

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.

- [Sweden formally ratifies](#)
- [“Luxembourg is the solution” AIIB delegates are told in Mumbai](#)
- [Luxembourg Rail Protocol will open up rail finance through asset-backed securities](#)
- [African Finance Ministers hear the importance of railways for free trade](#)
- [New Oxera reports published on 1520 region and South Africa](#)
- [UN ECA Head calls for an efficient, expanded, rail network and the Luxembourg Protocol](#)
- [Topic of the month: The dilemma of Article 40](#)
- [Cape Town Convention Conference 2018](#)
- [Save the date – Hungary stakeholder Seminar](#)
- [Save the date – Madrid stakeholder Seminar](#)
- [Save the date – East AfricaRail 2018](#)
- [“The Railway Market in Africa and the Middle East” – special offer for members](#)
- [Official Commentary - special deal for RWG members](#)

### Sweden formally ratifies



The Kingdom of Sweden today formally ratified the Luxembourg Rail Protocol at a special ceremony which took place at the UNIDROIT offices in Rome. Sweden is the third state to ratify the Protocol. At least 4 ratifications are required before the Protocol may enter into force. From L to R: Fredrik Alfer, Minister Counsellor at the Swedish Embassy in Rome, Louise Petrelius, Legal Adviser, Swedish Ministry of Justice, Professor Anna Veneziano, Acting Secretary General UNIDROIT and Prof. Alberto MAZZONI, President UNIDROIT.

### “Luxembourg is the solution” AIIB delegates are told in Mumbai

“Luxembourg is the solution” RWG Chairman Howard Rosen told delegates at the Asia Infrastructure Investment Annual Meeting in Mumbai this week. He was speaking at one of the Governors’ seminars on the subject of “Connectivity within and beyond Asia”. There was no need, he said, for the public sector to be financing rolling stock as long as the legal conditions were right but at the moment they were not. Specifically, he highlighted the growing mobility of rolling stock across borders both as part of the rail “silk routes” and beyond, where the rights of owners and operators in relation to specific rolling stock were not protected. The solution, he concluded, was Luxembourg, or more specifically the Luxembourg Rail Protocol to the Cape Town Convention which would create that legal framework and make it easier and cheaper for the private sector to finance railway equipment.

### Luxembourg Rail Protocol will open up rail finance through asset-backed securities

A legal step-change in Europe is set to create a major new opportunity for institutional investors in transport-focused securitisations, said Managing Partners Group (MPG), the international asset management group. The Luxembourg Rail Protocol, which is currently undergoing ratification by member states in the European Union, will make it considerably easier for the private sector to finance railway rolling stock and the asset-backed securities (ABS) will provide the ideal investment vehicles, Richard Ambery, General

Counsel at MPG, told the Global ABS 2018 conference on 5<sup>th</sup> June 2018 in Barcelona, Spain. [More](#).

### **African Finance Ministers hear the importance of railways for free trade**

The Annual Meeting of African Finance ministers, which took place in Addis Ababa on May 14th under the auspices of the UN Economic Commission for Africa, acknowledged the importance of the railways in delivering free trade for Africa.

RWG Chairman Howard Rosen presented the Luxembourg Rail Protocol to the Committee of Experts meeting before the ministerial meeting and it was confirmed that the Luxembourg Rail Protocol will be on the agenda for detailed consideration at the 52nd meeting of Finance ministers taking place next year in Morocco.

Separately in his speech to the ministerial meeting, Mr. Rosen emphasised that, when focusing on free trade, it would, literally, be the railways which delivered the goods. He urged African States to adopt the Luxembourg Rail Protocol as quickly as they could.

In their official statement at the end of the meeting, ministers committed themselves “to pursuing efforts to modernize and expand our infrastructure assets, in particular the railways, which remain the most efficient and environmentally sustainable way of moving people and goods.” Referring to the Luxembourg Protocol, the statement continued: “In this regard, we note the importance of international instruments on matters specific to railway rolling stock”.

### **New Oxera reports published on 1520 region and South Africa**

The RWG has published [in June](#) two new reports on the direct microeconomic benefits of the Luxembourg Rail Protocol. The reports, prepared by independent economics consultancy Oxera and commissioned by the Group, estimates the benefits at EUR 13.9 bn for 9 former CIS states, operating on the 1520 gauge network and EUR 1.3 bn for South Africa.

Reports in full: [1520](#), [South Africa](#)

### **UN ECA Head calls for an efficient, expanded, rail network and the Luxembourg Protocol**

Addressing AfricaRail 2018 in Johannesburg, Dr. Vera Songwe, Executive Secretary of the Economic Commission for Africa (ECA), said that economic development in Africa needs an efficient, expanded, rail network and described the current condition of existing railway infrastructure and rolling stock in many countries as “sub-optimal.” “Rail will be the future land transport mode of choice for Africa,” said Dr Songwe.

Elaborating on the numerous opportunities for rail transport development in Africa, she said that with the operationalization of the African Continental Free Trade Area (AfCFTA), large volumes of goods and bulk commodities will be generated to create huge markets for rail transport. Additionally, Africa's large land mass, which is marked by 16 landlocked countries will encourage the development of high speed, high capacity and efficient transport corridors. "This presents opportunities for rail transport development in Africa", said Dr Songwe adding, "the large-scale urbanization comes with transportation challenges that can only be handled by railways."

But the railway renaissance comes with a large price-tag for governments and as noted by Dr. Songwe, States' financial resources are being stretched to the limit and this becomes even more precarious when commodity prices fall. Furthermore, private sector and public-private partnerships, she said, would give the private sector access to secure, long-term investment opportunities. Private sector partners can profit from PPPs by achieving efficiencies, based on their managerial, technical, financial and innovation capabilities.

Raising finance for rail development would also be boosted by the Luxembourg Rail Protocol, which noted Songwe, offers some solutions. The Protocol, due to enter into force in late 2019, will protect private investment in the rail sector. Dr. Songwe called on governments to ratify the Protocol, saying it would enable the private sector to be tapped into finance delivery and management of the rail sector. This, she stressed, "is important for Africa's rail renaissance and vital for the future of Africa economic integration; it is an opportunity we dare not let slip through our fingers." [More.](#)

#### **Topic of the month: The dilemma of Article 40**

Article 40 of the Cape Town Convention is arguably one of the most challenging provisions of the Convention and the various Protocols. It states that a "Contracting State may at any time in a declaration .... list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly." As pointed out in a previous note (see IT 31), Article 40 was designed to deal with very specific types of liens, either recognising the priority of certain state claims, court judgements or generally accepted liens such as the mechanic's lien for work performed on a specific asset where he is permitted under local law to retain possession of the asset until he is paid. Article 40 is, in this case, positive even for other creditors, since, unlike Article 39, it requires a public notice of the types of liens which could be registered. But we are now discovering, from experience of the operation of the Aircraft Protocol to the Convention, that the Article can be abused and presents a practical dilemma.

It has been a basic principle of the operation of the international registry that the registrar is not expected to evaluate whether a registration of an international interest is proper or

not. In the case of consensual interests, this is not an issue as both the creditor and the debtor have to agree to the registration. However the nature of Article 40 is that a party can register an international interest unilaterally, which means that it is open to abuse by third parties wishing to hold an owner or financier hostage. They can register an actual or possible claim as a non-consensual interest without any control by the owner, financier or registrar, knowing that, even if the interest is ultimately cleared by the court in the jurisdiction where the registrar is based, this can take several months and may effectively block the disposal, through sale or lease, of the asset.

The Irish courts have been commendably robust in dealing with such abuse in relation to the operation of the Aircraft Protocol, through the use of the legal concept of slander of title, but this remains a practical problem. Accordingly, in the latest issue of the regulations (7th ed. 2016) applying to the international registry for aircraft in Dublin (which will surely be followed by the regulations applicable to the international registry for railway rolling stock in Luxembourg), some safeguards have been introduced (Section 5.4). In particular, any registering party has been required, in addition to providing the usual information to effect the registration, to (i) give the name of the Contracting State under whose laws the registrable non-consensual right or interest has been conferred (ii) identify which category of registrable non-consensual right or interest, as listed in the declaration of such Contracting State, is relied upon, (iii) certify that the rights claimed are validly conferred under the laws of that Contracting State and that all of the registration information being provided to effect the registration is accurate; (iv) submit documentary evidence of the non-consensual right or interest being registered; and (v) submit itself to the jurisdiction of the courts of the place in which the registrar has its centre of administration in relation to legal action with regard to the registration, and (vi) to indemnify the registrar for all costs it incurs from the legal action unless the validity of the registration is upheld. In another helpful provision of the latest issue of the regulations, the registrar is released from its duty of confidentiality in respect of the documentary evidence (Section 9).

Apparently, the obvious abuse has reduced but has not been not eliminated. There remain some key open issues. What if the information provided is wrong? Does the registrar have to check this? What if the “documentary evidence” is not evidence at all? Can the court order the removal of the registered interest without addressing the substance of any claim? Does the registrar have a duty of care to check that at least prima facie there is a legitimate claim from the documentary evidence? If so, should the registering party's indemnity extend to the possible liability of the registrar in damages? What if the registering party has no assets, so the costs' indemnity undertaking is worthless, and what about the costs incurred by owner or financier having to go to court to protect its interest? Moreover, the release of the confidentiality obligation does not necessarily impose an obligation on the registrar to release the documentary evidence to affected parties. Abuse of Article 40 threatens the integrity of the international registry. These issues need to be

addressed in forthcoming editions of the regulations applicable both to the registries in Dublin and Luxembourg.

### **Cape Town Convention Conference 2018**

The annual conference in Oxford on the Cape Town Convention will take place on 12<sup>th</sup> and 13<sup>th</sup> September. RWG members regularly attend this conference. For more information click [here](#).

### **Save the date – Hungary stakeholder seminar**

A stakeholder seminar on the Luxembourg Rail Protocol will take place in Budapest at 9 a.m. on 6<sup>th</sup> September. To pre-register please write to us [here](#).

### **Save the date - Madrid stakeholder seminar**

The RWG Spanish Contact Group will be running a special seminar on the Luxembourg Rail Protocol in Madrid on Wednesday 17<sup>th</sup> October between 4 and 7 p.m. More details will be distributed nearer the time with registration information but please put the date and time in your diary now if you can attend. To pre-register please write to us [here](#).

### **Save the date – East AfricaRail 2018**

The East Africa Rail Conference will be taking place this year in Nairobi 21<sup>st</sup>/22<sup>nd</sup> November 2018. The RWG will again be negotiating a special deal for its members. More information [here](#)



### **“The Railway Market in Africa and the Middle East” – special offer for members**

SCI Verkehr, has just published a new study on the market for railway technology products and services in Africa and the Middle East. Rail Working Group members are entitled to purchase the study at a 10% discount if you mention your membership during the order process. To place an order click [here](#).

### **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](#)

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

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



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

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