



Baarerstrasse 98, PO Box 7262, 6302 Zug, Switzerland
Tel: +41 (0)41 760 28 88; Fax: +41 (0)41 760 29 09; email: info@railworkinggroup.org

Guidance notes on the adoption of the Rail Protocol to the Cape Town Convention

The adoption of the Rail Protocol to the Cape Town Convention (the “Protocol”) is currently a process which can involve three stages. Once the Protocol has entered into force it becomes a two-stage process. The stages are as follows:

1. Signature (until the Protocol is in force)

- 1.1 Once a government is clear it supports the objectives of the Protocol and wishes to commence the process for its adoption, it will usually sign the Protocol (Article XXI(1) of the Protocol).
- 1.2 Within government there will usually be a review process before the State commits to signature and individual States will have their own procedures as to when signature requires authorisation by a specific minister, a committee of ministers or the head of government.
- 1.3 Signature itself will take place at the location of the depositary, the International Institute for the Unification of Private Law (UNIDROIT), in Rome and the signatory can either be the State's ambassador accredited to Italy, a minister or other plenipotentiary duly authorised by the State concerned.
- 1.4 Signature is an expression of intent to support the entry into force of the Protocol and does not, of itself, create treaty obligations for the signing State. However signature is not mandatory and a State may go to the second stage directly without signing the Protocol even if it is not yet in force.

2. Ratification / Accession

- 2.1 For the Protocol to be binding on the signing State, the State must deposit an instrument of ratification, acceptance or approval with the depositary (Article XXI(2) of the Protocol). A State that has not signed the Protocol can deposit an instrument of accession with the depositary (Article XXI(3) of the Protocol).
- 2.2 If the Protocol is not in force at the time of ratification, acceptance, approval or accession by a contracting state, it will become binding on that State on the later to occur of (a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance,



approval or accession and (b) the confirmation of the Secretariat (OTIF, in Berne) that the International Registry is fully operational (Article XXIII(1) of the Protocol).

- 2.3 The Protocol permits a number of declarations to be made which allows a contracting state to either opt in or opt out of certain provisions in the Protocol. A number of the declarations are not mandatory and there is no obligation on a contracting state to make any non-mandatory declarations. Such non-mandatory declarations can also be made subsequently to the Protocol becoming binding on a contracting state. The Rail Working Group has further information about these declarations on its website <http://www.railworkinggroup.org.nova.chmeta.net/wp-content/uploads/docs/R0647.pdf>
- 2.4 One declaration is mandatory. The making of the Article 54(2) declaration under the Protocol is mandatory at the time of the deposit of an instrument of accession to the Protocol.
- 2.5 At the time of the deposit of the instrument of ratification/accession, the contracting state must also attach those various declarations which it has chosen to make. States are asked to deposit instruments and declarations under the Protocol written in one of UNIDROIT's working languages, English or French.
- 2.6 If the contracting state comprises more than one territorial unit (e.g. Canada), the Protocol will apply to all of them unless the contracting state declares that it is to apply only to some of them. A contracting state may also make different declarations for different territorial units (Article XXIV).
- 2.7 The deposit with the depositary should be accompanied by the credentials as required by the depositary and under the 1969 Vienna Convention on the law of treaties (and particularly Article 7). This will often be handled through the treaties section of the external affairs department of the contracting state.
- 2.8 Different States will have different procedures for authorising the ratification/accession process. These procedures may include cross department committees analysing the impact of the Protocol on the State and possibly a stakeholder consultation process.
- 2.9 Once the internal procedure for ratification is finalised, the instrument of ratification/accession – which needs to be signed by the Head of State, Head of Government or Minister of Foreign Affairs – and accompanying declarations will then be deposited with UNIDROIT, Depositary of the Protocol. The instrument may be presented by a minister or the State's ambassador in Rome or sent by courier. To be able to accept the deposit, UNIDROIT needs to have the original of the instruments. Draft instruments are to be found on the UNIDROIT's website (see links below).



3. Implementation

- 3.1 In some contracting states, the ratification/accession of the Protocol will automatically have a status as a matter of domestic law and, to the extent that there are any conflicts with existing law, will override any conflicting provision. Many contracting states, however, will need to initiate legislation in order to introduce the Protocol into domestic law. This can be through a bill presented to the legislature, or secondary legislation authorised under existing legislation (for example statutory instruments under UK law) or by decree.
- 3.2 It should not be necessary to write the entire Protocol into the legislation or decree as appropriate. Often it is possible to incorporate the Protocol by reference through annexing the Protocol and (separately) the declarations made thereunder. However, ultimately this will be a function of the legislative process in the contracting state.
- 3.3 Contracting states will often wish to review key areas of domestic law which could be modified by the Protocol and amend such legislation to ensure that the impact is as intended. For example:
- The Protocol may necessitate amendments to any local commercial or civil code.
 - Article IX of the Protocol may modify creditor rights under existing domestic insolvency legislation (depending on whether a declaration is made by that contracting state and, if so, which alternative is chosen). The contracting state may amend that insolvency legislation directly through the legislation implementing the Protocol or through separate legislation, particularly if part of a wider insolvency reform.
 - Article VI of the Protocol, guaranteeing party autonomy in relation to choice of law (assuming it is adopted by the contracting state by declaration), may potentially conflict with domestic law or practice, and this will need to be addressed.
 - Any local law or commercial code regulating the registration of security interests, where the priorities and rights of creditors would need to be modified by the rules set out in the Protocol.
 - The Protocol may also have an impact on other aspects of the operation or financing of railway rolling stock where applicable regulations may need to be modified. For example, the domestic rail safety agency may wish to adopt the URVIS identifier allocated under the Protocol as its reference identifier for immatriculation, monitoring or other safety purposes. This may necessitate a review, and possibly update, of local applicable regulations.
- 3.4 To the extent that the Protocol may change the way that the courts of the contracting state deal with matters covered under the Protocol, for example repossession claims where there is an application to the courts, a contracting state may wish to modify rules of judicial procedure to accommodate this.



4. Post ratification actions

Each contracting state automatically becomes a member of the Supervisory Authority constituted under the Protocol (Article XII(1) of the Protocol). It will therefore need to appoint a representative to attend meetings of the Authority either in person or remotely.

5. Cape Town Convention requirement

A State is not entitled to be a party to the Protocol if it is not also a Party to the Cape Town Convention (Article XXI(5) of the Protocol). If a State deposits an instrument of ratification, acceptance, approval or accession with the depositary without having become a party to the Cape Town Convention, the Protocol shall not be binding on the contracting state until that contracting state has also become a party to the Cape Town Convention.

6. Official information relating to the procedure of adoption of the Protocol may be obtained from the Depositary:

Depositary contact details:

Ms. Marina Schneider
The International Institute for the Unification of Private Law
28 Via Panisperna
I-Rome 00184, Italy

m.schneider@unidroit.org

Tel. +39 06 6962142

Fax +39 06 69 94 13 94

Depositary Resources

Draft instrument of accession

<https://www.unidroit.org/english/conventions/mobile-equipment/180306%20rail-model-instr-rat-e.pdf>

Memorandum of declarations

<https://www.unidroit.org/english/documents/2009/depositary/dc10-dep-01-e.pdf>

General page on the Rail Protocol

(text, status, text of declarations, preparatory work which you find on the right hand side of the page.)

<https://www.unidroit.org/instruments/security-interests/rail-protocol>

Depositary page relating to the Rail Protocol

<https://www.unidroit.org/depositary-2007-luxembourg>