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**A SUMMARY OF
THE LUXEMBOURG PROTOCOL
TO THE
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK**

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This note summarises the operative provisions of the Luxembourg Rail Protocol. It reviews the provisions thematically but following where possible the order of the Protocol. It does not seek to be a definitive analysis and readers are referred to the official texts of the Luxembourg Rail Protocol and the Convention, together with the official commentary thereto by Professor Roy Goode QC.

1. Application to Railway Rolling Stock

The Convention applies to all the railway rolling stock. This means vehicles movable on a fixed railway track or on, above or below a guideway, together with component parts installed on such vehicles and all manuals, records and other data.

2. Exclusion and derogation

The Protocol provides specifically that parties may exclude the application of Article IX (insolvency provisions) and derogate from, or vary, any other provision in the Protocol except for Articles VII, (3) and (4) of the Protocol. Article VII (3) in turn disapplies Article 8 (3) of the Convention and Article VII (4) modifies the limited notice provision for a proposed sale or lease as provided by Article 8 (4) of the Convention (see paragraph 6 below).



3. Representative capacities

A person can enter into an agreement and make registrations and assert rights and interests under the Convention in an agency, trust or representative capacity.

4. Identification

Article 7 of the Convention requires identification of rolling stock before constituting as an international interest an interest in rolling stock and Article V of the Protocol provides that, for the purposes of constituting the agreement, this identification requirement is fulfilled either through a direct description of the rolling stock by item or by type or even by a statement covering all present and future railway rolling stock (i.e. a floating charge). It should be noted however that when it comes to registration of an international interest there are strict identification requirements (see § 14 below).

If an interest in future railway rolling stock is identified (i.e. after acquired property), the interest crystallises into an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the equipment without any need for a new act of transfer.

5. Choice of law

Subject to a declaration being made by the Contracting State, the parties have complete freedom on choosing the law which is to govern their contractual obligations, both in relation to the direct agreement, creating the international interest or any related contracts, such as a guarantee contract or subordination agreement.

6. Modification of default remedies

The Protocol modifies some of the remedies in Chapter III of the Convention. Subject to agreement with the debtor, the creditor may procure the export and physical transfer of the railway rolling stock from the territory in which it is located, subject also to the consent of any party holding a registered interest having priority over that of the creditor. A Contracting State is required to ensure that the relevant administrative authorities co-operate and assist the creditor concerning the export and physical transfer of the rolling stock, but the creditor must also make sure that all interested parties are given reasonable notice, except where it is acting under a court order.

Article 8 (3) of the Convention is excluded and replaced by a broader requirement that any remedies exercised pursuant to the Protocol must be done so in a commercially reasonable manner, which is deemed to be the



case where there is an agreement (here no longer restricted to the security agreement) between the parties unless the agreement provision is manifestly unreasonable. By way of modification of Article 8 (4) of the Convention, for the purposes of giving notice to interested parties before an asset is sold or leased by a repossessing creditor, the notice period must be at least 14 calendar days, but can be longer if agreed between the parties.

7. Modification of interim relief provisions

This extends Article 13 (1) of the Convention to the sale of the rolling stock if the creditor and debtor specifically agree, and makes it clear that any sale of an asset thereby would be made free of any interest which is subordinate to that of the selling creditor. There are also specific provisions for administrative authorities in a Contracting State, on interim relief being granted by its court or by a court, recognised by such state where that court's interim orders can also be executed in the Contracting State, providing assistance through administrative authorities for physical transfer and export of the rolling stock no later than 7 calendar days after the creditor has notified the authorities that relief has been granted. These provisions are only applicable when a Contracting State has opted in and to the extent of the opt-in.



8. Insolvency remedies

A Contracting State has to opt-in into these provisions, otherwise normal domestic insolvency rules will apply. If the State does decide to opt-in, it has three alternatives.

Alternative A is the strong pro creditor provision, which requires the debtor or the insolvency administrator to deliver up the assets within a period of time, either set out under local law or in the Contracting State's declaration. There is a general obligation on the insolvency administrator or the debtor, to look after the rolling stock and it may retain possession during the cure period, if it has cured all defaults other than the non curable default of becoming insolvent and there is an agreement to perform all future obligations under the relevant agreement(s). There are also provisions for a Contracting State to co-operate in relation to the export and physical transfer of the rolling stock, but nothing shall alter or affect the insolvency administrator's right to terminate the agreement under domestic law.

Alternative B is more debtor friendly, which also gives the insolvency administrator or debtor the obligation to declare when the defaults will be cured, or to give the creditor the opportunity to take possession of the rolling stock under local law, but neither the delivery up nor sale of the asset would take place without sanction from a court.

Alternative C represents a compromise between Alternatives A and B, basically giving the creditor the right to require repossession of the asset, unless the insolvency administrator or the debtor has received a court order, suspending the redelivery where it must be clear that any condition for such order is a requirement to pay all sums accruing to the creditor during the period the delivery up process is suspended. In most other respects, Alternative C follows the provisions of Alternative A, with the cure period being specified in the declaration applying the Alternative.

9. Insolvency assistance

Again, subject to a contracting-in declaration, there is a commitment for the courts of a Contracting State where the rolling stock is located to cooperate to the maximum extent possible with foreign courts and foreign insolvency administrators in applying the provisions of Article IX.

10. Debtor provisions

This gives quiet possession to the debtor as long as it is in compliance with its agreement as against its creditor and any holder of subordinate interest, and



free of any interest of any party holding a right superior in priority where that holder has agreed.

11. Supervisory Authority

This will be a new body with a representative from each ratifying state and, in addition, there will be three other signatory states represented designated by each of Unidroit and OTIF as temporary members until there are ten ratifications. The terms of office of the temporary representatives will end no later than two years after the Protocol has entered into force in the tenth ratifying state.

The representatives will set their own rules of procedure but the adoption of the initial rules will be through a double majority being a majority of the ratifying states and the majority of the representatives which are appointed.

The Supervisory Authority has power to establish a commission of experts and OTIF is appointed as the secretariat to assist the Supervisory Authority. The Supervisory Authority has power to appoint a replacement secretariat if the existing secretariat is unable or unwilling to act. It is specifically provided that the exemptions and immunities applying to the Supervisory Authority are extended to the secretariat in relation to its functions under the Convention and the Rail Protocol. There is also provision restricting the Supervisory Authority's powers to implement measures affecting one or a group of ratifying states where a majority of such affected states do not agree.

12. Registrar

The first Registrar needs to be appointed for a period of between 5 and 10 years and thereafter any appointment or re-appointment shall be for successive periods not exceeding 10 years.

13. Designated entry points

The Contracting State may designate one or more agencies as entry points through which registration information should or may be processed and these entry points shall be operated at least during working hours in their respective territories. In relation to notices of sale, the designation may permit use of such an entry point but cannot compel it.

14. Identification of rolling stock for registration.

The regulations issued by the Supervisory Authority will set out a system for identification by the Registrar of the rolling stock enabling unique identification



of the rolling stock and the number must either be affixed to the rolling stock itself or linked with another number which is affixed to the rolling stock or associated with a national or regional identification number so affixed. The Contracting State can make a declaration specifying the system that should be used, but this is subject to an agreement with the Supervisory Authority and where a declaration has been made, for registration to be valid all national regional identification numbers to which the rolling stock has been subject since the entry into force of the Protocol have to be specified on the registration together with the time during which each number has applied to the rolling stock concerned.

15. Additional modifications to registry provisions

The regulations issued by the Supervisory Authority will set out the search criteria. Where Article 25 (2) of the Convention applies, the holder of a registered interest must do whatever it can to discharge the registration within 10 days from receipt of the demand. The same applies to any beneficiary under a subordination agreement where he has received all the rights under the subordination. The international registry must be operated on a 24 hours basis. There is limitation of the registrar liability to the value of the rolling stock concerned and then there is also an annual limitation being initially set at 5,000,000 SDRs subject to increase as determined by the Supervisory Authority by regulations*. The limitation of liability however does not apply for loss caused by gross negligence or intentional misconduct of the Registrar or its officers and employees. In any event, the Registrar must be insured at least to the level of its liability.

16. Registry fees

These have to be set from time to time by the Supervisory Authority under its regulations and are set so as to permit the recovery of the establishment, implementation and operational costs of the registry.

17. Notices of sale

* Some delegations at the Luxembourg Diplomatic Conference expressed concern at the low level of the cap on liability but it was also understood that as the Registrar would have no assets other than retained fees, a level of liability in excess of the amount which could be insured would be illusory because there would be no ability to pay and excess claims would potentially make the Registrar insolvent, to the obvious detriment of other parties. On the other hand, the availability of insurance at a reasonable cost can only be assessed at the time the Registry begins operations. Accordingly, Resolution 6 of the Final Act of the Luxembourg Diplomatic Conference invites the Supervisory Authority to review this limit at the earliest possible opportunity subject only to satisfactory insurance cover being available. As the limit can only increase, the intention of the Conference was to mandate the Authority to raise the limitation as long as, but also to the extent that, the increased liability could be insured as a reasonable cost - HR



Provision shall be made in the Supervisory Authority's regulations for the registration of notices of sale of railway rolling stock. This is an informational facility and does not affect the priorities of holders of international interests.

18. Jurisdiction

A written waiver of sovereign immunity which also contains a description of the railway rolling stock will be binding and subject to any other local jurisdiction or enforcement provisions, shall be effective to confer jurisdiction and permit enforcement.

19. Conflicts with other treaties

There are specific provisions giving the Rail Protocol priority, in the case of inconsistency, over the Unidroit Convention on International Finance or Leasing (the Ottawa Convention) and the Convention concerning International Carriage of Rail as modified by the 1999 Protocol (COTIF 1999).

20. Procedure for adopting the protocol

Article XXI sets out the signature, ratification acceptance, approval and accession provisions. To enter into force in a Contracting State, the Protocol must be ratified by such state and not just signed and a ratifying state must also ratify the Convention. A state which has not signed the Protocol may accede to it.

21. Regional Economic Integration Organisations (REIO)

This provision gives authority for such organisations to sign the Protocol where competence over certain matters covered by the Protocol has been ceded by its member sovereign states to such organisation. In these areas of competence, the organisation concerned will be treated as if it is a contracting state.

22. Entry into force

The Protocol will enter into force on the later of 3 months after deposit of the fourth instrument of ratification and the date the Supervisory Authority secretariat delivers to Unidroit a certificate confirming that the international registry is fully operational. For other states, the Protocol enters into force three months after the date of the deposit of the instrument of ratification or the date the Secretariat delivers its certificate (if later).



23. Territorial units

The Contracting State can, if it has various jurisdictional units, declare whether the Protocol is extending to all of these units or only to one or more of them. If no declaration is made it is assumed that the ratification will apply to all such units. The article concerned also provides for variable declarations in relation to the different units. There are also specific provisions determining where a debtor is considered to be situated, or an asset is considered to be located by reference to a specific territorial unit, and similarly any reference to an administrative authority also is determined as referring to the administrative authority having jurisdiction in the specific territorial unit to which the Protocol applies.

24. Public service rolling stock

A Contracting State may at any time make a declaration, that it will continue to apply local law in force at that time which affects the repossession rights in the Convention and the Protocol to the extent that the repossession is of rolling stock habitually used for the purposes of providing a service of public importance. If this right is exercised then any person, including a government or public authority, taking control of the relevant rolling stock has an obligation to preserve and maintain the rolling stock from the time of possession until it is restored to the creditor. During that period also the possessing party must pay to the creditor an amount equal to amounts payable under local law or the market lease rental during the period of possession, whichever is the greater. The first payment must be made within 10 days of the date when the power to possess is exercised and subsequent payments are made on the first day of each successive month. However if any payments made exceed the amount due to a creditor who has first priority then the amounts will cascade down to the creditors with lower priority in order of their priority and any excess after all creditors have been paid will be remitted to the debtor.

Where a state does not have specific rules providing for a compensation and custody obligations, as specified above, it may make a separate declaration that it will not abide by these obligations. Nothing however shall preclude any person agreeing with a creditor to perform such obligations.

There is a grandfathering clause which precludes any declaration made under this Article (XXV) from affecting any rights or interests of creditors arising under an agreement entered into prior to the date the declaration is filed (with the Depository) and there is a general obligation on a Contracting State making any declaration, to take into consideration the protection of the interests of the creditors and the effect of any declaration on the availability of credit.



25. Pre-existing rights or interests

The Convention is modified so that a Contracting State may specify in a declaration a date between 3 and 10 years after the date on which the declaration becomes effective, when the rules concerning priority of international interest apply to pre-existing rights or interests. However those pre-existing rights shall continue to hold their priority if registered before the expiration of the period specified in the declaration whether or not it has previously been registered.

26. Declarations

Article XXVII gives detailed provisions as to the process of making declarations and the following articles deal with the procedures concerning declarations generally.

27. Denunciations

A Contracting State may denounce the Protocol by notification in writing, such denunciation to take effect the first day of the month following 12 months from the date of receipt of the notification by Unidroit. However the Protocol continues to apply as if no denunciation had been made in respect of all rights and interests arising prior to the effective date of any such denunciation.

28. Review conferences

Unidroit together with the Supervisory Authority are required to issue reports from time to time for the Contracting States and a review conference may be convened from time to time on a request of not less than a quarter of the ratifying states considering the practical application to the Convention traditional interpretations, the functioning of the registry system and performance of the registrar as well as the Supervisory Authority's oversight and lastly whether any modifications to the Protocol are required. Any amendment to the Protocol requires a two thirds majority of participating and ratifying states at the conference.



29. The Depositary

Article XXXIV sets out the detailed rules for Unidroit to be designated as the depositary and specifying its detailed duties.

For articles and other information on the Luxembourg Rail Protocol see www.railworkinggroup.org or contact howard.rosen@railworkinggroup.org

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