

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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[British consultation period to begin shortly](#)

The United Kingdom signed the Luxembourg Protocol last year and we expect the Department for Transport to issue its public consultation document in the coming weeks. This will then give the rail community the opportunity to comment on the Protocol as, hopefully, it proceeds towards ratification by the UK.

RWG publishes a revised Declarations Matrix

The RWG has just published a revised Declarations Matrix where we make additional recommendations on the declarations to be made by ratifying states. We have now emphasised that it is particularly important that ratifying states do not omit to make a declaration concerning Article 54 (2) of the Convention. Specifically this relates to whether a state wishes to dictate that certain remedies are only exercisable with the leave of the court. The RWG recommends that the declaration which must be made (it is mandatory) should state that the remedies do not need leave of the court since this would create a significant additional barrier for the credit of exercising its rights. But failure to make a declaration at all in relation to Article 54 (2) could result in the ratification being rejected by the depositary, UNIDROIT. The revised matrix may be found [here](#).

Swedish Government about to close its consultation period

The Swedish Government's public consultation for comments on the Luxembourg Protocol will close on Friday, 3rd February. Various organisations have filed representations to the Swedish Government. After the period of reflection the Government will then set out the legislative path for the adoption of the Protocol. Unusually the Swedish Government decided not to sign the Protocol but to proceed directly to ratification (as they are entitled to do).

Luxembourg to Mauritius

The Rail Working Group together with the Mauritius Board of Investment will be running a half-day workshop on the Luxembourg Protocol in the morning of the 7th March. RWG Chairman Howard Rosen will be leading the workshop which will be open to both government and stakeholders.

Mauritius is a key financial services centre in Africa. Many finance transactions into Africa are run through Mauritius and there are rail leasing companies which are based there. So if Mauritius adopts the Protocol then any secured refinancing by those leasing companies will be protected by the Protocol.

For further information about the event, please contact us at: info@railworkinggroup.org.

AfricaRail 2017

The annual exhibition and conference, taking place in Sandton, Johannesburg, South Africa will take place this year on 13th – 14th June. This is one of the key events for the African rail community throughout the year and, as usual, it will have a broad spread of expert speakers. As usual, there is a special arrangement for our RWG members. For more information contact us at: info@railworkinggroup.org.

Topic of the month: The Registrar and the courts

Article 44 (1) of the Cape Town Convention makes it clear that the only courts which have jurisdiction to award damages and make orders against the Registrar are the courts in which the Registrar has its centre of administration. For the Luxembourg Protocol therefore jurisdiction will be with the Luxembourg courts but the interesting question, which has already been confronted in relation to the aircraft protocol, is when do the courts have power under the Convention to make such orders?

Essentially, there were two circumstances where the courts have authority.

Article 25 of the Convention requires a creditor to remove a registered security interest from the International Registry where the secured obligations have been discharged (i.e. usually where either the lease has come to an end or where the secured loan has been repaid). If the creditor does not do this automatically, the debtor can demand this by sending a written notice to the creditor as its address stated in the registration (Article 25 (1)). Similarly, Article 25 (4) provides that where there is an incorrect registration of a security interest or it should not have been made, the beneficiary of such interest must discharge or amend the registration when the debtor sends a written demand to the beneficiary as its address stated in the registration. If the written demand in each case is not complied with, then the debtor is entitled to go to the court (for the Rail Protocol the Luxembourg court) for relief. Article 44 (2) then states that the Luxembourg courts can direct the Registrar to discharge the registration where the beneficiary or creditor has failed to respond to a demand and that person either ceases to exist or cannot be found. It is not clear whether the court has jurisdiction to make an order where such person does respond but not in a way that the debtor wishes. But the assumption is that the court will still accept jurisdiction in this case to look at the issue, to see if the creditor or beneficiary correctly responded and still make an order against the Registrar if it considers that the registration should be removed.

In addition, the Luxembourg court will be entitled to enforce an order made by another court of "competent jurisdiction" requiring a party to amend or discharge a registration. So, for example, if there is a lease contract under English law and the English courts have jurisdiction and make an order requiring the lessor to discharge the interest from the International Registry, the Luxembourg court will enforce that order by making a direction against the Registrar to amend the registry entry accordingly (Article 44 (3)).

The Article 44 (4) makes it clear that, otherwise, no court may make orders or give judgements or rulings against or purporting to bind a new registrar. This can raise unexpected problems. For example if the party adversely affected by the registration is not the debtor but another interested party (perhaps even a creditor of the party who has the

benefit of the international interest registered at the international registry), there is no jurisdiction as such for the court to make an order against the Registrar. Similarly, there may be a problem where an interested party is adversely impacted by a registration of a non-consensual right of interest pursuant to Article 40 of the Convention (for example a mechanic's lien) where the affected party has no position as debtor to require deregistration of this interest either pursuant to Article 25 or under contract.

The Irish courts have reacted to this problem innovatively, effectively taking the view that the maintenance of a registration of an international interest at the international registry, where it should not be so registered, constitutes a tort under Irish law as a so called "slander of title" and this in turn gives the Irish courts the right to make a primary ruling on the substantive tort claim and, having made such ruling, can then direct the Registrar to enforce the decision of the court. It remains to be seen as to whether the Luxembourg courts will take such a creative approach to bridge this gap or whether Luxembourg procedural law will allow them to be innovative in this way.

[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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