

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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[Interest on the Protocol growing fast in South Africa](#)

At the beginning of September the South African Contact Group of the RWG ran an industry seminar on the Protocol which was highly successful. You can see a full report and the key presentations [here](#). There were also a number of meetings with stakeholders and with government officials outside of the seminar itself which indicates strong support for the Protocol. As a result, the RWG South African membership and also RSA Contact Group are both expanding in size. The current Contact Group membership may be found [here](#).

Dialogue continues with UK government

The RWG participated in a meeting with officials at the UK Department for Transport earlier this month with the objective of agreeing a process and timetable for UK adoption of the Protocol going forward. A follow up meeting is planned for November.

New discussions with the Swedish government

The Swedish government has commenced its evaluation of the Luxembourg Protocol and has approached the RWG. The RWG will set up a local contact group shortly to work with the government on ratification.

RWG to support the 4th Annual African Railway Summit

The RWG will be supporting the 4th Annual African Railway Summit taking place on 17th/18th November 2015 in Johannesburg. More details about the event [here](#). RWG Chairman Howard Rosen will be speaking at the Summit. RWG members are entitled to a special discount – and should mention this when enrolling for the event.

Topic of the month: What is a leasing agreement?

One instance of an international interest in mobile equipment in railway rolling stock created by the Luxembourg Rail Protocol is where it relates to an interest vested in a lessor under a leasing agreement. But what do we mean by a leasing agreement?

A leasing agreement is defined as by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment (Article 1 (q) of the Cape Town Convention). So the definition will encompass agreements whereby possession is passed from party to another even if this relationship is not described as a lease under local law. There is no requirement of exclusivity so a licence agreement permitting a party to have use of an asset even though it may be sharing that use with other parties is, for the purposes of the Convention and the Protocol clearly a “leasing agreement”. Moreover there is no limitation in time. An agreement to provide possession for a few days, or even hours, would be considered to be a “leasing agreement” even if as a matter of practice, the parties considered that there is no point of registering that interest. But there is always a risk that a subsequently registered interest would override such a short term leasing agreement which is not registered.

On the other hand a wet-lease, where the lessor provides not only the rolling stock but also the crew, maintenance and insurance where clearly the equipment remains under the

control of the lessor is not a leasing agreement for the purposes of the Protocol even though it is often referred to as a lease in particular countries (see paragraph 4.23 of Professor Goode's commentary (second edition) on the Convention and the Protocol). The interesting discussion is where the line is drawn. What about "damp leases" where some components are provided by the lessor but not others? The key is possession and control. If the lessor deals with maintenance and insurance, but does not have the day-to-day control of the asset, then this is clearly a leasing agreement and covered by the Protocol. If the lessee or another third party provides insurance and/or maintenance but the lessor provides the crew then the question would be whether the crew are directly answerable to the lessor or to the lessee particularly where they have been subcontracted in. This may not always be clear, if crew has been provided on a short term/emergency informal basis.

But even that is not the end of the story since the definition refers to an agreement whereby the lessor "grants a right to possession or control". In other words control may not actually pass to a lessee but it potentially could do so. That must be considered already as a "leasing agreement". If a lessor committed to provide back-up rolling stock – say a locomotive – for an operator if required (for example one of the lessee's locomotives breaks down and it wants to have the right to call in a replacement locomotive on a short-term basis, that must already be considered to be a leasing agreement even if control has not physically passed and, if there is no breakdown and cause to call for the reserve equipment, may never pass during the term of the agreement.

In conclusion any agreement presumed to which one party (party A) grants a right to another party (party B) the right to possession or control of railway rolling stock, however brief, regardless of whether party B actually takes over possession or control of the asset, would be considered to be a leasing agreement for the purposes of the Protocol. Consequently party A has the rights provided to the lessor under the Protocol, party B has the right of quiet possession under Article XI of the Protocol and the agreement between party A and party B (as long as it is in writing) has created an international interest which should then be registered at the International Registry to preserve the priority interest of party A.

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](#).

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