

UPDATE: The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock

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In February 2007, representatives from 42 countries met in Luxembourg and adopted a Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock. As some readers probably know, the Cape Town Convention, signed by 20 participating states in Cape Town, South Africa in November 2001, established for the first time an international legal framework for the registration of rights in mobile equipment including aircraft and aircraft engines, railway rolling stock and satellites. The Convention is structured with the basic objectives and provisions set forth in the treaty, with three separate protocols to be adopted, each applying and adapting the treaty to a relevant industry sector. A protocol applying the Convention to the aviation industry (the Aviation Protocol) was adopted in 2001 and took effect in March 2006. At the same time, an International Registry for the registration of interests in aircraft commenced operation.

In June 2010 the Intergovernmental Organization for International Carriage by Rail (OTIF) and the International Institute for the Unification of Private Law (UNIDROIT) began a tender process inviting interested entities to submit proposals to be appointed as the Registrar for an International Registry for railway rolling stock, much like the aircraft registry currently in operation. The Rail Protocol will become effective when at least four states have ratified it and the registry has become operational.

The Rail Protocol differs from the Aviation Protocol in several key respects, and the drafters of the Rail Protocol grappled with several issues that did not arise in the preparation of the Aviation Protocol. One such issue involved the political fallout that could result from the protection of creditors' interests in rail equipment. Trains are used for mass transportation to a much greater extent than aircraft; a creditor's repossession of certain rail equipment could, for example, prevent an entire city's commuters from getting to work or bring a halt to crucial freight service in a particular geographic location. Under the Rail Protocol, a contracting state with laws in place that would prevent a creditor from repossessing rolling stock could, upon acceding to the Rail Protocol, make a declaration that would apply to rolling stock that is "habitually used for the purpose of providing services of a public importance."¹ The declaration would enable the state to require a creditor to continue to use such equipment for the same purpose in exchange for government compensation equal to the greater of (a) the amount the government would be required to pay under its national law and (b) the market lease rental for such equipment.²

In his Official Commentary to the Rail Protocol, Professor Sir Roy Goode notes that determining whether certain railway rolling stock is used for "a public importance" will depend upon the facts in each case. He points to two criteria of particular importance: (1) "the volume of traffic carried by the service" and (2) "the perception of public importance of the service in the Contracting State."³ The availability of alternatives to the service in question does not disqualify that service from being one of public importance—the nature of the service provided will be the most important factor. The drafters of the Rail Protocol extended this public-service exemption to freight rolling stock only reluctantly, and it is therefore expected that the exception will apply primarily in the passenger rail sector and secondarily in the freight sector if, for example, the freight in question has public safety implications, such as nuclear waste or other hazardous material.⁴

The Rail Protocol's approach to insolvency options differs from that of the Aviation Protocol. The latter allows contracting states to apply their own national insolvency laws or to adopt one of two regimes: an Alternative A, which enables a creditor to repossess equipment following the expiration of a state-specified waiting period unless the default is cured; or Alternative B, which requires the creditor to comply with state law requirements before repossession.⁵ The Rail Protocol follows the same model but provides an additional Alternative C, a middle ground between the creditor-friendly Alternative A and the more pro-debtor Alternative B. Under Alternative C, the debtor or insolvency administrator can, during a period within which it may cure all defaults (such period to be specified by the contracting state), apply for a court order suspending the right of creditors to repossess the equipment, which court order would also require the debtor or its administrator to preserve and maintain the equipment and continue to pay the creditor the amounts it would have been paid had no default occurred.⁶

An additional difference between the Aviation Protocol and the Rail Protocol concerns their respective approaches to the identification of particular equipment, both for purposes of constituting an "international interest" and for purposes of the registration of that interest. For both such purposes, the Aircraft Protocol simply requires that an object be identified by manufacturer, model and serial number.⁷ The drafters of the Rail Protocol, however, could not adopt those simple criteria for either purpose because (a) it has not always been the practice for rail equipment manufacturers to allot serial numbers to their products, (b) in some, more modern rolling stock, serial numbers are not always readily apparent upon inspection and (c) in some parts of the world, industry practice has been to identify rolling stock by reference to numbers generated through a national or international agency (for example, the UNICLER numbering system used in North America and the RIVRIC system used in Europe), and there is potential for these numbers to be reused and applied to different items of rolling stock. Therefore, the Rail Protocol leaves it for the regulations governing the International Registry to prescribe a system by which the Registrar will allocate unique identification numbers to each item of rolling stock.⁸ A unique identification number will be generated by the Registry and (1) affixed to the item of equipment or (2) associated in the Registry with the manufacturer's name and identification number already affixed to the item or (3) associated in the Registry with a national or regional identification number already affixed to the item. This will be a complex system and will require the Registry to effectively maintain a library of identification numbers and to note where numbers have changed on the rolling stock. The Request for Proposals for the International Registry issued by OTIF and UNIDROIT posits 20-digit identification numbers, and the Registry's system must be capable of generating numbers that incorporate national or regional identification numbers.

Much work remains to be done before the Rail Protocol will come into effect. When it does, and as it is widely adopted, it is expected to help revitalize the railway sector, drawing more private capital into the industry, especially in places like Africa, where it has traditionally been difficult for lenders to take security interests in rolling stock that passes through multiple jurisdictions and their patchwork legal systems.

¹ Article 10(1)(a).

² Article 10(1)(b).

³ Sir Roy Goode, *Official Commentary to the Rail Protocol*, at ¶ 10.1 (2010).

⁴ Sir Roy Goode, *Official Commentary to the Rail Protocol*, at ¶ 10.2 (2010).

⁵ Article 11(1).

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