

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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[UNIDROIT hosts symposium on Luxembourg Rail Protocol](#)

UNIDROIT hosted a special symposium on the Luxembourg Rail Protocol on 30th November.

The event was open to government officials and included presentations from the Secretary General of OTIF, Mr. François Davenne, the Secretary General of UNIDROIT, Mr. José Angelo Estrella Faria as well as the two co-chairs of the Preparatory Commission, Peter Bloch and Mervi Kaikkonen. Elizabeth Hirst, the Registrar Designate, as well as RWG Chairman Howard Rosen, also made presentations and Howard Rosen also chaired a panel session on the benefits of the Protocol which included presentations by Olivier Desfontaines, the Head of Rail Finance at Crédit Agricole and Roberta Odoardi, a rail specialist from PricewaterhouseCoopers.

[UNIDROIT Press release](#)

[OTIF Report](#)

[Luxembourg in Vienna](#)

The Rail Working Group, through its chairman Howard Rosen gave a presentation on the Luxembourg Rail Protocol at the European Rail Freight Day which took place in Vienna on 9th December. This annual event is organised jointly by the European Commission and RNE (Rail Net Europe) and took place at the stately Palais Ferstel. Attendees included senior officials from the European Commission representatives of rail freight operators and infrastructure managers.

In his presentation, Mr. Rosen highlighted the fact that the Protocol brought specific advantages to infrastructure managers making it easier for them to identify rolling stock using tracks managed by them.

You can see all the conference presentations [here](#).

[The real cost to manufacturers](#)

There are some misunderstandings amongst the manufacturing community as to the real cost of the Luxembourg Rail Protocol for them. On the one hand, it will bring some clear economic advantages in making it easier for them to sell their products as more and cheaper private finance becomes available as a result of the Luxembourg Rail Protocol. We also expect the Protocol to have a positive impact on ECA support conditions for exports. However, the benefits depend on unique identification of the rolling stock and this will almost certainly mean attaching the unique rail vehicle identifier or “URVIS” number to railway equipment. Nonetheless, the cost will be nominal and this development will bring its own advantages. The Rail Working Group has now issued a detailed note summarising the costs and benefits for manufacturers, which may be found [here](#).

[Topic of the month: Pre-existing interests and the Rail Working Group’s sample “Luxembourg clause”](#)

As described in an earlier issue of Inside Track (see Issue 6), Article 60(1) of the Convention states that “[u]nless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.” So, in principle, any lease or security interest created in relation to an item of railway rolling stock before the Luxembourg Rail Protocol comes into force in a Contracting State retains its priority regardless of any subsequent registration after the Protocol comes into force.

However, Article 60(3) of the Convention opens up the possibility of a Contracting State making a declaration bringing pre-existing interests under the Convention “not earlier than three years after the date on which the declaration becomes effective.” Over and above this, the mothers and fathers of the Luxembourg Rail Protocol felt that there were good public policy reasons to bring pre-existing rights within the Cape Town system in a relatively timely manner. In this way, the International Registry can be as inclusive as possible and creditors and searchers, after a suitable transition period, will not have to look back to pre-existing rights overreaching what is registered. It is for these reasons that Article XXVI of the Luxembourg Rail Protocol replaces Article 60(3) of the Convention with a new paragraph and sets out how a Contracting State should, if it makes a declaration, deal with pre-existing interests. In particular, pre-existing interests must be brought under the Convention no later than ten years after the date on which the Contracting State’s declaration becomes effective.

It is obvious from the above that creditors must ensure re-perfection of their lease or security interests in the International Registry within the time-period specified in the relevant Contracting State’s declaration. Such registration will preserve the priority of the pre-existing right or interest but will not convert the interest into an international interest. Further still, it may even be advisable to execute a new agreement replacing the existing lease or security agreement. This will create a fresh international interest and allow the creditor to take advantage of the additional rights which flow to it under the Convention and the Protocol. While parties to a transaction entered into prior to the effective date of the Rail Protocol in the applicable jurisdiction could, at the outset, agree in the documentation that such transaction shall constitute an international interest following the Rail Protocol coming into effect in such jurisdiction, it is unlikely that such a provision would have the desired effect. The Rail Working Group has therefore designed wording requiring the lessee to re-execute a lease agreement entered into prior to the Rail Protocol coming into force in the jurisdiction where the lessee has its principal place of business (The suggested wording can be found [here](#)). In addition, this sample “Luxembourg Clause” also anticipates actions which, from a lessor’s perspective, should be taken by the lessee once the Rail Protocol is in force (e.g. affixation of unique identification numbers issued by the International Registry on the relevant rolling stock). Subject to a limited number of alterations, the wording suggested by the Rail Working Group can also be used for a loan or security agreement. Although the sample “Luxembourg Clause” is designed by reference to an agreement under English law and may need to be adapted to different laws and circumstances, it is intended to help lawyers when facing the task of ensuring that pre-Convention transactions reap the full benefits of the Convention after its effective date in the State where the debtor is situated. This is particularly important in the rail sector as most items of rolling stock are long-lived assets, with a useful life of 40 years in

some cases. Admittedly, in some cases there may be prudent reasons not to apply the Rail Working Group's "Luxembourg Clause", such as required governmental approvals, tax or accounting treatment, bankruptcy preference issues and the like.

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](#).



Our next issue will be published towards the end of January. The board of the RWG wish all of its members, readers and supporters a wonderful festive season and a happy, successful and Protocol ratifying New Year.



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