

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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### **France signs the Protocol**

On 3<sup>rd</sup> March France became the latest signatory of the Luxembourg Rail Protocol. At a ceremony at the UNIDROIT head office in Rome, the French Ambassador formally signed the Protocol and the RWG will be working closely with the French Government on taking the Convention and the Rail Protocol through to ratification.

### **Mauritius workshop on the Protocol**

On 7th March, the Mauritius Board of Investment hosted a half day workshop on the Luxembourg Rail Protocol in Port-Louis, Mauritius. The event was opened by Vinay Guddye, Head, Outward Investment, for the Mauritius Board of Investment and Harvesh Seegolam, Chief Executive of the Financial Services Promotion Agency. Thierry Koenig, the Head of ENSafrica:Mauritius introduced the event then RWG Chairman Howard Rosen as well as Jean-Eric Sauzier and Mushtaq Namdarhkan from BLC Robert & Associates Ltd as well as Anthony Leung Shing, a Partner of PricewaterhouseCoopers Mauritius, gave detailed presentations. The event was closed by Yvan Caril Jean-Louis, Principal State Counsel, State Law Office of Mauritius. See presentations [here](#).

### **New Roland Berger Study – Private financing playing a greater role for railway equipment procurement in Europe**

The Rail Working Group together with the consulting firm Roland Berger have published a new study examining the extent to which rolling stock procurement in Europe is, directly or indirectly publicly funded. The study analyses by country and sector 440 rolling stock procurement projects in 22 countries across Europe over the years 2013-2015, costing on average EUR 12.1 billion per annum. In that period, EUR 9.7 bn. was directly or indirectly financed by governments or state owned agencies with the balance, approximately EUR 2.4 bn, being provided by private financiers. There is a marked difference between Western and Eastern Europe. In Western Europe, private finance is accounting for 22% of total investment against 11% in Eastern Europe.

This new study follows an analysis of the period 2011-13 in a report published by the Rail Working Group and Roland Berger in January 2016. In the previous study, where total investment averaged EUR 13.3 bn. p.a., private finance made up only 12% or EUR 1.7 bn. p.a. and the latest report shows that this has grown dramatically to EUR 2.4 bn. p.a. in the years 2013-15. The share of projects involving private financing has increased considerably from 18% to 35%.

The revised study also 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.

[Detailed Roland Berger Study](#)

[Press release](#)

### **Symposium on The Luxembourg Rail Protocol in Beijing**

A Symposium on the Luxembourg Rail Protocol took place on 28 March 2017 in Beijing, organised by the Treaty & Law Department of the Ministry of Commerce of the People's Republic of China (MOFCOM) and hosted by the University of International Business and Economics (UIBE). The Symposium was opened by Mr. YE Jun (Deputy Director General, Treaty & Law Dept, MOFCOM), and Professor SHI Jingxia (Dean UIBE Law School), Mr LIU Keyi (Deputy Director, Domestic Trade Law Divisions, Treaty & Law Dept, MOFCOM). The speakers included the Secretary-General of Unidroit, Professor José Angelo Estrella Faria and Elizabeth Hirst, Managing Director, Regulis SA – the Registrar Designate of the International Registry under the Protocol as well as Professor Gao Shengpin, from Renmin University of China.

The Symposium was addressed to industry stakeholders and government officials and aimed at providing an understanding of the benefits of the Luxembourg Rail Protocol, its overall impact, the functioning of the Registry, as well as an assessment based on the Aircraft Protocol.

### **RWG publishes declarations' guidance in multiple languages**

With the publication this week of its recommendations in French on declarations by contracting states, the Rail Working Group has now completed its initial cycle of publishing recommendations in English, Spanish, Italian and French. In each case the recommendations are presented in two versions, one to cover the situation where the contracting state has neither ratified the Cape Town Convention nor the Luxembourg Rail Protocol, and one where it has already ratified the Convention. The sets of recommendations may be found at <http://railworkinggroup.org/documentation/rwg-briefing-papers/>.

### **Topic of the month: Preserving the Value of Rolling Stock during an Insolvency**

Where a debtor becomes insolvent and the creditor intends to take back possession of the rolling stock, it is important for the creditor to know that the rolling stock will be properly maintained in the interim period. This goes to the heart of the residual value and the opportunity to release or resell the rolling stock when it is returned to the creditor's

possession. While the funding documents or lease agreement may contain obligations relating to maintenance, some additional protections for the creditor can be found in the insolvency provisions in Article IX of the Rail Protocol. There are 3 alternatives for dealing with the insolvency of a debtor, but only two of which contain clear provisions for maintaining the value of the rolling stock.

Under Alternative A, Article IX(5)(a) requires the insolvency administrator or debtor (as appropriate) to preserve the railway rolling stock and maintain it and its value in accordance with the agreement until the creditor is permitted to take possession of the rolling stock under Article IX(3). This effectively allows the creditor to link the continued use of the rolling stock with the obligation to maintain and bring any action to meet the maintenance requirements as part of any proceedings under the Rail Protocol. This may have a significant time saving compared to bringing any general actions to meet repair covenants set out in the underlying agreement. Equally importantly, it would allow any handback procedures to be enforced, including the repair of any dilapidations as this goes to the heart of maintaining the rolling stock's value for the creditor.

Equally important for the debtor (and the operator of the railway rolling stock), Article IX(6) allows the railway rolling stock to continue to be operated during the period of insolvency provided arrangements are in place to preserve and maintain that railway rolling stock. A knock-on effect of this is that the debtor or insolvency administrator would have to ensure that maintenance facilities continued to receive sufficient funding to be able to carry out the relevant maintenance obligations. If the maintenance was insufficient then there is an argument that the creditor could apply through the courts to require a specific level of maintenance to be undertaken (using Article IX(5)(b)). An ongoing provision of maintenance is particularly important in the light of Article XXV, which allows the continued operation of rolling stock for services of public importance.

Article IX(6)(a) of Alternative C mirrors that of Article IX(5)(a) of Alternative A and requires the insolvency administrator or debtor (as appropriate) to preserve the railway rolling stock and maintain it and its value in accordance with the agreement until the creditor is permitted to take possession of the rolling stock under Article IX(3). Like Alternative A, Article IX(7) of Alternative C allows the railway rolling stock to continue to be operated during the period of insolvency provided arrangements are in place to preserve and maintain that railway rolling stock.

Under Alternative B, there is no specific obligation with respect to the maintenance of the railway rolling stock in the period from insolvency until the rolling stock is delivered up to the creditor. Given that the timely maintenance is necessary for preserving the value of the rolling stock, and its ability to be re-leased or sold once it has been returned to the creditor, such an absence of a maintenance obligation is likely to provide some cause for concern to a creditor. While it would still be possible to look at enforcing the maintenance covenants in the underlying agreement, this would be treated as a simple contract dispute and may take a significant amount of time for any dispute to be resolved through the courts, during which time the quality and structural integrity of the rolling stock is reduced.

The ability to use Article IX to support the maintenance of the railway rolling stock when the debtor is insolvent is another area of consideration which should be taken by a State when deciding which of Alternatives A, B or C it is intending to adopt. A level of certainty for a creditor on the maintained state of the assets it gets back is likely to have an effect on any risk premium associated with that finance.

#### **RWG supporting AfricaRail 2017 - special deal for RWG members**

The 20<sup>th</sup> AfricaRail 2017 conference will take place on 13<sup>th</sup>/14<sup>th</sup> June 2017 in Johannesburg, South Africa. Keynote speakers include Howard Smith, Operations Director, Crossrail, UK, Argent Chuula, CEO, COMESA & ACTESA, Zambia, Seth Bodnar, Chief Digital Officer, President Digital Solutions, GE Transportation and Jack van der Merwe, CEO, Gautrain Management Agency, South Africa. The RWG is an official media partner and RWG Chairman Howard Rosen will chair and present a paper at one of the streams at the conference. The RWG has negotiated a 15% discount for its members and RWG members should mention their membership when applying for tickets.



Register [here](http://www.terrapinn.com/africarail).

### **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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