

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.

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[Debating the Protocol in Spain](#)

The RWG Spanish Contact Group ran a special stakeholder seminar on the Luxembourg Rail Protocol in Madrid on 17th October. Amongst the speakers were the new Secretary General of UNIDROIT, Professor Ignacio Tirado, Deputy UNIDROIT Secretary General Professor Anna Veneziano, Registrar Designate Liz Hirst, Professor Teresa Rodriguez de las Heras Ballel from the University Carlos III de Madrid and RWG Chairman Howard Rosen. Each speaker looked at a different aspect of the Protocol and its particular implications for Spain, bearing in mind the developing standard gauge rail links with France and the rest of Europe.

RWG response to Irish Consultation

The Irish Government is conducting a detailed review on a revised strategy for its international financial services sector. As part of that review, it issued a consultation document to the public calling for responses as to the best way for the financial services sector in Ireland to develop in the coming years. The Rail Working Group submitted a detailed response, arguing that the Cape Town Convention as well as its various protocols, including the Luxembourg Rail Protocol, should be an important part of the financial services strategy for the Republic of Ireland in the coming years. You can see the RWG detailed submission [here](#).

1st “Ethiopia Railway Summit”

The 1st “Ethiopia Railway Summit” was successfully held in Addis Ababa from 17 to 18 September 2018. 91 delegates from 19 countries, representing 47 different governmental institutions, multilateral organizations and private companies took part in the rich presentations and discussions about current and future opportunities in Ethiopia’s striving railway sector.

H.E. Semegn Wube, State Minister, Transport and Communications Sector at the Ministry of Public Enterprises, Ethiopia, opened the Summit saying that it takes place “at an opportune moment as we are moving towards privatization of major enterprises and new forms of partnership in the railway sector”, inviting participating companies to become a part of Ethiopia’s fast-growing railway sector. Subsequently, Dr. Birhanu Beshah, CEO, Ethiopian Railways Corporation, highlighted the great achievements of Ethiopia’s first light rail transit system in operation in Addis Ababa since 2015 and first cross-border electrified standard gauge railway line connecting Addis Ababa to the Port of Djibouti since 2017.

Soteri Gatera, Chief Industrialisation and Infrastructure at the UN Economic Commission for Africa gave a detailed presentation on the Luxembourg Rail Protocol. This was focused specifically on the promotion of private capital to fund the expansion of rolling stock acquisition and manufacturing in Africa.

Explaining the benefits of the Protocol in Dublin

At the 2018 European Transport Conference which took place in Dublin this month a detailed presentation was given by Andrew Meaney, Partner and Head of Transport for Oxera Consulting LLP and Howard Rosen, Chairman of the RWG. The speakers went into some detail on the methodology of the recent studies published by Oxera in assessing the micro economic benefits of the Protocol. At the same time a detailed paper was published and this may be found [here](#).

Topic of the month: Who are you going to tell?

Whilst the debtor and the creditor are the main players in the Convention and the Luxembourg Protocol, there are a group of actors who appear on the stage from time to time and who have an important role to play when a creditor seeks to enforce its claim. These are the “interested persons”.

Article 1 (m) of the Cape Town Convention defines “interested persons” as

"(i) the debtor;

(ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(iii) any other person having rights in or over the object”

Article 1 (j) specifies that a “debtor” is a “chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest”

This means that the composition of this group is wide but there are two classes of interested persons.

Under Article 8 (4) of the Convention, as modified by Article VII (4) of the Luxembourg Protocol, a chargee (the creditor to whom the asset is pledged or charged under a security agreement) proposing to sell or grant a lease of an object as a result of a default must give at least 14 calendar days’ prior written notice of the proposed sale or lease to (a) interested persons specified in Article 1(m)(i) and (ii); and (b) interested persons specified in Article 1(m)(iii) (i.e. any other person having rights in or over the object) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.

Similarly, in Article VII, the Luxembourg Protocol introduces a further remedy for the chargee to procure the export of railway rolling stock after a default. But again, the same rules apply in terms of notice.

There are some practical issues. How does the chargee know who to notify and what happens when the notice requirement reverses?

It has to be assumed that it is reasonably easy to identify the debtor although there could be concealed debtors where the security interest is not, or cannot be, registered. The debtors could even be the grantors of the guarantors will surely be known to the creditor giving notice (although presumably guarantors do not include issuers of letters of comfort and other documents which stop short of being a guarantee).

But “any other person having rights in or over the object” is a broad category. These are not necessarily rights registered anywhere (especially bearing in mind that, unlike the aircraft sector, there are no national registries for ownership or property rights in rolling stock). The rights may accrue under national law or even by being non-registrable non-consensual rights or interests under Article 39 of the Convention. The Convention and the Protocol try to solve this dilemma by effectively placing an obligation on “any other person” to notify the chargee of its interest within a reasonable time prior to the sale or lease by the chargee. So the party entitled to notice, has to first give notice of its interest to the creditor! But will those parties know of the default or of the intention of the chargee to take possession of and remarket the rolling stock? Will they know if there is an intention to export the equipment? Not necessarily.

One solution would be for “any other person” to automatically notify the chargee of its interest as soon as it becomes aware of the chargee (which means regular searches in the registry if this information is not provided by the debtor) regardless of any default by the debtor. Whether this is a reasonable time prior to the sale or lease (because it is made too far in advance) would be for a court to decide although this hopefully would be decided in favour of the notifying party as the intention of the provision is to prevent unreasonably short, not unreasonably long, notice. But what if no notice is given by such person to the chargee and the chargee knows or ought to know about that person’s interest? If the interest is registered somewhere could this be construed as constructive notice? The better view is to take the wording of the definition at its literal interpretation; the alternative is potentially chaotic. Nonetheless, it would be prudent for any repossessing chargee to notify any other person having rights in or over the rolling stock if the chargee has actual knowledge of that person’s claim on the asset being repossessed and remarketed.

Save the date – East AfricaRail 2018

The East Africa Rail Conference will be taking place this year in Nairobi 21st/22nd 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 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](#).

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

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

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