	Howard Rosen	27/11/2006 8.32.00

maximum value of [an item of] railway rolling stock as

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