



RAIL WORKING GROUP

An association under Swiss law

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**INFORMATION SESSION
FOR POTENTIAL BIDDERS TO BE THE REGISTRAR
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**How the Registry Regulations will work
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The legal basis for the draft regulations for the International Registry pursuant to the Luxembourg Rail Protocol (the Rail Registry Regulations) comes from Article 17(2)(d) of the Cape Town Convention itself. This gives the Supervisory Authority the basis on which to issue initial and subsequent regulations. The Regulations govern the operation of the Registry and are therefore a core part of the overall régime within the Luxembourg Rail Protocol, namely the notice-based system facilitating third parties ascertaining potential rival interests in a specific item of rolling stock.

The draft Rail Registry Regulations are based on the Regulations issued by ICAO for the International Registry for Aircraft Equipment (the Aircraft Registry Regulations). This makes sense since both the Rail and the Aviation Protocols have a common basis and are essentially structured along the same lines, even though there are some variations between the two Protocols.

Secondly, it is important that the Rail Registry Regulations take into account the experience of the Aviation Registry. Nonetheless they cannot be identical since they are dealing with

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different types of assets, there are different issues on the identification of the respective assets and the comparative asset value and quantities differ in financings. In addition there are certain variances in the operation of the respective Protocols. For example, the fact that sales are pulled within the priorities' system under the Aviation Protocol but not under the Luxembourg Rail Protocol where notices of sale are purely informational.

In addition, new ideas develop because of the experience with the International Registry for Aircraft Equipment and we also have to take into account specific feedback from both governments and industry stakeholders.

The basic construction used however follows the aviation example. There is a set of detailed regulations issued by the Supervisory Authority with the involvement of Contracting States and, after its appointment, the Registrar, and then the Registrar issues and amends Registry Procedures with the consent of the Supervisory Authority (except in the case of emergencies).

Two related points should be made clear from the outset. The Cape Town régime is based on a notice system. The filing of the notice however does not of itself guarantee legal rights. These are still governed by local law. It simply places rival creditors/owners on notice as to what the respective *claims* are. By the same token, it is not the role of the Registrar to police parties' rights or even that the claims have been properly registered with the correct details. That is ultimately an issue between the parties. The Registrar's role in terms of verification therefore only relates to the identity of the parties registering. It is obviously essential that parties claiming specific rights who are seeking to register those rights are who they say they are. Accordingly, although the Registry will, pursuant to the Regulations, operate normally without human intervention, both the validation of the registered users as well as of any local entry and numbering systems are the responsibilities of the Registrar. In other words, it is responsible for the integrity of the system but not for whether the system is used correctly by third parties not underwriting claims of specific parties.

The Regulations, in common with the Aircraft Registry Regulations, clearly identify the different parties who may register interests as being the relevant transaction parties themselves or their duly appointed representatives. One distinction however with the comparable Aircraft Registry Regulations is that the intention will be to validate users directly through an electronic banking type of security token system rather than to create a system of designated computers where changes have to be notified whenever a different computer is being used by the registered user. It was felt by the Preparatory Commission that the rail sector needs a more flexible solution which will allow a registered user to be able to access the Registry from wherever he is, using security protocols but not tied to a specific computer.

With this preamble, I would like to look at three specific issues arising in the Rail Regulations, where there are clear differences in the circumstances and approach compared to the Aircraft Registry Regulations.

1. Designated entry points

Provision is made in Article XIII of the Luxembourg Protocol for registrations to be made through designated entry points. A Contracting State may stipulate that registrations of international interests, are effected through a local agency. Nonetheless this is not ideal. Unlike the Aviation Protocol, an international interest is not created if the asset over which an interest is created is located the Contracting State. It is solely the location of the debtor which is determinative. Depending therefore on where the debtor is located, there could be rival registrations coming into



the Registry on the same asset where the respective debtors are located in different jurisdictions, some coming through indirectly at national entry points and others not.

Moreover there is only a requirement for the designated entry points to be open during working hours. In a global economy where the debtor could be based thousands of miles away from the location of the asset, this could also cause complications.

An additional issue here relates to the security and correctness of the information passed through designated entry points. Section 13.2 and Section 14.1*bis* deal specifically with the need for the Registrar to agree on the procedures with a designated entry point so as to ensure that there is no risk of the system being corrupted or not operating correctly as a result of registration through a regional or national entry system.

Lastly, there is also the question of liability in relation to registrations made through national entry points. Unless Contracting States are prepared to guarantee to creditors that their rights will not be impacted adversely through this, I can see some scope for concern for creditors both in terms of delay in information being provided up to the International Registry by the designated entry point, as well as the accuracy of the information.

2. Asset identification

Unlike the aviation sector, there is no uniform descriptor for rolling stock across the world. In the aviation world generally, once a manufacturer's serial number is applied to an aircraft, it does not change (although I understand that even here there have been some difficulties with identification of engines when they are being rebuilt). Nonetheless, the issue is much more acute in the rail sector where there is a running number, which often describes the type of, and provides other information about, the rolling stock and which can change, and a manufacturer's serial number which normally will not, but nonetheless will be structured in completely different ways in different parts of the world. In addition, we know from the experience with the Aviation Registry that the entry of free form text has been one of the biggest problems in practice. This is almost inevitable if one accepts a variety of different descriptors for the same type of rolling stock whereas section 5.4 of the Rail Registry Regulations precludes this other than in exceptional situations.

Article XIV of the Luxembourg Protocol takes into the account that in certain cases a Contracting State may wish to use State or regional identification numbers, but the Registrar does need to be comfortable that these numbers do ensure unique identification of the rolling stock concerned (Article XIV(2)). Because running numbers have been developed with a different objective in mind, there is a concern that, if those numbers are changed (or recycled and applied to other rolling stock), this could cause considerable confusion in the finance market. Moreover, the numbering systems are often quite different in different parts of the world.

Clearly therefore, a uniform system of identifying rolling stock is preferable and on the other hand the Luxembourg Protocol itself provides for the Registrar to issue numbers (see Article XIV(1)). As a result, the Rail Working Group, together with other industry representatives, have been working intensively on a worldwide standard for a unique descriptor of rolling stock, an "URVIS"¹ number. The working paper setting this out was published today on the RWG website and may be found at

¹ Unique Rail Vehicle Identification System



http://www.railworkinggroup.org/r0184_240210%20RWG.pdf. Simply, the plan is to create a bank of numbers within the Registry which would contain 19 digits (including a check digit) where registered users may block numbers (against payment) and the number will be unique at the time it is issued and thereafter. The manufacturer or the operator would be required to attach a plate, with this number, on the rolling stock, or stamp a number on the chassis, and one idea which is now being floated to keep costs down, is for the Registrar itself to be providing plates.

This does not mean that regional or running identifiers are to be ignored and we would anticipate that where there are regional/running numbers, they would be included in the registration, and then the Registrar would provide the facility for an informational search against the running numbers which, we would hope, normally would still link in with the permanent identifier for the rolling stock. Nonetheless it will be the unique URVIS number which will be the number against which the security will be registered.

3. Liability and insurance of the Registrar

This is covered in Section 15 of the Regulations and is also an important distinction compared to the Aviation Registry Regulations. In the Rail Registry Regulations there is a limitation of liability following the concept set out in Article XV(5) of the Luxembourg Protocol. This does not limit liability for gross negligence or intentional misconduct but subject to this, the Protocol itself sets the annual maximum liability of 5 million Special Drawing Rights which liability may be increased by the Supervisory Authority in the Regulations. In fact the Regulations do so increase the liability.

It is important to understand here that there is a balancing act going on. On the one hand the industry's key concern is to ensure that the cost of operating the Luxembourg Protocol is as low as possible and in particular the registration and search fees are kept to modest levels so as to encourage universal acceptance, as well as carefully avoiding the creation of an additional material burden on the rail community. The whole point of the exercise is that it should create financial benefits for the rail community. We know that insurance costs can be a significant element of the fixed costs of the Registrar. So creating a high level of liability which would result in heavy insurance costs (because generally under Article XV(7) the liability will need to be covered by some type of insurance) is something we wish to avoid.

On the other hand, the creditor has to have material protection if things go wrong. If he does not have this, then the benefit of the registration becomes nominal. This calculation inevitably requires the Preparatory Commission to "think backwards". It wanted to set a high liability level, giving creditors comfort, without imposing inordinate cost on the Registrar due to insurance costs. However, it should also be noted in this context that for the first four years of its operation (arguably the most difficult period) there have been no claims on the Aviation Registry for negligence or malfeasance.

The compromise reached, which is now evidenced in Section 15.4 of the Regulations, sets a liability limit of 5.1 million SDRs per event of loss with the event of loss being defined as one event or omission or malfunction (i.e. it is not such an event per item of rolling stock). If one malfunction incurs loss to creditors, the maximum combined liability is 5.1 million SDRs. The restriction of the liability to an annual figure is therefore overreached – properly so because otherwise this would favour early claimants in a calendar year



But there needs to be two follow-up remarks. This figure could well increase in the coming years, not just in line with inflation, but also taking into account the insurability of the loss at a reasonable price. As the insurance industry becomes more comfortable with the actions of the Registry (and of course insurers will need to audit the internal systems of the Registrar to ensure that they can carry out their function correctly) then we would expect the insured price to go down further opening up the possibility of a higher level of insurable liability. This will of course be discussed at the time between the Registrar and the Supervisory Authority.

The second key point is that there is a common misconception that we look at the value of the rolling stock to analyse the scope of the loss. In other words if an item of rolling stock has a value in excess of the liability limit and a malfunction occurs, there is supposedly a risk that the creditor will be covered only for part of the loss. What this analysis ignores is the fact that oftentimes a creditor will not lose at all by reason of a malfunction in the system if it is corrected sufficiently in time and even if it does suffer loss, that loss could be significantly less than the value of the asset, due to the fact that the most likely scenario is a re-ordering of the priorities of respective creditors. As a matter of local applicable law, the error may even be required to be corrected between the parties.

Once the liability level has been established, we then address in Section 15.5 of the Regulations on the level of insurance. Here the minimum is set at 15.3 million SDRs with a requirement for insurance for three events of loss. What is important to note in this context is that if the insurance policy is drawn upon during a year in respect of one event of loss then the policy will need to be topped up to ensure that there remain 3 events which are covered subsequently during that year.

So the Rail Regulations are work in progress. There are still details that need to be finalised and on the other hand as the Aviation Registry Regulations shortly go into their fourth iteration, we will again be watching the experience of the Aviation Registry to see where we can learn lessons and take our colleagues' experience into account as we plan for the Rail Registry to operate as effectively and efficiently as possible.

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