THE 2001 CAPE TOWN CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

RAIL WORKING GROUP

An association under Swiss law

www.railworkinggroup.org

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

The Luxembourg Rail Protocol – the Arguments Against

The Luxembourg Protocol to the 2001 Cape Town Convention will make it much easier for the private sector to finance railway rolling stock worldwide. It will provide a new system of international security rights for creditors (secured lenders and lessors) whose "international interest" created under the Protocol will be registered, and searchable 24/7, at an international registry to be based in Luxembourg. It will also introduce a new unique global identification system, URVIS[1], for all rolling stock.

Once it comes into force, the Luxembourg Protocol will facilitate banks and other financiers providing cheaper finance to support much needed new rolling stock procurement in Europe and beyond without state guarantees or support. Accordingly it will lower the barriers to entry for new operators, support operators offering transportation services in various parts of Europe and lead to a more competitive and dynamic rail industry worldwide – bringing important social, environmental, developmental and economic advantages as well as new business opportunities. For financiers and lessors of rolling stock moving across national boundaries, it will bring a new layer of legal protection and may change the traditional structure of secured financings in specific jurisdictions.

So what are the downsides?

Would reduce dependency on government
Currently the vast majority of expenditure on new rolling stock is either government financed or government guaranteed[2]. The Luxembourg Protocol will make it easier for operators, whether private or state owned, to source funds independent of government. We think this is a good thing but some governments may, for ideological reasons, feel that the rail industry should be funded exclusively by the public sector.

[1] Unique Rail Vehicle Identification System, set out in the regulations applicable to the international registry

[2] See for example the position in Europe from the Roland Berger Report issued by the Rail Working Group in January 2016 at http://railworkinggroup.org/wp-content/uploads/docs/160122_Private%20financing%20of%20rolling%20stock_Europe.pdf

Government time and legislative time needed at the outset
The Protocol will need to be adopted through a legislative process in the state concerned. The exact process will vary from country to country but inevitably this may involve a number of government departments, a formal and informal consultation process, parliamentary or other counsel drafting legislation (which will also have to take into account existing legislation). It takes up time in what is often a crowded parliamentary legislative agenda and potential conflicts withexisting legislation, case law and administrative practice will need to be resolved.

Another number
To obtain the benefits of the Luxembourg Protocol, every item of rolling stock will need to be uniquely identifiable. This will require the debtor or its agent purchasing the 20 digit URVIS number from the international registry and attaching it in a prescribed form to rolling stock. A manufacturer may decide to add the number onto new equipment automatically. Manufacturers, maintenance companies and operators will probably wish to add this number into their records. The number will need to be affixed permanently to the rolling stock in ways set out under procedures established by the international registry. This will result in an additional minor process and cost.

New costs
There will be a small charge for the URVIS number. Then registering the creditor's international interest at the international registry will be subject to registration fees. Possibly some of these fees will be passed on to the debtor. Each charge is a one off fee and the per-asset cost will not be substantial.

Repossession risk
The Protocol will restrict any defaulting debtor holding onto financed equipment if it defaults under its finance or lease agreement. Moreover, contracting states to the Protocol will only be able to block repossession for pre-specified types of rolling stock and on the basis of compensating the creditor.[3]

Initial investment of time
Understanding the way that the Protocol works, as well as organising initial registrations of transactional and professional user entities, will involve an initial investment of time for interested parties and their advisers. This will not necessarily be significant but in common with any new system, it may mean reading guidance notes, articles and instructions. Debtors and creditors will also need to revisit their standard documentation to see what changes would be needed as the Protocol comes into force in the country where the debtor is located. However many users will be familiar with the procedures set up for the international registry of aircraft objects, under the Cape Town Convention, in Dublin and we expect the

[3] See article XXV of the Protocol

international registry of railway rolling stock, which will be operating in Luxembourg, will use very similar procedures.[4]

Transparency
Because the International Registry is in the public domain, anyone, including a competitor, can search the Registry to check which organisations hold international interests in a specific asset. The details of any financing will not be lodged with the International Registry and so would not be available but even the identity of a creditor could be useful information. However a sensitive party could counter this by using a nominee or trustee as the registered holder of the international interest.

What this analysis shows is that, although there are some disadvantages arising from the Protocol, these will be minimal. And certainly they will be outweighed by the benefits by the Protocol.

For further information on the Luxembourg Rail Protocol, see www.railworkinggroup.org.

[4] The regulations for the international registry in Luxembourg are based on those operating for the Dublin registry and the registrar in Luxembourg, like the registrar in Dublin, is a subsidiary of SITA.