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INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

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

Luxembourg, 12 to 23 February 2007

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**REPORT OF THE DRAFTING COMMITTEE TO THE CONFERENCE
ON THE DRAFT FINAL PROVISIONS AS REVIEWED BY IT
FOLLOWING THEIR PRELIMINARY CONSIDERATION BY THE CONFERENCE**

(presented by the Chairman of the Drafting Committee)

INTRODUCTION

1. The Report of the Final Clauses Committee was given a preliminary reading by the Conference on 19 February 2007 (DCME-RP- Doc. 26). At its fifth and seventh meetings, held on 19 and 20 February 2007, the Drafting Committee reviewed the draft Final provisions as annexed to the aforementioned Report in the light of the comments made during that preliminary reading. The text of the draft Final provisions as thus reviewed is set out in the Appendix to this Report.

2. The changes proposed to the text of the aforementioned Final provisions of the draft Protocol submitted to the Conference in DCME-RP – Doc. 3 are indicated by the crossing out of the relevant provision, where parts of the text would under these changes be deleted, and by underlining, where new provisions would be introduced.

APPENDIX

DRAFT FINAL PROVISIONS TO BE EMBODIED IN THE DRAFT PROTOCOL

CHAPTER VI
FINAL PROVISIONS*Article XXI**Signature, ratification, acceptance, approval or accession*

1. This Protocol shall be open for signature in Luxembourg on 23 February 2007 by States participating in the ~~D~~iplomatic Conference to ~~A~~adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment ~~on Matters Specific to Railway Rolling Stock~~ held at Luxembourg from 12 to 23 February 2007. After 23 February 2007, 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.

*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 Depositary 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 Depositary 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.

Article XXIII
Entry into force

1. This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:
 - (a) the first day of the month following the expiration of three months after the date of the deposit of the ~~third~~ fourth instrument of ratification, acceptance, approval or accession, ~~between the States which have deposited such instruments, and~~
 - (b) the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.^{*}
2. For other States this Protocol enters into force on the first day of the month following the later of:
 - (a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and-
 - (b) the date referred to in sub-paragraph (b) of paragraph 1.

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 Depositary 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;

^{*} It should be noted that the final shape to be given to this provision will be conditional on the decision to be taken by the Conference regarding Article XIII of the draft Protocol.

- (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.

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 Depository;~~

~~(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 Depository;~~

~~(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.~~

1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway rolling stock habitually used for the purpose of providing a service of public importance ("public service railway rolling stock") as specified in that declaration notified to the Depository.

2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor.

3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:

- (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and
- (b) the market lease rental in respect of such railway rolling stock.

^{**} The text of the proposed new Article XXV reproduced here for ease of reference is that set out in Part II of the Report of the Drafting Committee to the Commission of the Whole (DCME-RP – Doc. 33). It will be recalled that this Article was not considered by the Final Clauses Committee as having been decided to fall within the remit of the Commission of the Whole.

The first such payment shall be made within ten calendar days of the date such power is exercised, and subsequent payments shall be made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depository, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.

5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date that declaration is received by the Depository.

6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

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 and not later than ten 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.”

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.

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 Depositary.

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, in lieu of the reference to an "internal transaction", a Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will exclude from the application of this Protocol specified types of railway rolling stock—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 that are only capable, in itstheir normal course of use, of being operated only on a single railway system within that Contracting State because of track gauge or ~~other~~ elements of the design of such railway rolling stock. ^{***}

*** The Drafting Committee found it difficult fully to review this provision, being unclear as to the policy in this regard adopted by the Conference on its preliminary reading thereof.

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.}~~

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 preceding~~ 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.

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-twelve~~ 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.

^{****} The Final Clauses Committee recommended that an explanation regarding the concept of "subsequent declaration" be provided in the planned Official Commentary.

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~~twenty-five 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.

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;
(i bis) the date of the deposit of the certificate referred to in Article XXIII(1); *****
 - (ii) the date of entry into force of this Protocol;

***** It should be noted that the final shape to be given to this provision will be conditional on the decision to be taken by the Conference regarding Article XIII of the draft 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.

DONE at Luxembourg, this twenty-third day of February, two thousand and seven, in a single original in the English, French and German languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

- END -