

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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New Roland Berger Study – Governments still finance nearly all railway equipment in Europe

The second part of a new study by consultants Roland Berger, commissioned by the Rail Working Group, was published on 27th January. It shows that governments, or their state owned agencies across Europe, underwrite 88% of railway rolling stock procurement. The Study, now expanded to cover Eastern Europe, analyses by country and sector 370 rolling stock procurement projects in 19 countries across Europe over the years 2011-2013, costing in total on average EUR 13.3 billion per annum. However EUR 11.645 bn. (88%) representing 303 of 370 projects (82%), was directly or indirectly financed by governments. A full copy of the study may be found [here](#).

The expanded study reaffirms the clear correlation between the deregulation of rail markets and private finance: the more markets are opened up, the greater role private capital plays in financing new railway equipment. “The Study also shows that, with limited exceptions, private finance has only played a role in procurement of freight equipment and there are few opportunities to bring in private finance for passenger rolling stock outside of the UK” commented Roland Berger partner Andreas Schwilling, one of the authors of the report. “This has to change as governments look more creatively to save precious public resources” he adds.

The new study was launched at a special event at the British House of Lords on the Luxembourg Rail Protocol (see below).

The Luxembourg Rail Protocol – A key element securing the future for the railways

At a special briefing on 27th January, organised by the Rail Working Group at the House of Lords in the British parliament, the Luxembourg Rail Protocol was introduced to the UK rail and finance communities. Attendees included key rail companies, banks, lessors as well as Transport Select Committee chair Louise Ellman MP and other MPs. The speakers all made it clear that in a liberalising rail market in Europe, the Luxembourg Rail Protocol was an essential tool for both the private and public sector for the railways in the future.

Lord Berkeley, chairman of the Rail Freight Group, told the meeting that the Luxembourg Protocol was an essential part of an open and competitive rail market.

The Protocol's two sponsoring organisations were both represented by respectively Anna Veneziano, Deputy Secretary General of UNIDROIT, the International Institute for Unification of Private Law and Francois Davenne, the Secretary General of OTIF, the

Intergovernmental Organisation for International Carriage by Rail.

UK seminar on the Protocol to take place on 1st March

A half day industry seminar on the Luxembourg Protocol will take place on 1st March in London. Speakers will include Professor Sir Roy Goode QC, Andrea Pearson from the UK Department for Transport, UNIDROIT Deputy Secretary General Anna Veneziano, Preparatory Commission co-chair Peter Bloch, and Registrar-Designate Elizabeth Hirst and RWG Chairman Howard Rosen.

Registration for UK Seminar

Stakeholders call on South African government to move forward with the Luxembourg Protocol

In an unprecedented move, major companies in South Africa have written to ministers in the South African government urging it to adopt the Luxembourg Rail Protocol.

In their letter, addressed to Transport Minister Ms Dipuo Peters, Minister of International Relations and Cooperation, Ms Maite Nkoana-Mashabane and Dr Rob Davies, Minister of Trade and Industry, 10 signatories, comprising key local stakeholders including Rand Merchant Bank, Grindrod, GE and EMD, pressed the Government to ratify the Protocol at the earliest opportunity. "The Protocol will facilitate the private sector providing Transnet, PRASA and other operators with more and cheaper capital for their extensive future procurement programmes and attract much needed investment in the rail sector from abroad", the letter stated. "It will also make it easier for South African-based manufacturers to promote exports of railway equipment to other parts of Africa" they added.

The letter comes at a time of very heavy investment in rolling stock in South Africa and a growing need for new railway equipment across Africa as part of the African sustainable growth agenda. In each case however procurements will be seriously constrained by the lack of public sector funds. The complete letter to the ministers may be found [here](#).

Topic of the month: Debtor insolvency

One of the most critical issues to secure a creditor is its rights in the case of insolvency of the debtor (which for these purposes includes the lessee under a lease agreement).

The central questions here for any creditor/lessor are not just whether it can reposes the asset but whether it can do so quickly since every day where the asset cannot be repossessed, assuming payments are no longer being received from the debtor, is a real loss to the creditor. The greater the risk of loss, the more expensive the financing as this will be built into the creditor's risk assumptions.

Article IX of the Luxembourg Protocol creates essentially four alternatives for a Contracting State. Firstly a state can decide to rely on, or amend, domestic legislation. In some cases indeed domestic legislation may be very favourable to the creditor but otherwise a state will need to consider making a declaration adopting one of three of alternatives set out in Article IX.

Alternative A, which broadly follows Alternative A of Article XI of the Aircraft Protocol, sets out a clear obligation on any debtor/insolvency administrator to give possession of the railway rolling stock to the creditor by no later than the earlier of the end of a pre-set waiting period (as set out in a state's declaration) or as required under domestic law, and until repossession the debtor/insolvency administrator must preserve and maintain the rolling stock. If the debtor/insolvency administrator has cured all defaults (other than the opening of the insolvency proceedings) and has agreed to perform all future obligations under the credit or lease agreement prior to the date of repossession then it is allowed to retain possession. But it can only use this right once. Any further default (most likely failure to make further payments on time under the relevant agreement) would give a new right to the creditor to obtain repossession of the rolling stock and effectively, without the creditor's consent, it will not be possible for the debtor to cure the default to preclude repossession.

Alternative B creates a much more softer, pro-debtor, regime where, on the occurrence of an insolvency related event, the debtor can either cure the default (other than the insolvency itself) or will give the opportunity to the creditor to reposes the rolling stock in accordance with applicable law which will probably mean an application to the courts. Alternative B also follows the precedent in the Aircraft Protocol.

Alternative C does not appear in the Aircraft Protocol and we see it as a modified version of Alternative A still essentially protecting the creditor's interest but giving the right for the debtor to apply to the court for a suspension of the right of repossession but only subject to "all sums accruing to the creditor during the suspension period being paid" and all other debtor obligations being complied with during that period. In other words the debtor can only ask a court to restrict the creditor's repossession rights on the basis that the creditor continues to receive the economic and other contractual benefits it would have had, had the credit or lease agreement not been terminated. There are also some strict rules on timing to be sure that a creditor cannot be frustrated by a court taking too long to make any decision. Again, pending repossession, the debtor has an obligation to preserve and maintain the rolling stock. Again also, like Alternative A, any suspension of repossession can only be requested once.

The Rail Working Group recommends the adoption of Alternative A with a short time period for curing a default or, if this offends against public policy, Alternative C. But like with the Aircraft Protocol, if there is suitable domestic legislation which gives the creditor an immediate repossession remedy on debtor insolvency, such as section 1168 of the US Bankruptcy Code, then we will be perfectly happy with no declaration being made.

There is one further complication at the EU level in relation to Article IX. Because of the EC Regulation on insolvency, member states (other than Denmark which has opted out) cannot actually make a declaration implementing one of the alternatives set out above but can only incorporate them analogously directly into domestic law through domestic legislation.

4th Africa Railway Summit – privileged rates for RWG members

The 4th African Railway Summit will be taking place on 25th/26th February 2016 in Johannesburg, South Africa. RWG Chairman Howard Rosen will be presenting a paper at the Summit. The RWG has negotiated a 20% discount for its members. For more information about the conference please see [here](#) and RWG members should mention their status when applying for tickets.

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](#).

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

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