

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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[Gabon becomes the first African State to ratify the Luxembourg Protocol](#)

On 4th April 2017 UNIDROIT accepted the Gabonese Republic's instrument of accession to the Luxembourg Rail Protocol. The Luxembourg Rail Protocol will enter into force when the conditions under its Article XXIII(1) have been satisfied. Gabon was a signatory to the Luxembourg Rail Protocol at the Diplomatic Conference in 2007 and becomes the first African nation to ratify the Protocol.

The G-20 Compact with Africa report

Following the G-20 Finance Ministers and Central Bank Governors' Meeting on March 17-18, 2017 in Baden-Baden, Germany, the [G-20 Compact with Africa report](#) was published as a joint report from the African Development Bank, the IMF, the OECD and the World Bank Group. It specifically lists the Luxembourg Rail Protocol (on page 46) as an example of government actions which will facilitate effective a sustainable domestic and international private investment in Africa.

Highlighting the Protocol's benefits for the US market

Earlier this month an article on the Luxemburg Protocol was published in the New York Law Journal entitled "Financing Rolling Stock; Luxembourg Rail Protocol Steams Ahead" written jointly by Barbara M. Goodstein and Howard Rosen. The article points out the current limitations under the US law of providing creditors and lessors with cast-iron security. In particular it focuses on the relatively unknown restrictions of the operation of Section 1168 of the US bankruptcy code and the problems arising from the current system of registering security instruments with the Surface Transportation Board. To access the article click [here](#).

Cape Town Convention Academic Project: 6th Annual Conference

The 6th Annual Conference of the Cape Town Convention Academic Project will take place 12th/13th September 2017 in Oxford (UK). Registration is now open and you can register [here](#). The draft programme may be accessed [here](#).

The Protocol on one page

RWG has produces a one page "elevator pitch" slide about the Luxembourg Protocol. It sets out its essential elements and will be useful for briefings to government ministers, other policy makers and government officials. You can download the slide [here](#).

Topic of the month: The Registrar's Liability under the Rail Protocol

Recent issues of Inside Track dealt with the supervision over the Registrar (issue 20) and its relationship with the courts (issue 22). This issue now focuses on the Registrar's liability as stipulated by the Cape Town Convention and the Luxembourg Rail Protocol.

As a starting point, Article 28(1) of the Convention provides that the Registrar is subject to strict and unlimited liability for errors and omissions. This standard also applies in relation to any malfunction of the international registration system that does not result from an event that was unavoidable and insurmountable even using best practices in the field of electronic registry design and operation.

The Aircraft Protocol, which is the only Protocol currently in force under the umbrella of the Cape Town Convention, makes no modification of this rule but in practice, the Registrar only has limited assets, including retained earnings, technical equipment and software. Reality will usually be that the liability can be met only to the extent of any insurance of such liability being in place. Article 28(4) of the Convention leaves it to the Protocols to determine the level of such insurance and the Aircraft Protocol stipulates that this shall "not be less than the maximum value of an aircraft object as determined by the Supervisory Authority".

The drafters of the Luxembourg Rail Protocol took a somewhat different approach, thereby attempting to reflect the reality right from the outset. As a consequence, they introduced a limitation of the Registrar's liability in Article XV(5) of the Rail Protocol, which is accompanied by specific insurance provisions in Article XV(7) of the Rail Protocol. It is important to deal with these issues separately.

Article XV(5) of the Rail Protocol actually specifies two limitations of liability. First, the Registrar can only be liable for damages "up to an amount not exceeding the value of the railway rolling stock to which the loss relates". As a consequence, the asset value is a limiting factor in the Registrar *liability* as opposed to the Aircraft Protocol system, where it is a factor in the *level of insurance* required in relation to the Registrar's liability. Article XV(5) of the Rail Protocol then continues: "Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations." As things currently stand, the Regulations for the International Registry will provide, initially at least, for such "greater amount" by creating a limitation on the Registrar's liability of 5 million Special Drawing Rights not on an annual basis but rather per event of loss. The liability only remains unlimited where the loss is caused by the Registrar's gross negligence or intentional misconduct (Art. XV(6) of the Rail Protocol).

Article XV(7) of the Rail Protocol then gives the Supervisory Authority discretion as to the level of insurance required in the light of the liability level it sets. The Regulations for the International Registry can be expected to initially require a coverage of not less than 5 million Special Drawing Rights per event of loss. The Registrar will be obliged to maintain such coverage through insurance or financial guarantee for the term of its appointment and under such conditions as set by the Supervisory Authority.

In essence, the liability limitation and the insurance requirement under the Rail Protocol

will thus be identical. In addition, there is no reason to preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention, and this is made explicit in Article XV(8) of the Rail Protocol.

RWG supporting AfricaRail 2017 - special rates for RWG members

The 20th AfricaRail 2017 conference will take place on 13th/14th June 2017 in Johannesburg, South Africa. Keynote speakers include Howard Smith, Operations Director, Crossrail; UK, Argent Chuula, CEO, COMESA & ACTESA, Zambia and Jack van der Merwe, CEO, Gautrain. 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](#).

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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