

THE 2001 CAPE TOWN CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT



**INSIDE TRACK**

“Inside Track” keeps RWG members and colleagues up to date on the progress of the Luxembourg Protocol. You can be added onto the mailing list by clicking on “subscribe” at the bottom of the newsletter.

- [Talking to China](#)
- [RWG responds to latest BIS Consultation](#)
- [Brexit and the Luxembourg Protocol](#)
- [Discussing railway finance in Spain](#)
- [Luxembourg to Johannesburg](#)
- [Topic of the month: The interaction between the Luxembourg Rail Protocol and other Protocols to the Cape Town Convention](#)
- [Special deal for RWG members](#)

**[Talking to China](#)**

Mr Lu Dongfu, Vice Minister of Transport of the People’s Republic of China, led an official delegation to meet Secretary General Davenne and his team at the Intergovernmental Organisation for International Carriage by Rail (OTIF) in Berne on 12th July. The principal purpose of the meeting was to develop a strong relationship between the National Railway Administration of China and OTIF, working towards China acceding to the COTIF Convention. A formal Memorandum of Understanding was signed at the meeting between the two parties, setting out key areas of future co-operation.

OTIF is also the designated secretariat for the Supervisory Authority when the Luxembourg Protocol comes into force and OTIF invited RWG Chairman Howard Rosen and Registrar-designate Liz Hirst to meet the visiting Minister and his delegation. Mr Rosen made a presentation about the Protocol to the delegation. He pointed out that the Protocol would not only bring benefits to the domestic rail sector in China, but that it will also help secure rolling stock, such as that running on the China to Europe rail “Silk Route”, crossing various jurisdictional borders as well as underwrite the position of Hong Kong as a major global financial centre.

### **RWG responds to latest BIS Consultation**

Last March the Basel Committee on Bank Supervision issued a [consultative document](#) in relation to the use by banks of internal risk models in assessing the way that capital is allocated internally by banks to secured loans and leases of movables. Essentially the Committee is proposing a “one size fits all” solution disregarding the fact that in some industries, such as the rail sector, there will be considerable industry and legal considerations resulting in a high level of security for the financing banks.

In its detailed submission filed on 24<sup>th</sup> June, the RWG argued that banks must be allowed to evaluate the additional security that they have when financing rolling stock, especially once the Luxembourg Protocol is in force. If the BIS insists on a standardised approach for asset based financing, this will, warned the RWG, significantly increase the cost of debt funding for rail operators as banks will have to allocate much more capital to cover these financings, and increase their margins to cover the cost, with negative consequences for the consumer, for the rail industry and for the community as a whole looking to encourage investment in the railways as a key stimulus for sustainable growth. The complete RWG submission may be found [here](#).

### **Brexit and the Luxembourg Protocol**

On 23<sup>rd</sup> June, the United Kingdom electorate voted to leave the European Union, and a new Prime Minister took charge. This in turn has led to the reshuffling of key ministerial positions in the British Government, including in the Department for Transport. How will this impact the UK’s planned adoption of the Luxembourg Protocol?

The need for the Protocol still exists in the UK, and may even be greater as we look ahead. Politically, there is a growing consensus that Britain needs to invest dramatically in its infrastructure and, in the rail sector, rolling stock to support the infrastructure. Britain

will increasingly need to look beyond the domestic rail industry as it reshapes its external business relationships. The UK government is now stressing that Britain is open for business. That will mean promoting UK exports independently of the EU, which may assist UK-based rolling stock exporters especially as UK Export Finance will be able to act autonomously of DG Trade, post Brexit. The City of London will also need to carve out for itself a more global and less European role by looking anew at the way it provides finance for investments worldwide. Establishing “The City” as a centre of excellence in the rail finance area would be completely consistent with that approach and the Protocol then will be extremely useful in facilitating syndications and private equity, institutional or other financing structures for UK specialist rail leasing and finance companies.

Our view is that initially we could see some delay as new ministers review their new assignments. Otherwise, legally, the adverse consequences will be negligible as EU law will continue to apply to the UK until it actually leaves the EU and we expect much existing EU law to be adopted by the UK as domestic law (where it is not already) as part of the transition process. Alternatively the UK could choose to make certain declarations (such as for Article IX – remedies on insolvency) once EU law no longer applies in the UK.

### **Discussing railway finance in Spain**

On 22<sup>nd</sup> June, the Banking & Finance team of Bird & Bird in Madrid organised a breakfast briefing on the future for railway finance in Spain in collaboration with the Rail Working Group of UNIDROIT. The briefing focused on how the Luxembourg Rail Protocol of the Cape Town Convention will transform the rail sector in Spain.

Speakers included Bird & Bird in Madrid partner José Luis Lorente, Professor Benjamin von Bodungen from the Bird & Bird Frankfurt office and RWG Treasurer, and special guest speaker Teresa Rodríguez de las Heras, Professor in Commercial Law at the University Carlos III of Madrid and Deputy Vice Chancellor in International Relations and Co-operation. Professionals and in-house lawyers from some of the most important companies within the Spanish banking and rail sectors attended the seminar, including Sacyr, CAF, Banco Santander, Talgo, Credit Agricole, Banco Popular and Acciona.

### **Luxembourg to Johannesburg**

The Luxembourg Rail Protocol was discussed at various points during the AfricaRail 2016 conference that took place in Johannesburg last month as delegates considered the future for railways in Africa. The conference and the accompanying exhibition were attended by over 5,700 attendees from 55 countries; the two day conference was chaired by RWG Chairman Howard Rosen. In his [opening remarks](#) he urged delegates to press their

governments to allow the rail industry to develop on a commercial basis and to compete on a level playing field with transporters of people and freight on the road. This in turn requires private finance options where the Luxembourg Protocol can play a positive role in supporting leasing and loans where the debtor is not a strong credit, he said. A number of other presenters also looked at private sector finance as a key element of the progression of the African rail sector.

At the exhibition, Transnet Engineering launched its new diesel-powered “Africa Locomotive” which it expects to export around Africa (customer funding permitting).

### **Topic of the month: The interaction between the Luxembourg Rail Protocol and other Protocols to the Cape Town Convention**

The Luxembourg Rail Protocol casts a wide net in terms of defining its scope, encompassing as it does all vehicles movable on a fixed railway track or directly on, above or below a guideway. This causes no serious problems in relation to equipment that is covered by the existing Aircraft and Space Assets Protocols because airframes, helicopters and satellites can be clearly distinguished from railway rolling stock. However, the broad definition of railway rolling stock triggers a potential overlap of the Rail Protocol with subsequent Protocols that was not contemplated at the time of its creation. This potential conflict surfaced during the preparation of a Fourth Protocol to the Convention on Matters Specific to Agricultural, Construction and Mining Equipment (the MAC Protocol) which applies the Convention to said categories of equipment. By way of an example, a piece of mining equipment such as a lorry used for removing rocks and stones may move on a guideway and in this case will constitute railway rolling stock for the purposes of the Rail Protocol. At the same time it potentially could also be subject to the – future – MAC Protocol due to its use for mining purposes.

The Study Group entrusted with preparing an initial draft of the potential MAC Protocol contemplated several approaches to solve the overlap described above. First, both Protocols could work alongside each other and parties who want to ensure the priority of their international interest would have to register this interest in the registries under both the Rail and the MAC Protocols. Next, the 'first in time' registration logic embedded in the Cape Town Convention system could be applied, providing that in case of a piece of equipment that could be registered under either the MAC or the Rail Protocol, the first registration in time would preclude any subsequent registration under the other Protocol. Finally, the conflict between the two legal texts could be dissolved through limiting the scope of the – yet to be – MAC Protocol and excluding any type of equipment therefrom

that is to be treated as an object under the Rail Protocol.

The potential registration of an international interest in two separate registries not only could be quite burdensome on the parties involved but may also cause significant priority issues if the registration of an international interest in relation to the same piece of equipment was not made in both registries at the same time. On the other hand, a 'first in time' rule with respect to the determination of the relevant International Registry contains an element of arbitrariness. For the sake of clarity and legal certainty, the Study Group therefore ultimately decided to deal with the interaction between the Rail Protocol and the MAC Protocol by completely carving out the scope of the Rail Protocol from the scope of the MAC Protocol. The current draft of the MAC Protocol thus provides that it "does not apply to objects falling within the definition of [...] 'railway rolling stock' under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock [...]."

#### **Official Commentary - special deal for RWG members**

Rail Working Group members are entitled to purchase Professor Goode's official commentary on the Luxembourg Protocol at a 15% discount. If you wish to use this facility, please use the official form which you can find [here](#).

*The next issue of Inside Track will be published in September. We wish our readers in the Northern Hemisphere a restful summer break.*

For copies of past newsletters click [here](#).

For information about membership of the RWG click [here](#).

Published by the Rail Working Group, a not for profit Association established under Swiss law.

[www.railworkinggroup.org](http://www.railworkinggroup.org)

Contact: [info@railworkinggroup.org](mailto:info@railworkinggroup.org)

The opinions expressed in articles or reports in this publication do not necessarily reflect the opinions or policy of Rail Working Group

© 2016 Rail Working Group

---

[unsubscribe from this list](#) | [subscribe to this list](#) | [update subscription preferences](#)