

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 Rail Protocol to the Cape Town Convention. You can be added onto the mailing list by clicking on "subscribe" at the bottom of the newsletter.

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[Kenya about to ratify](#)

Government officials in Nairobi have confirmed that the Republic of Kenya is about to move forward to ratify the Luxembourg Rail Protocol. The political and legal approvals had been given and it is understood that the only open issue is to find the appropriate date for the formal ratification ceremony in Rome. Kenya will be the 4th contracting state for the Protocol and, with this ratification, the first precondition for the Protocol to come into force, will have been fulfilled. The secretariat to the Supervisory Authority still has to certify that the international registry, which will be officially based in Luxembourg, is ready to go into operation. It is anticipated that this certification will only be given next year.

AfricaRail 2019

Soteri Gatera Senior Economic Affairs Officer in the Private Sector Development and Finance Division at the UN Economic Commission for Africa, gave a keynote presentation at AfricaRail 2019 looking at the special role that the railways will play in the future in Africa. "Moving passengers and freight onto rails is vital for environmental, social and economic reasons" he said, and he particularly referenced the Luxembourg Rail Protocol as being a vital component of the development of the rail sector in Africa in the future. South African transport minister, H.E. Mr. Fikile Mbalula also gave a keynote speech at the conference and the implementation by South Africa of the Rail Protocol was specifically raised with him by delegate and RRA CEO, Mesela Nhlapo.

RWG chairman Howard Rosen also spoke at the conference on new business and finance models for the rail sector, focusing on operating leasing, underwritten by the Rail Protocol, as the way forward for many operators in Africa.

China looks again at the Cape Town Convention

RWG chair Howard Rosen has been invited to give a presentation on the Luxembourg Rail Protocol at high level symposium on the Cape Town Convention taking place at the China University of International Business & Economics (UIBE) in Beijing on 8th/9th of July. Dr. Hongbin Jiang, partner of the Capital Project and Infrastructures and Director of Corporate Finance, PriceWaterhouseCoopers Beijing, will also be giving a presentation on the Cape Town Convention System and its relevance for the Belt and Road Initiative.

Topic of the month: The Problem of Contiguity

Article 3 (1) of the Cape Town Convention states that it applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a contracting state. The aircraft protocol creates the possibility of an additional nexus, registered in an aircraft register of a contracting state but as there are no comparable title registries in the rail sector, this was not extended to the Luxembourg Rail Protocol. Another distinction however is that aircraft fly over states between the point of departure and the point of arrival. But rolling stock operating internationally will travel through other states. So where one or more of those transit states have not (yet) ratified the Luxembourg Rail Protocol, there's a potential problem. Will the lessor's or secured creditor's rights over the secured rolling stock under the Protocol be respected by states which have not ratified the Protocol (a non contracting state)? At first glance, the answer is "no" but it's not as simple as that.

A non-contracting state is not bound by the Protocol; it assumes no international law obligations and the provisions of the Protocol are not incorporated into its domestic law. A creditor's rights under the Protocol can be divided into the priority of its property interest against other claimants and the remedies it can draw on to enforce its rights. These should be examined in turn.

The registration of an international interest in the international registry, may have an effect *as a matter of domestic law* in the non-contracting state since the competing claimant claiming an interest in the financed asset has actual or constructive notice of the creditor's rights due to the fact that it is searchable at the international registry by anyone 24/7 through the internet. There could be other reasons why the creditor would prevail as a matter of domestic law. For example, if the debtor has become insolvent and the asset is not located in that non contracting state, the creditor's rights may be enforceable in the debtor's "primary insolvency jurisdiction" - where the debtor had its centre of activities or, if there is a secondary insolvency jurisdiction, in that jurisdiction if the assets are physically impounded there. Moreover, at the risk of stating the obvious, although the international interest can only arise if the debtor has its principal place of business in a contracting state *at the time the creditor's security is created*, the enforceability of the rights in other jurisdictions will depend on whether the transit state is a contracting state, *at the time the creditor's interest is challenged* - which could be much later.

Then if the creditor brings an action against the debtor in the courts or at an arbitral tribunal, as agreed in the contract, for repossession of the asset concerned, under the applicable law to the contract, the judgment or award, respectively, may be enforceable under existing international treaties or, for the EU, a Regulation, in a non-contracting state, unless the laws of the non contracting state give a priority to a local claimant (most likely a government or government agency claim). In addition, local courts often differentiate between creditor title rights in the affected assets and its contractual rights. So it could be easier to enforce the creditor's position if it is the actual legal owner the assets concerned (for example a lessor that is also the owner of the assets) as opposed to an intermediate lessor or where the owner is the debtor and the creditor is the secured party.

There may also be practical considerations. If the affected rolling stock moves back into a contracting state, the creditor may then also be able to reclaim its security under the terms of the Protocol as incorporated into the law of that state. Historically, a creditor that (of course) does not have possession of the rolling stock would struggle to establish where the equipment is in real time. In the future, this will be different. The development of asset tracking technology, combined with the unique vehicle identifier (URVIS) created under the Protocol, will facilitate a creditor being able to design its best strategy to arrest or attach its assets as they move around the rail system.

But this is not the ideal solution. States should adopt the Protocol on a regional or continental basis, also co-ordinating on a common strategy in relation to the opt-in and opt-out declarations, in order to ensure as much uniformity as possible in relation to the treatment of secured creditors across contiguous states.

Pan African Contact Group

The business activities of many of our members both in Africa and outside of Africa extend beyond one specific jurisdiction on the continent and as a result they have an interest, as operators, manufacturers or financiers, in benefiting from the adoption of the Rail Protocol by many countries across the continent. Governments increasingly understand that the expansion and equipping of African railways is an essential part of the African Continental Free Trade Area and a sustainable development agenda. Accordingly, the RWG is now setting up an extended regional contact group for sub-Saharan Africa. It will focus on interaction with local stakeholders and governments in relation to the adoption and implementation of the Rail Protocol across sub-Saharan Africa, liaise with continental African organisations such as the African Union and the UN Economic Commission for Africa, as well as provide an excellent network for its members. Membership will be open to representatives of RWG members worldwide as well as members of industry associations which are members of the RWG. There is no cost and group meetings will be by telephone or video conferencing. If you would like to become a member of this new group please contact us at info@railworkinggroup.org.

Save the date – Cape Town Convention Academic Project Conference 2019

This year's conference will be held in Oxford on 10th/11th September 2019. As will be seen from the [draft programme](#), there will be a major discussion of the Oceanair litigation in Brazil. Fundamental Cape Town Convention issues are present in that case, including the interpretation and application of its substantive and cross border insolvency provisions. Oceanair is the first large scale insolvency in which the treaty plays a central role. With the Diplomatic Conference coming up in November this year, there will be two sessions on the MAC protocol: one looking critically at provisions in that protocol that are based on those in the other protocols, and the other looking at the relationship between the MAC protocol and domestic secured transactions law. There will also be a session on the interpretation of the Cape Town Convention in the various language versions, and a discussion of the CTC Compliance Index.



FACULTY OF LAW

Subscription discount for RWG members for “Railways Africa”

Rail Working Group members are entitled to purchase the South African online publication “[Railways Africa](#)” at 25% discount off R6500 - place promo code *railworkinggroup2019* when checking out. The code expires at the end of 2019.

“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 announce 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](#).



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