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INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

**DIPLOMATIC CONFERENCE TO ADOPT A
RAIL PROTOCOL TO THE CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT**

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COMMENTS AND PROPOSAL ON ARTICLE XXV OF THE DRAFT RAIL PROTOCOL

(presented by Germany and the Rail Working Group (RWG))

1. Chapter III of the Convention and Articles VII to X of the Draft Protocol provide for certain creditor remedies (the “remedies”) in the case of debtor default arising either as a result of a breach of a contractual obligation or due to the debtor’s insolvency. These provisions deal, inter alia, with the requirement for redelivery to the creditor of the rolling stock providing security to the creditor following a debtor default/insolvency and other ancillary provisions.
2. Certain States have legislation regulating and limiting seizure of railway rolling stock and other default remedies in order to maintain public transportation of passengers and cargo without any disruption. This interest of a State to maintain public transportation ensured by such domestic legislation creates to some extent a conflict with the interest of a creditor to benefit from his security right and to execute remedies in case of default. Article XXV of the Draft Protocol in its current version provides a mechanism to solve this conflict by excluding the creditor’s default remedies to the extent specified in a declaration of the Contacting State at the time of ratification. This mechanism, however, restricts the creditor’s remedies more than necessary. It does not only maintain the current domestic legislation safeguarding public transportation but it also provides for the possibility of introducing new limitations by declaration. This mechanism jeopardizes both the secured interest of the creditor and the purpose of this Protocol.
3. This is the reason why Germany and the Railway Working Group – supported by Professor Sir Roy Goode – elaborated a more narrow provision which maintains domestic legislation safeguarding public transportation on the one hand and protects the creditor’s interest to benefit from his security right and to execute the default remedies as far as possible on the other hand.. This revised text is attached below. Germany and the Railway Working Group submit this proposal and ask the Diplomatic Conference to take it into consideration.

4. The revised text seeks to solve the above mentioned problem of Article XXV of the current draft in four ways. First, instead of barring remedies itself it leaves the applicable law of the declaring State to determine, to the extent specified in the declaration, in what respect exercise of the creditor's remedies is to be precluded or suspended. Where this occurs, the sole obligation of the Contracting State is to observe the requirement of paragraph 2. Secondly, it provides that any person who, under rules of law of a Contracting State, exercises a power to take possession, use or control of the rolling stock covered by that State's declaration is to preserve and maintain the railway rolling stock until possession, use or control is restored to the creditor. Thirdly, that person has to pay or procure payment to the creditor of a sum not less than the fair rental value of the rolling stock so long as the creditor is deprived of possession, use or control. However, all the above obligations may be excluded by a Contracting State in its declaration to the extent that the rules of its law do not provide for such obligations at the time of ratification. Fourthly, nothing is to preclude a person from agreeing with the creditor to perform the above obligations or affect the enforceability of an agreement so concluded.

Accordingly we propose that Article XXV of the draft Protocol be amended as follows (marked and unmarked versions for ease of reading):

Article XXV
Public service rolling stock

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare ~~which and to what extent the following sub-paragraphs shall apply to such Contracting State:~~ that it will continue to apply, to the extent specified in its declaration, rules of its law which preclude, suspend or govern the exercise within its territory of any of the remedies specified in [Chapter III of the Convention and Articles VII to X of this Protocol] in relation to:

(a) ~~the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to~~ the public service rolling stock specified in its declaration or determined by a competent authority of that State notified to the Depository; or

(b) ~~the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to~~ railway rolling stock as far as it is used for the purpose of providing a service of public importance as specified in its declaration or determined by a competent authority of that State notified to the Depository. ~~+~~

The Contracting State, however, shall not thereafter change such law in this regard to the detriment of the creditor.

2. ~~(e)~~ the Contracting State making a declaration under this Article ~~either of the preceding sub-paragraphs~~ shall take into consideration the protection of the interests of the creditor.

3. Any person who, under rules of law of a Contracting State making a declaration under paragraph 1, exercises a power to take or procure possession, use or control of any rolling stock covered by that declaration, shall preserve and maintain the railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor. During the period of time specified in the preceding sentence that person shall also pay or procure payment to the creditor of an amount not less than the fair rental value of such rolling stock. However, the Contracting State may, in its declaration, exclude the preceding provisions of this paragraph to the extent that the rules of its law do not provide for such obligations at the time of ratification, acceptance, approval of or accession to this Protocol. The Contracting State may not thereafter change such law in this regard to the detriment of the creditor.

4. Nothing in the preceding paragraph precludes a person from agreeing with the creditor to perform the obligations set out in that paragraph or affects the enforceability of any agreement so concluded.

Article XXV
Public service rolling stock

1. A Contracting State may, at the time of ratification, acceptance, approval of or accession to this Protocol, declare that it will continue to apply, to the extent specified in its declaration, rules of its law which preclude, suspend or govern the exercise within its territory of any of the remedies specified in [Chapter III of the Convention and Articles VII to X of this Protocol] in relation to:

(a) the public service rolling stock specified in its declaration or determined by a competent authority of that State notified to the Depositary; or

(b) railway rolling stock so far as it is used for the purpose of providing a service of public importance as specified in its declaration or determined by a competent authority of that State notified to the Depositary.

The Contracting State, however, shall not thereafter change such law in this regard to the detriment of the creditor.

2. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of the creditor.

3. Any person who, under rules of law of a Contracting State making a declaration under paragraph 1, exercises a power to take or procure possession, use or control of any rolling stock covered by that declaration, shall preserve and maintain the railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor. During the period of time specified in the preceding sentence that person shall also pay or procure payment to the creditor of an amount not less than the fair rental value of such rolling stock. However, the Contracting State may, in its declaration, exclude the preceding provisions of this paragraph to the extent that the rules of its law do not provide for such obligations at the time of ratification, acceptance, approval of or accession to this Protocol. The Contracting State may not thereafter change such law in this regard to the detriment of the creditor.

4. Nothing in the preceding paragraph precludes a person from agreeing with the creditor to perform the obligations set out in that paragraph or affects the enforceability of any agreement so concluded.

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