

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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[RWG introduces the Luxembourg Protocol to CRRC](#)

On 8th February 2017 Howard Rosen, Chairman of the RWG together with RWG members PricewaterhouseCoopers and ING met Mr. Xi Guohua, the General Manager of CRRC Group, Vice President, Mr. Wei Yan and Legal Manager, Mr. Nie Yachao, to give

them a detailed presentation about the Luxembourg Protocol. The meeting took place at CRRC's corporate headquarters in Beijing. CRRC Corporation Limited is the largest manufacturer of rolling stock in the world. It was formed on 1st June 2015 through the merger of China CNR Corporation and CSR Corporation and is publicly traded.

Aside from providing a new legal system underwriting private or institutional finance for rolling stock within China, the Protocol, when adopted outside of China, will protect Chinese operators and their financiers when their rolling stock is running outside of China (particularly important as the "one belt one road" project develops) and will also generate potentially a new source of finance for Chinese manufacturers exporting rolling stock.

China has adopted the Cape Town Convention and the Aircraft Protocol and the RWG urged Mr. Xi and his team to press the Chinese government to move forward with the adoption of the Luxembourg Rail Protocol.

RWG sets up China Contact Group

Following the detailed discussions earlier this month with the CEO of CRRC in Beijing, the RWG has now established a contact group for the People's Republic of China. This is designed to work locally with both industry and government on our promoting the adoption of the Luxembourg Rail Protocol by China. The initial membership list may be found [here](#).

Malta on board

The Maltese government is taking the first step in the adoption of the Luxembourg Rail Protocol. Earlier this month, the Minister for Transport authorised the required decree to endorse signature of the Protocol and the formal lodging of the signature at UNIDROIT is expected to take place in the coming weeks.

Talking railways in Mauritius

On March 7th, the Mauritius government will be hosting a half day seminar on the Luxembourg Rail Protocol in Port Louis. Speakers will include RWG Chairman Howard Rosen, Thierry Koenig from ENSafrica and Jean-Eric Sauzier from BLC Robert & Associates Ltd. PWC will also be giving a presentation on the tax aspects of leasing rolling stock into Africa from Mauritius.

Although Mauritius does not currently have an operating railway, there are plans for a new line. Nonetheless Mauritius, as a major financial services centre, is a well-known and highly regarded base for leasing and finance companies financing rolling stock in various

parts of Africa. So the Protocol will be important for Mauritius when local leasing and finance companies look to refinance their positions and obtain credit on the security of rolling stock operating in other parts of Africa. For more information about the seminar, contact info@railworkinggroup.org .

Dates announced for the 6th Annual Conference of Cape Town Convention Academic Project 2017

The 6th Annual Conference of the Cape Town Convention Academic Project will take place in Oxford on 12th/13th September. Each year top professors, academics and practising lawyers come together to discuss key legal issues arising from the Cape Town Convention itself and its various protocols. For more information please click [here](#).

New key work on the Cape Town Convention published

Springer books have just published “Implementing the Cape Town Convention on the Domestic Laws on Secured Transactions” edited by Professor Souichirou Kozuka, Professor of Law at Gakushuin University in Tokyo. The distinguished contributors to the book examine the Cape Town Convention from a perspective of current securities law in 18 different countries and then the book takes a practical look at each of the three Protocols.

Topic of the month: Floating charges and the Protocol

A common component of a corporate finance package is that the creditor demands a floating charge over the debtor’s assets which only crystallises in relation to the assets then in the ownership of the debtor at the time when an event of default occurs. This is designed so that the debtor has full flexibility to deal with its assets without requiring the consent of the creditor before using or even disposing of them. What is the position of the creditor holding a floating charge over railway rolling stock acquired after the creation of the charge and then separately financed?

Article 7 of the Convention sets out the four formal requirements for constituting a security interest as an international interest covered by the Cape Town regime. It has to be in writing; it has to relate to an object of which the chargor, conditional seller or lessor has power to dispose; it must enable the object to be identified in conformity with the Protocol; and, in the case of a security agreement, enables the secured obligations to be determined.

Article V of the Luxembourg Rail Protocol focuses on Article 7 (c) of the Convention,

identification of the railway rolling stock. Under Article V, it is sufficient to describe the rolling stock either by item, by type or by statement that an agreement covers all present and future railway rolling stock (or a modified statement where certain specific items or types of rolling stock are excluded). So even if the equipment is not owned by the chargor at the time the charge is created, an international interest will be created in that after acquired equipment once it is owned by the chargor, the conditional seller or the lessor. There is no need for there to be any further act of transfer to ensure that the international interest flows through to the creditor (chargee). So at the time the floating charge is created, it is not necessary to be able to uniquely identify the object, notwithstanding Article 2 of the Convention. This then gives the creditor the various rights and remedies under the Protocol in relation to after acquired property. By implication it loses these rights and remedies if the equipment concerned is sold prior to any crystallisation of the floating charge, again without any further act of the parties.

Accordingly the Protocol makes a clear distinction between the creation of an international interest and the more significant formalities required to enable that international interest to be registered. Article XIV, quite logically, makes it clear that once an international interest is to be registered, there has to be a unique identifier attached to the rolling stock or associated in the international registry with an acceptable identifier affixed to the rolling stock. This is necessary because otherwise the registrar would not know against which asset the international interest is being registered and parties searching the registry would not be able to identify assets which are subject to an international interest. Bearing in mind that, unless the parties agree otherwise, the first registration has priority over subsequent registrations of international interests in relation to a specific asset (Article 29 of the Convention), and this applies regardless of actual knowledge, the holder of the floating charge must consider carefully as to when it wishes to crystallise the charge to become a fixed charge on a specific asset where, as long as it is uniquely identifiable, the registration then becomes possible. The floating chargee may wish to provide for the registration of the international interest as soon as there is a crystallisation into a fixed charge. Possibly there should also be contractual provisions forcing a subordination of any subsequent registered international interest if the intention is that the initial financier takes priority.

However the creditor should not lose sight of the general provisions in Article 60 of the Convention concerning application of the Convention (as modified by the Protocol). If the floating charge was created before the Convention and the Rail Protocol came into force (i.e. it was not in force in the jurisdiction where the debtor or the lessee, as appropriate,

had its principal place of business at the time the floating charge was created) no international interest is created under Article 7. So a prudent creditor taking a floating charge over rolling stock at a time when the Protocol is not in force in that jurisdiction should be providing for re-execution of the floating charge as soon as it does come into force to ensure that it is holding an international interest in the current and after acquired property. Otherwise it may be a pre-existing interest which would give some interim protection to the creditor (see *Inside Track* 21) but otherwise limited rights under the Protocol.

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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