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U N I D R O I T

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STEERING AND REVISIONS COMMITTEE

(Rome, 16-17 March 2000):

REPORT

(prepared by the UNIDROIT Secretariat)

Rome, March 2000

Background

1. At its 76th session, held in Rome from 7 to 12 April 1997, the UNIDROIT Governing Council approved a proposal to split the future UNIDROIT Convention on international interests in mobile equipment into a base Convention setting forth general rules universally applicable to all the different categories of equipment falling within its sphere of application and one or more equipment-specific Protocols containing such additional rules as might be necessary to adapt the general rules of the base Convention to the special financing patterns of specific categories of equipment.

2. Pursuant to this decision, the President of UNIDROIT on 23 December 1997 invited *Mr H. Rosen*, as expert consultant on international rail finance matters to the UNIDROIT Study Group for the preparation of uniform rules on international interests in mobile equipment, to organise and chair a working group to prepare a preliminary draft Protocol on Matters specific to Railway Rolling Stock (hereinafter referred to as the ***R.W.G.***) capable of being submitted to UNIDROIT as early as possible.

3. The text of a preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (hereinafter referred to as the ***preliminary draft Rail Protocol***), developed by the R.W.G. was communicated by Mr Rosen to the President on 4 February 2000, in English-, French- and German-language versions. This text had been finalised by the R.W.G. at the conclusion of its seventh session, held in London on 19 January 2000, in the light of the texts of the preliminary draft Convention on International Interests in Mobile Equipment (UNIDROIT CGE/Int.Int/3-WP/2 - ICAO Ref. LSC/ME/3-WP/2, Appendix I) (hereinafter referred to as the ***preliminary draft Convention***) and of the preliminary draft Protocol thereto on Matters specific to Aircraft Equipment (UNIDROIT CGE/Int.Int/3-WP/2 - ICAO Ref. LSC/ME/3 - WP/2, Appendix II) (hereinafter referred to as the ***preliminary draft Aircraft Protocol***) established by a restricted *ad hoc* Drafting Group which had met in Rome from 25 to 27 November 1999.

4. At its 78th session, held in Rome from 12 to 16 April 1999, the UNIDROIT Governing Council decided that the preliminary draft Rail Protocol should be further refined by a Steering and Revisions Committee (hereinafter referred to as the ***Committee***) modelled on what had been done for the preliminary draft Aircraft Protocol (C.D. (78) 23, at p.36). It was envisaged in particular that those provisions of the preliminary draft Rail Protocol capable of application to the generality of equipment encompassed by the preliminary draft Convention be moved into the body of the preliminary draft Convention and that the preliminary draft Rail Protocol be generally aligned, as to both style and terminology, with the preliminary draft Convention. The Council decided that the business of the Steering and Revisions Committee would be to consider the compatibility and consistency of the preliminary draft Rail Protocol with the preliminary draft Convention and prepare a clean text of the preliminary draft Rail Protocol in English. This text would then be submitted to the UNIDROIT Governing Council at its 79th session for advice as to the most appropriate follow-up action to be taken and in particular to decide whether the text established by the Committee could be judged ripe for submission to governmental experts. The UNIDROIT Secretariat invited to attend the Committee's meeting representatives of the UNIDROIT Governing Council, of the R.W.G. and of the international and national Organisations which took part in the preparation of the preliminary draft Rail Protocol.

Opening of the meeting

5. The Steering and Revisions Committee met at the seat of UNIDROIT in Rome on 16 and 17 March 2000. The meeting was opened at 2.30 p.m. on the 16th by Prof. Dr. Herbert Kronke, Secretary-General of UNIDROIT. In opening the meeting, the *Secretary-General* welcomed the members of the Committee and voiced the Institute's especial gratitude to Mr Rosen, co-ordinator of the Rail Working Group, for all the work he had put into preparing the preliminary draft Rail Protocol with a view to facilitating the Committee's work. He expressed his and the Institute's gratitude to Mr Mutz for the collaboration offered by the Organisation he represented which was UNIDROIT's most important partner in this exercise. He also expressed gratitude to Sir Roy Goode, the *Rapporteur*, for his on-going efforts in the whole procedure, to Mr Loewe and Mr Sánchez Cordero for agreeing to represent the particular interests of Civil law jurisdictions in relation to the texts.

6. Mr Loewe, first Vice-President of UNIDROIT and member of the Governing Council, was elected Chairman, on a proposal by Prof. Sir Roy Goode supported by Mr G. Mutz. The draft agenda was adopted and is reproduced in Appendix I to this report.

7. The meeting was attended by the following representatives of UNIDROIT, O.T.I.F. and R.W.G. as members of the Steering and Revisions Committee:

Members of the Committee

UNIDROIT

Mr Roland LOEWE, Professeur honoraire de l'Université de Salzbourg; Ancien Directeur-Général au Ministère Fédéral de la Justice; *member of the UNIDROIT Governing Council*; *Chairman of the Committee*

Sir Roy GOODE, Q.C., Emeritus Professor of English Law University of Oxford; *member of the UNIDROIT Governing Council*

Mr Jorge SÁNCHEZ CORDERO, Public Notary; *member of the UNIDROIT Governing Council*

Mr Herbert KRONKE, Secretary-General

Intergovernmental Organisation
for International Carriage by
Rail (OTIF)

Mr Gerfried MUTZ, Deputy Director-General

International Union of
Private Wagons

Mr Antoine MAILLARD, Administrateur;
Ermewa, Geneva

International Union of Railways

Mr David GECHT, Head of Legal Affairs
Department

European Company for the Financing of Railroad Rolling Stock (Eurofima)	Mr Jean-Pierre DERIAZ, first Vice-President
Association of American and Railroads	Mr Louis P. WARCHOT, Senior Vice-President, Law-General Counsel
Rail Working Group	Mr Howard ROSEN, <i>co-ordinator of R.W.G.</i>

Materials before the Committee

8. The Committee was seized of the following working materials:

(1) Draft Agenda (S.R.C. 2 Agenda);

(2) Preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (Study LXXIIH – Doc. 1);

(3) Preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment as reviewed by the restricted *ad hoc* Drafting Group, constituted by the second Joint Session, in the light of the Joint Session's second reading, at its meeting held in Rome from 25 to 27 November 1999 (UNIDROIT CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2, Appendix I);

(4) Preliminary draft Protocol thereto on Matters specific to Aircraft Equipment as reviewed by the restricted *ad hoc* Drafting Group, constituted by the second Joint Session, in the light of the Joint Session's second reading, at its meeting held in Rome from 25 to 27 November 1999 (UNIDROIT CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2, Appendix II);

(5) Revised Preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock as prepared by the Rail Working Group after its meeting on 19 January 2000, Draft 3.2, March 2000.

Opening statements and General observations

9. In his opening statement, the representative of O.T.I.F. underlined that his Organisation, which represented 27 countries in Europe, the Maghreb as well as Syria, Iran and Iraq, strongly supported the idea and the envisaged structure of the Convention. The approach to split the Convention in a basic Convention and different protocols recognised the different situations concerning the different industries. Unlike aircraft equipment, in the case of railway rolling stock Governments mainly rely on the know-how of mostly state-owned railway companies. Whereas the aircraft industry was mainly dominated by a few manufacturers, the railway industry has to take into account many different systems in different parts of

the world, different legal traditions and even different technical standards of a huge number of manufacturers. He therefore stressed the difficulty of the task of the Rail Working Group but insisted that he wanted to keep the overall design of the project even if the R.W.G. would definitely need more time than the Aircraft Working Group to finish its work.

10. On behalf of the Association of American Railroads, representing most of the freight railroad operators in the United States of America and Canada, as different manufacturers, a member pointed out that his Organisation welcomed the idea of a Protocol on security interests in the field of railway rolling stock. He further noted that notwithstanding the existence of a system for perfecting security interests on railway rolling stock in the United States and Canada, the industry he represented was supporting the approach of the Convention and the Protocol so as to be able to expand the market activities outside North America. He explained that the north-American railroad system was geographically limited to the United States, Canada and Mexico, as significant geographical barriers between Mexico and Guatemala existed and the question would not be solved in a foreseeable future.

11. The representative of the International Union of Private Wagons stated that his Organisation, which represented 14 different national associations with a total fleet of 200,000 private wagons in Europe, also supported the development of the Rail Protocol. He indicated that the current average age of the fleet of private wagons was 25 years old with a life expectancy of 30 years; this meant that within five years – hopefully when the Convention would enter into force – there would be a need for massive investment to renew the fleet and the industry would then have to attract other investors and financiers. It was therefore of the utmost importance for the private wagon owners that some kind of instrument capable of providing for the perfection of international security interests over railway rolling stock be put in place.

Business of the meeting: Sir Roy Goode and Mr. Rosen's introductions

12. The *Chairman* asked Sir Roy Goode as Rapporteur to the Joint Session and Mr. H. Rosen as Chairman of the R.W.G. to give a short introduction of the business and the purpose of the meeting.

13. *Sir Roy Goode* pointed out the substantial work which had been made by the R.W.G. and particular its Chairman Mr H. Rosen. He urged the members of the Committee to follow three general principles: firstly, the preliminary draft Protocol should deviate from the preliminary draft Convention and the preliminary draft Aircraft Protocol only if necessary; secondly, the preliminary draft Protocol should avoid provisions which are already covered by the preliminary draft Convention and finally, the language of the preliminary draft Protocol should – for the sake of transparency – be as short and simple as possible.

14. *Mr Rosen* expressed his and the R.W.G.'s gratitude to the UNIDROIT Secretariat and to Sir Roy Goode for the support they always gave to the work of the Group. He pointed out that the preliminary draft Rail Protocol was part of the overall design and that the structure Convention/Protocol was ideal for the different types of equipment. He explained that the railway industry traditionally, with particular exceptions in North America, were mostly financed by Governments or with Government support. The essential question here

was the access to private capital markets and the Protocol's task was to create an innovative system whereby investors and banks could finance railway rolling stock without Government support, an effective mechanism to facilitate investment when it is vital for the development of economy. Mr Rosen also explained that, for the reasons mentioned by Sir Roy, the R.W.G. had tried to follow the preliminary draft Aircraft Protocol when possible. He further underlined that the R.W.G.'s intention was not to create a mechanism to regulate the matter “à la carte” for the sake of uniformity.

15. *Mr Rosen* suggested that as time was limited, it did not focus on what were pure railway issues because this was the task of the R.W.G. but he sought advice on principles and issues. There was a general question of whether the Committee should leave issues to Governments to decide or try to come to a reasonable conclusion/recommendation. The R.W.G. had thought that some questions were raising policy issues which had to be kept open for governmental negotiations and had therefore placed these in square brackets. One of those policy issues was the question of the possible international institutions which could be the Supervisory Authority – a question seen as difficult because there was no universal international organisation in the railway sector – or the Registrar. He nevertheless stressed that OTIF and Eurofima could perfectly well perform the duties of Supervisory Authority and Registrar respectively.

16. He further reported some criticism raised on the general tone of the Convention and industry protocol. The first was there was too much of an Anglo-Saxon imprint on the drafting. The second was that, in the preliminary draft Aircraft Protocol, some approaches cut across civil law rules, in particular as far as repossession or insolvency are concerned. Mr Rosen indicated that the preliminary draft Rail Protocol tried to avoid this and create a synthesis to protect the creditor on the one hand and to take into consideration the positions of the railway operators and of third party unsecured creditors on the other hand.

17. *Mr Rosen* explained that after the last meeting of the R.W.G. on 19 January 2000 he received many comments from the members on the text circulated as Study LXXIIIH – Doc. 1, which he had to take into account. He therefore prepared a revised version of that text and urged the Committee to work on the basis of this new document (cf. discussion paper draft 3.2, hereinafter referred to as to *revised preliminary draft Rail Protocol*). The Committee agreed to such a procedure (this text – in English only – is annexed as Appendix II to this Report).

Decisions taken by the Committee regarding the preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (cf. Appendix II)

Preamble

18. It was agreed that the preamble could be kept without changes as the purpose is correctly put into it.

Re Article I (2)(b)

19. It was agreed to eliminate the definition of “deregister the railway rolling stock” in view of the deletion of the reference to “deregistration” in Article VI (a)(i).

Re Article I (2)(d)

20. It was noted that the term “immatriculation”, adopted from the Aircraft Protocol, could not be the only criterion for the railway industry, as there was no unique system of registration. The system of “immatriculation” was used only in Europe. Further it was mentioned that the only purpose for a definition of “immatriculation” was to find a reasonable connection between the asset and jurisdiction. The Committee therefore recommended to the *R.W.G.* to find another “close connection” as an alternative to “immatriculation”.

Re Article I (2)(e)

21. The Committee noted that this definition of “insolvency administrator” in the revised preliminary draft Rail Protocol was expanding the definition in Article 1 (n) of the preliminary draft Convention in order to include a person or body authorised only by contract and wondered whether this was necessary.

22. It was explained that the railway sector was being privatised and/or commercialised and that Governments were not always the owner of the operator but could be a regulator and this new situation had to be covered. But because of this, there could be a need to protect the public interest against the creditor, independent of an insolvency situation. The franchise-director under English law was given as an example of a person the expanded definition in Article 1 (2)(e) of the revised preliminary draft Rail Protocol was intended to cover. Some members still had doubts as to the necessity of this expanded definition in the Rail Protocol. Its extension to non-insolvency situations was thought to be inappropriate in this position. It was suggested that the definition be removed and the public law aspects be dealt with separately.

23. One member considered that it was beyond doubt that a convention covering private law relationships could not override local public law. This required further review. One suggestion would be to consider the possible addition in the preliminary draft Convention of a general provision dealing with public interest or safety problems which could read: “Nothing in this Convention shall affect rules in the public law domain”.

Re Article I (2)(f)

24. It was agreed to replace the word “national” by the words “local” or “regional”, as the structure of the registry authority differs between States.

Re Article I (2)(h)

25. It was noted that the definition of “primary jurisdiction” was adopted from the preliminary draft Aircraft Protocol (Article I(2)(p)). Unlike the definition in the preliminary draft Aircraft Protocol which connected the primary jurisdiction to the “debtor’s statutory seat”, the revised preliminary draft Rail Protocol used the concept of “principal domicile”. It was recommended to consider whether the “statutory seat” could also be adopted for railway rolling stock so that a general provision might be formulated in the preliminary draft Convention.

Re Article I (2)(i)

26. The purpose of the long definition of “railway rolling stock” was to limit the kind of equipment covered by the revised preliminary draft Rail Protocol. But the Committee agreed that it would be better to replace the long definition by the shorter version as drafted in footnote 1 of the revised preliminary draft Rail Protocol in order to cover the possible technical changes and development in the asset. Accordingly, if there was to be a limitation of the applicability of the Rail Protocol, this should be reflected in another specific provision. It was further suggested just to include a reference to “engine” in the new definition of railway rolling stock but to exclude the definition of “engine”, as until now engines were not single financed assets in the railway sector.

Re Article I (2) (m)

27. It was considered that the definition of subordinating party was no longer required.

Re Article III (1)

28. In respect of the recommendation of the Committee to Article I (2), it was suggested that an alternative “close connection to a Contracting State” to that of “immatriculation” was required because this criterion does not exist in some jurisdictions. A suggestion was made to add the “principal place of business of the operator” in Article III (1).

Re Article III (2)

29. It was agreed that the wording of this paragraph required modification. The intention was to create a situation where a Contracting State had the possibility to exclude the application of the Rail Protocol to a purely “internal” transaction. A first suggestion was then to add the word “not” after the words “This Protocol shall” in Article III (2). Another proposal was to move this idea to Chapter VI of the revised preliminary draft Rail Protocol as a possible reservation to the application. The Committee expressed its preference for the second alternative with a definition of what a “purely internal transaction” is. A member further noted that this provision was required in the Protocol because of the words in brackets in Article V of the preliminary draft Convention ([If the Protocol so provides, a] ...). The governmental

experts still had to decide whether this was a provision specific to a type of equipment – and should therefore be in a Protocol – or not – and should therefore appear in the Convention only.

30. For the time being, the Committee decided to delete the reference to “purely internal transaction” from Article III and to move it to Article XXV (which would change title).

Re Article III (4)

31. The Committee decided not to consider this paragraph because the issue of transitional provisions would be dealt with at the forthcoming Third Joint Session and the text would probably be modified.

Re Article IV (1)

32. It was noted that the identification system differed in the particular railway systems: the manufacturer’s serial number and RIV/RIC system was being used in Europe whereas an allocated number by the national registry authority was used in North-America. It was indicated that the purpose of the identification was to know which asset was secured and who had rights against that asset. It was therefore suggested to modify Article IV in such a way, so that there should be one unique identification parameter which could be “the manufacturer’s serial number or another unique number allocated and appearing physically on the equipment by the requisite national or regional authority”. It was pointed out that this approach should also be reconsidered for Article VIII of the preliminary draft Aircraft Protocol. It was further agreed that the Supervisory Authority should control the definition of identification parameters.

Re Article IV (2)

33. It was noted that the requirement of the notification of the change to the description in paragraph 2 would not affect the security interest. The change, being notified or not, would have no sanction. The Committee indicated that there remained an open issue as to how transfers of assets from one restricted rail region to another should be handled if the unique identification parameters change.

Re Article IV (4)

34. It was noted that this provision of the revised preliminary draft Rail Protocol originated from the practice used in Canada and the United States for the filing and registration of an interest but the Committee agreed that it was changing the fundamental formal requirements for the constitution of an international interest provided for in Article 7 of the preliminary draft Convention in giving sufficient evidence to a summary or memorandum instead. The Committee therefore suggested deleting or modifying this provision.

Re Article V

35. The Committee suggested moving this provision together with Article VI of the preliminary draft Aircraft Protocol into the preliminary draft Convention as a new Article. To take into account the contract of sale mentioned in Article VI of the preliminary draft Aircraft Protocol, reference to this new Article in the future Convention should be added to the list in Article IV of the future Aircraft Protocol (Application of Convention to sales).

Re Article VI (1)(a)(i)

36. The Committee suggested deleting the whole provision because the purpose of it should not be to eliminate a possible conflict between national and international interests, but to set priorities and this issue was being already dealt with by the priority rules. The corresponding provision in the preliminary draft Aircraft Protocol was formulated for the purpose of recognising a system for nationality registration which does not exist for railway equipment.

Re Article VI (1)(a)(ii)

37. It was agreed that there was no need for such a provision and it could therefore be deleted.

Re Article VI (3)

38. It was agreed that paragraph 1 of the new Article 13 bis of the future Convention was not needed as the issue was already picked up by the Convention (reference to Article 14 in Article 8(2)). It was noted to draw the attention of the Joint Session to Article IX(3)(b)(i) of the preliminary draft Aircraft Protocol where this paragraph still appeared and could also be deleted.

39. The Committee also noted that paragraph 3 of the new Article 13 bis had been deleted from the preliminary draft Aircraft Protocol and should therefore not appear in the Rail Protocol. The only paragraph to remain would be paragraph 2 and this would be stated as relating to Article 8(2) of the proposed Convention.

Re Article VII (1)

40. The Committee noted that the wording of this paragraph was somewhat different from the corresponding Article VII of the preliminary draft Aircraft Protocol and could be preferable in particular as it referred to “the law to govern their contractual rights and obligations” instead of “the law which is to govern their rights and obligations under the Convention”.

41. The Committee further decided that the words “and the related transaction documents” should be deleted considering that transaction documents could not have parties.

Re Article VIII (1)

42. It was noted that this paragraph was raising a policy issue because it departed from Article 14(1) of the preliminary draft Convention which required the debtor's consent for a creditor to obtain speedy judicial relief. This appeared to undermine the whole concept of the Article. It was moreover indicated that in Civil Law legal systems it would be difficult to have speedy relief if this was dependant on the consent of the debtor.

43. The Committee generally agreed with the text proposed and asked the Joint Session to consider to implement this approach in the Convention by modifying Article 14(1) in order to delete the requirement of the debtor's consent. In that case, this provision could be deleted from the Rail Protocol.

Re Article VIII (4)

44. The Committee noted the addition of this paragraph into square brackets which was linked to the concept of immatriculation. It considered that Article 40 (1) of the preliminary draft Convention was carefully drafted to allow the jurisdiction only to the court which could exercise control over the debtor or the asset. The Committee therefore decided to delete paragraph 4 and leave Article 40(1) of the future Convention as it now stood.

Re Article IX (3)

45. A member of the R.W.G. explained that this provision concerning the “cure period” deviated from the preliminary draft Aircraft Protocol in that it provided for a specified period whereas the Aircraft Protocol left to a declaration what the time should be. The R.W.G. considered that it was unrealistic to expect a court to apply a remedy if the cure period was too short. The R.W.G. could go along with the Aircraft Protocol approach but with a reasonable pre-set cure period.

46. A member of the Committee indicated that there was no real problem in case of winding up or liquidation but there would be one in case of reorganisation. The Committee therefore recommended to leave this policy question open for further negotiations by governmental experts.

Re Article XI

47. It was considered that it was neither for the R.W.G. nor for the Committee to decide who should be the Supervisory Authority or the Registrar and this was why the R.W.G. only made proposals in square brackets. As far as the Supervisory Authority was concerned, it was thought that OTIF could at least be the initial one, subject to the agreement of all Governments whereas the Registrar could be appointed by the Supervisory Authority. It was also noted that, in the current text of paragraph 2, the Registry Operating Entity was not necessarily conceived as a separate legal entity but as a division or affiliate. It was however agreed that this question should be kept entirely open and that the Supervisory Authority could be expected to work this out.

48. A member raised the question of whether the Supervisory Authority should have an ongoing ability to have control over the possible “service provider” coming in if the Registrar contracted out its duties (paragraph 7). It was indicated that such a control could be exercised through the operations agreement (paragraph 6) to which the Supervisory Authority, Registrar and the service provider should be a party.

49. It was noted that Article XI(3)(b) would not be necessary because the situation was already covered by Article XI(3)(a). It was then suggested to add the word “other” behind the word “any” in Article IX (3)(b) to extend the provision to persons other than the Registrar.

Re Article XII

50. It was noted that, unlike the preliminary draft Aircraft Protocol, the revised preliminary draft Rail Protocol envisaged a consultation period for draft regulations to facilitate industry input. The Committee recommended that this approach be considered also for the preliminary draft Aircraft Protocol, as it was very important to give the industry the possibility to review and comment on a draft, before it was actually promulgated by the Supervisory Authority. Should the Aircraft Working Group agree with this approach, the Committee suggested to move the provision to the preliminary draft Convention.

Re Article XIII

51. It was agreed that the provision on access through the regional rail registry should not undermine the concept of one unique International Registry. It was pointed out that only a centralised function, computer-based and with a twenty-four hour service, could ensure its effectiveness. One member indicated that the text should not make the regional body a part of the International Registry, but the regional body should be a portal to the International Registry. He therefore suggested to eliminate the concept of Article XIII (2) to the extent it envisaged a delegation of the duties of the Registrar. Article XIII (3) could be eliminated.

52. It was indicated that an existing registry or registries of security interests which is/are already established within a geographically closed area should not be affected by the Supervisory Authority. It must however be able to forward information to the International Registry in an approved form.

Re Article XIII (4)

53. The Committee wondered whether this provision, maybe workable, was to be preferred to the approach of the preliminary draft Aircraft Protocol. It also wondered whether this was a non equipment-specific provision which should go into the preliminary draft Convention.

Re Article XIII (5)

54. The Committee agreed that Article XIV (5) (a) was unnecessary as it was obvious the provisions of the Convention apply except when modified by the relevant Protocol.

Re Article XIV

55. The Committee agreed that some modification of Article XIV(1) was necessary to take into account the different identification parameters in different parts of the world. It was essential however to ensure that such parameters were applied consistently within a sealed geographical area.

Re Article XV

56. The Committee noted the policy question behind this provision namely if the Registrar could operate for profit or not. The Committee recognised that there is a real possibility in practice that the Registrars contract out of its duties to a service provider who will operate for profit. One member indicated that in case of monopoly there should be some control over the profit. The Committee agreed that the Supervisory Authority in having the power to approve fees, could allow a for profit but this should not be exorbitant. It was agreed that in practice, competitive forces would control the profits of the service provider.

Re Article XVI (1)

57. The Committee agreed to wait for a decision to be taken for Article 31 (1) (c) of the preliminary draft Convention because the concern could be solved there

Re Article XVI (2)

58. It was noted that rights that are associated with an international interest shall to a very limited degree have priority over a another interest in this associated right which is not actually connected to an international interest in the aircraft or the railway rolling stock. It was recommended to clarify and complete Article 34 of the preliminary draft Convention with this objective.

Re Article XVII

59. It was considered that some countries had problems with waivers of sovereign immunity, for example whether such waivers were binding in public international law. It was agreed that the provisions on waivers of sovereign immunity were a general issue to be dealt with in the main Convention but for the time being this would be left in the Rail Protocol.

Re Article XVIII

60. It was noted that the UNIDROIT Convention on International Financial Leasing of 1988 was not to be excluded but only superseded where there was conflict with the Rail Protocol. The limitation “to extent that convention is in force among them and that convention’s terms are inconsistent with the provisions of the Convention” was considered to be an important one and it was recommended that the conventions mentioned in Article XIX be moved up into Article XVIII in order to adopt a consistent approach.

Re Article XIX

61. See § 60 above. It was noted that the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters should be included beside the 1988 Lugano Convention. The Brussels Convention would probably become an European Union Regulation and consideration would need to be given to the inter-relationship of the Convention, Protocols and EU Regulations.

62. The Committee wondered whether the conventions listed contained a provision which precluded a Contracting State from entering into a conflicting instrument. It was agreed that the UNIDROIT Secretariat should make the necessary inquiry and report.

Re Article XXV

63. The Committee recalled the decision concerning Article III (2) to move that paragraph to this provision (cf. §30 of this report).

64. The Committee agreed that the text should not provide for too many reservations for the sake of uniformity. It was considered that Governments should be able to apply conditions to certain parts of the Protocol but not be able to disapply Articles. It therefore agreed to delete Article XXV(1)(a) as well as part of the square brackets in Article XXV(1)(b).

The way forward

65. The UNIDROIT Secretariat recalled the Committee that the text, as modified by it, should be submitted to the UNIDROIT Governing Council at its forthcoming session, in order for it to decide the next step and possibly its transmission to governmental experts.

66. Considering that the next meeting of the Governing Council would be held on the 10th April in Lisbon and that the third Joint Session of governmental experts would take place from 20 to 31 March in Rome, the Committee decided to proceed as follows:

(a) Mr H. Rosen, as Chairman of the R.W.G. would revise the preliminary draft Protocol on the basis of the discussions of the Committee;

(b) this text would then be circulated among the members of the Committee for comments until 24th March 2000 and additional comments considered. The text referred to in the preceding sub-paragraph (reproduced hereafter as Appendix III) would then be submitted to the UNIDROIT Governing Council. It was recognised that time constraints precluded full consultation within the R.W.G. before submission and that in any event many changes would probably be required after the meeting of governmental experts considering the proposed Convention and the Aircraft Protocol in the coming two weeks. The UNIDROIT Governing Council would be alerted to these reservations.

**STEERING AND REVISIONS COMMITTEE
FOR THE CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL
TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK**

(Rome, 16/17 March 2000)

DRAFT AGENDA

1. – Election of the Chairman.
2. – Approval of the draft agenda.
3. – Consideration of the text of the preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (Study LXXIIIH – Doc. 1) in the light of:
 - (a) the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment as reviewed by the restricted *ad hoc* Drafting Group, constituted by the second Joint Session, in the light of the Joint Session's second reading, at its meeting held in Rome from 25 to 27 November 1999 (UNIDROIT CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2, Appendix I);
 - (b) the preliminary draft Protocol thereto on Matters specific to Aircraft Equipment as reviewed by the restricted *ad hoc* Drafting Group, constituted by the second Joint Session, in the light of the Joint Session's second reading, at its meeting held in Rome from 25 to 27 November 1999 (UNIDROIT CGE/Int.Int./3-WP/2 ICAO Ref. LSC/ME/3-WP/2, Appendix II).
4. – Any other business.

**PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT
UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO RAILWAY
ROLLING STOCK**

(as established by a working group organised, at the invitation of the President of UNIDROIT, by Mr H. Rosen, expert consultant on international rail finance matters to the UNIDROIT Study Group for the preparation of uniform rules on international interests in mobile equipment)

PREAMBLE

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the UNIDROIT Convention on International Interests in Mobile Equipment, as it relates to railway rolling stock, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance,

HAVE AGREED upon the following provisions relating to railway rolling stock:

CHAPTER I

GENERAL PROVISIONS

*Article I
Defined terms*

1. In this Protocol, except where the context otherwise requires or are defined herein, terms used in it have the meanings set out in the Convention.

2. In this Protocol the following terms are employed with the meanings set out below:

(a) [“ATMF” means Admission technique du matériel ~~ferrovaire~~ ferrovaire or the Uniform Rules Concerning technical admission of Railway Material used in International Traffic.]

(b) ~~“deregister the railway rolling stock” means in respect of the state of registry the deregistration of the railway rolling stock from any registry maintained for recording ownership or title interests (including, but not limited to, security interests) in that country under such country’s laws and regulations;~~

- [(c) “engines” means such electric, diesel electric, steam, gas turbine or other propulsion drive traction motor system designed to provide traction power for railway rolling stock]
- [(d) “immatriculation” means the technical admission of railway rolling stock in a specific jurisdiction as being permitted to operate ~~and registration to an operator thereof~~ in accordance with applicable rules]
- (e) “insolvency administrator” means a person or body, being a person or body acting in an official and not personal capacity, including one appointed on an interim basis, authorised to administer the reorganisation or liquidation including, but not limited to, a person or body appointed by a Court or creditors or pursuant to statute
- (f) “national registry authority” means ~~the national authority, or the common mark registering authority maintained in a Contracting State which is the State of registry responsible for the registration and de-registration of railway rolling stock in a national personal property register~~ the authority or agency, whether governmental or acting pursuant to governmental authority, responsible for the administration of a national personal property register;
- (g) “national personal property register” means ~~a personal property registry, [in a Contracting State,] whether national or local, in which inter alia, an interest governed by the Convention may be registered~~ a registry in a Contracting State, whether national or local, in which an interest in railway rolling stock governed by the Convention may be registered;
- (h) “primary jurisdiction” means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be the place of the debtor's ~~seat or~~ principal domicile unless proved otherwise;
- [(i) “railway rolling stock” means vehicles moveable either directly above (through magnetic levitation), or on flanged wheels on, a railway track being either
- (i) self propelled vehicles (i.e. locomotives, whether diesel, diesel electric, steam, gas turbine or electric, and whether its source of power is inside or outside the vehicles)
- (ii) tenders, motor cars and snow ploughs
- (iii) any carriage, wagon or other vehicle for the transportation of
- 1) people and/or
- 2) goods including but not limited to tangible goods, mail, parcels, animals, chemicals, gases, petroleum based products and agricultural produce and other things capable of being transported,
- (iv) light rail passenger locomotives and wagons, whether automatically or manually driven,
- (v) underground, power cars or wagons
- (vi) tram or trolley cars
- (vii) auto-racks, ~~containers~~, swap bodies or other equipment attached to a wagon as a separate item of railway rolling stock

_____ [and engines which may be installed on (i) – (vi) and which may be separated from such without requiring any prior modification or alteration thereto]

_____ including all traction systems, engines, brakes, axles, bogies, and pantographs, and in each case including accessories and other equipment and parts installed or incorporated therein or attached thereto and all operating and technical data manuals, notebooks and other records relating to all or part of any of the foregoing.¹

(j) [“regional registry authority” shall mean a national personal property, register registry or registries or joint regional register authorised by the Protocol, designated by a Contracting State or] approved by the Supervisory Authority for the purposes of [acting as a portal into] [relating to] the International Registry]

(k) "registrar" means the entity initially designated or subsequently appointed or re-appointed as the Registrar, as the case may be, as specified in Article XI;

(l) [“RIV” means *Regolamento Internazionale de Veicoli*; and

(m) “RIC” means *Regolamento Internazionale de Carozze*]

(n) “subordinating party” means a party holding an international interest in railway rolling stock who agrees to subordinate such interest to another party holding an international interest in the same asset and who would otherwise hold such interest subject to the prior rights of the international interest pursuant to Article 27 of the Convention.

Article II

Implementation of Convention as regards ~~railway~~ Railway rolling ~~Rolling stock~~ Stock

1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.
2. The Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Unidroit Convention on International Interests in Mobile Equipment as applied to railway rolling stock.

Article III

Sphere of application

¹ An alternative is a simpler definition:

“vehicles moveable on or confined to movement on or above a fixed railway track or guideway, or superstructures or racks installed or designed to be installed on such vehicles, including all parts and components of any thereof.”

An additional issue is whether a separate reference to, and detailed definition of, “Engine” is required since this is based on the concept of a modular system which does not apply to most locomotives currently.

1. In Article ~~4-3~~ (1)(b) of the Convention the Convention shall apply if the railway rolling stock ~~[has its immatriculation in a Contracting State or]~~ is registered in a national personal property register therein but subject thereto, no other “close connection” to a Contracting State shall be applicable for the purposes of that paragraph.

2. ~~Notwithstanding the provisions of Article V of the Convention, this~~ This Protocol shall apply to a purely ~~domestic~~ internal transaction ~~[only where the obligor and obligee are situated in a single Contracting State and such Contracting State has declared its intention to this effect in its subscribing to this Protocol]. [This Protocol shall not, if the Contracting State declares in its subscription to this Protocol, apply in the case of railway rolling stock that is confined to use on a single railway system within that Contracting State because of track gauge, other elements of the design of such railway stock, or lack of connection to other railway systems.]²~~

3. In their relations with each other, the parties may not derogate from or vary any of the provisions of this Protocol except, by agreement in writing, Articles VI(1), VIII ~~[or]~~ IX(1) - (6) ~~[or XIV (3)]~~.

4. Any interest registered against railway rolling stock in a national personal property registry ~~after the effective date of this Protocol for the Contracting State~~ shall be subject to an international interest constituted pursuant to the Convention. In the event of a conflict, the appropriate national registry authority shall, on application by an debtor or creditor eliminate any such conflict by correcting entries in the national personal property register.

Article IV

Implementation of Convention as regards Railway Rolling Stock

1. A description of railway rolling stock that ~~includes reporting marks, contains its road~~ear numbers or ~~[similar identification conforming to the rules of a uniform system of identification of railway rolling stock in the Contracting State in which the obligor is situated and, if where applicable, in which the equipment of obligor moves]its manufacturer's serial number or works number, the name of the manufacturer and its RIV/RIC or manufacturer's model designation or inscription according to ATMF Uniform and other Unique Identification Rules~~Parameters as the Supervisory Authority shall set out in Regulations as ~~required~~ is necessary and sufficient to identify the object for purposes of sub-paragraph (c) of Article 7 of the Convention. ~~[The uniform system of identification in a Contracting State shall be designated by the Contracting State to the Supervisory Authority.]~~

2. ~~Any change to such description shall be notified to the Registrar on or before such change takes place by debtor but any claim of a creditor in relation to railway rolling stock where its description has been changed, shall be subject to any prior right registered in favour of a creditor in relation to the previous description or descriptions.~~

3. ~~Any modification, renewal or alteration to railway rolling stock shall not affect the rights of creditors.~~

~~[4. A summary or memorandum identifying~~

² ~~This does not follow the Aircraft Working Group (AWG) path and may require further discussion~~

- (a) the object of interest
- (b) the chargee, conditional buyer, lessee, debtor or other obligor,
- (c) the chargor, conditional seller, lessor, secured party or other obligee, and
- (d) any assignee,

is sufficient evidence of an interest in railway rolling stock for purposes of Article VII of the Convention.]

Article V
Representative capacities

A person may enter into an agreement and register an international interest in railway rolling stock created or provided for by the agreement in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention to the exclusion of the person or persons represented.

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article VI
Modification of default remedies

1. In addition to the remedies specified in paragraph 1 of Article 8 and in Article 10 and 14 (1) of the Convention, the creditor may

(a) to the extent that the debtor at any time has so agreed and in the circumstances specified in such Articles:

(i) ~~deregister any conflicting security interest in the railway rolling stock from any national personal property register (where appropriate)~~eliminate any conflicting security interest by correcting entries in the national personal property register (where appropriate);

[(ii) export and physically transfer the railway rolling stock from the territory in which it is situated] and

(b) apply for a court order authorising or directing any of the above acts and/or obtain an order from the court in the jurisdiction in which the railway rolling stock is physically located, directing immediate delivery of the railway rolling stock to a location within or outside of such jurisdiction where thereafter the creditor can move the railway rolling stock into the relevant regional international-rail network where the railway rolling stock is then located without the need of traction to be provided by the defaulting debtor or any party related to or acting in concert with it.

2. The creditor may not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. A new Article 13 bis shall be inserted after Article 13 of the Convention as follows:

"In relation to railway rolling stock the following provisions shall apply:

1.- Any remedy given by this Convention shall be exercised in a commercially reasonable manner.

2.- An agreement between an debtor and an creditor as to what is commercially reasonable shall, subject to paragraph 3, be conclusive.

3.- An creditor may not take possession or control of railway rolling stock otherwise than by lawful means. For these purposes, the disruption of rail transport shall not in itself be deemed to be unlawful.^{3"}

4. For the purposes of Article 8 (3) of the Convention, the chargor and chargee may agree in writing a notice period which shall be deemed to be reasonable if not less then 14 calendar days⁴.

Article VII Choice of Law

1. The parties to an agreement and the related transaction documents may agree on the law to govern their contractual rights and obligations, wholly or in part. The agreement and transaction need not bear a relationship to the selected body of national law.

2. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

Article VIII Speedy judicial relief

1. Notwithstanding the provisions of Article 14(1) of the Convention, relief shall not be dependent upon the consent of the debtor.

2. Relief given under Article 14(1) (a) of the Convention may specifically include directions as to normal maintenance and other necessary repair or modification of the object.

3. The remedies specified in Article VI(1) (a) – (b) shall be made available by the national registry authority and other administrative authorities, as applicable, in a Contracting State and by the International Registry Supervisory Authority, where appropriate, no later than [five]

³ Note deliberate departure from AWG draft

⁴ The AWG has suggested 10 days but this is surely too short.

calendar days after the judicial relief is authorised or, in the case of judicial relief authorised by a foreign court, approved by courts of that Contracting State.

4. [Article 40 (1) of the Convention shall be amended by adding the following before the words “may exercise”:

“(or where the initial immatriculation of the railway rolling stock takes place, or the railway rolling stock is registered at a national property registry, in the jurisdiction of that court.”

5.] Judicial relief under Article 14(1) of the Convention may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another [Contracting] State unless its application would contravene an international instrument binding on either Contracting State.⁵

Article IX Remedies on Insolvency

1. For the purposes of this Article, “insolvency date” means the earliest date on which one of the events specified in paragraph 2 shall have occurred.

2. This Article applies where:

- (a) any insolvency proceedings against the debtor have been commenced by the debtor or another person in a Contracting State which is the primary insolvency jurisdiction of the debtor; or
- (b) the debtor is located in a Contracting State and has declared its intention to suspend, or has actually suspended, payment to creditors generally.

3. Within a period not exceeding sixty days from the insolvency date (the “cure period”) the debtor or an insolvency administrator ~~(being, for the purposes of this Article, a person or body acting in an official and not personal capacity)~~, or a third party reasonably acceptable to the creditor, shall:

- (a) cure all defaults, and agree to perform all future obligations under the agreement and related transaction documents; or
- (b) give possession of the railway rolling stock to the creditor save where otherwise previously agreed in writing and otherwise in accordance with, and in the condition specified in the agreement and related transaction documents.

4. Where possession has been given to the creditor pursuant to the paragraph 3, the remedies specified in Article VI(1) shall be made available by the court, the national registry authority and other administrative authorities, as applicable, no later than [five] calendar days after the date on which the railway rolling stock is returned.

5. Unless and until the creditor is given possession under paragraph 3:

⁵ Open for discussion

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and
 - (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve and maintain it and its value.
7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period, it has cured all defaults and has agreed to perform all future obligations under the agreement. A second cure period shall not apply in respect of a default in the performance of such future obligations.
8. No exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.
9. No obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.
10. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law [to terminate the agreement].
11. No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 38 of the Convention, shall have priority in the insolvency over registered interests [and no doctrine of reputed ownership shall defeat registered interests].
12. Nothing in this Article shall operate to modify Article 28(3) of the Convention to which this Article shall be subject.
13. Article VI of this Protocol and Article 8 of the Convention as modified by Article VI of this Protocol, shall apply to the exercise of any remedies under this Article.

Article X
Insolvency assistance

The courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX.

CHAPTER III

RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XI

Supervisory Authority and the Registrar

1. [The initial Supervisory Authority shall be the Intergovernmental Organisation of Carriage by Rail or such successor organisation or other body as it may appoint].⁶ Subject to paragraph 2 below, the Supervisory Authority shall appoint a Registrar.
2. [The initial Registrar hereby designated to operate the International Registry shall be Eurofima European Company for the Financing of Railroad Rolling Stock]. ~~The Registrar shall~~, subject to paragraph 4 below, be create an newly created, independent special purpose affiliate or division ~~of for the purpose of operating the registry Eurofima European Company for the Financing of Railroad Rolling Stock~~ to be known as the Registry Operating Entity.
3. The Registry Operating Entity shall be organised in consultation with the Supervisory Authority. Its constitutive documents shall contain provisions which:
 - (a) restrict it to acting as Registrar and performing ancillary functions;
 - (b) ensure that it has no greater duties (fiduciary or otherwise) to its members of Eurofima European Company for the Financing of Railroad Rolling Stock than to any person or entity in the performance of its functions as Registrar⁷
4. In relation to the initial Registrar or any successor Registrar, the appointment shall be subject to regulations made by the Supervisory Authority from time to time and to an operations agreement entered into with the Supervisory Authority setting out the basis on which the registry should function.
5. The initial Registrar shall operate the International Registry for a period [of [ten] years from the date of entry into force of this Protocol][that the Supervisory Authority considers appropriate but in any event not exceeding ten years]. Thereafter, the Registrar shall be appointed or re-appointed ~~at regular [ten] year intervals by for such period that~~ the Supervisory Authority ~~or for such other period that the Supervisory Authority~~ considers appropriate (but in any event not exceeding ten years)⁸.
6. Notwithstanding the foregoing, the Supervisory Authority shall be entitled to appoint a replacement Registrar in the event that the Registrar (a) shall resign (b) shall become insolvent or generally be unable to pay its debts (c) shall be dissolved or (d) does not [materially] comply with its obligations herein, under the operations agreement or under regulations set out by the Supervisory Authority.

⁶ Alternative:

“will be named or constituted by the Contracting States who will provide a mechanism for replacement of the initial Supervisory Authority or continuation of the initial Supervisory Authority as circumstances warrant.”

⁷ In the contract with the Registrar there should be a requirement that it operates under a general duty of fairness and impartiality.]

⁸ This allows some discretion bearing in mind the investment in training and software which will be required by the Registrar

7. The Registrar shall be entitled to contract out its duties to a third party “service provider” subject to the identity of the service provider [and to the conditions under which the service provider carries out duties on behalf of the Registrar] being accepted by the Supervisory Authority by a declaration in writing prior to such contracting out. Contracting out of its duties shall not relieve the Registrar of its obligations hereunder or under the regulations.

Article XII
First Regulations

The initial regulations shall be issued no later than the date that is [three months] prior to the entry into force of this Protocol. Prior to issuing regulations, the Supervisory Authority shall publish draft regulations in good time for review and comment and thereafter consult with representatives of manufacturers, operators and financiers thereon.

Article XIII
Access to Registry

1. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

[2. The Supervisory Authority shall designate regional registry authorities as it considers necessary from time to time and may set out such qualification requirements as it considers appropriate for a national personal property registry or other registry as a regional registry authority. Prior to any designation, the proposed regional registry authority, the Registrar and the Supervisory Authority shall enter into an operations agreement which shall, inter alia, provide for the delegation of the Registrar’s duties in relation to a defined geographical area and shall otherwise be subject to the provisions of Article XI(4) and (6) herein. The various registration facilities shall be operated and administered during working hours in their respective territories. Any regional registry designated pursuant to this paragraph 2 shall ensure that registration through it shall automatically result in a registration at the International Registry and, if it comprises more than one registry facility, shall provide equal access and full co-ordination between the respective facilities.]

~~3. — Notwithstanding the foregoing, any regional registry authority shall be operated and administered on a twenty-four hour basis, shall ensure that registration through it shall automatically result in a registration at the International Registry and, if it comprises more than one registry facility, shall provide equal access and full co-ordination between the respective facilities.~~

4[3. Any regional registry authority shall be the exclusive access to the International Registry in relation to the geographical area covered by it.

4.4. At the time of ratification, acceptance, approval of, or accession to this Protocol, a Contracting State may make its ratification, acceptance, approval of, or accession conditional on the designation of a regional registry authority by the Supervisory Authority.⁹

Article XIV
Additional Modifications to Registry provisions

1. For purposes of Article 19 (6) of the Convention, the ~~identification search~~ criterion for railway rolling stock shall be the description required to identify the equipment set forth in Article IV (1) herein and the search criterion at the International Registry shall be established by the Supervisory Authority¹⁰ ~~its or their roadcar number where applicable, its or their manufacturer's name and serial or works number, its or their type and its or their RIV/RIC or manufacturer model designation or inscription according to ATMF Uniform Rules, as supplemented to ensure uniqueness. Such supplemental information shall be specified in the Regulations.~~⁴⁴
2. For purposes of Article 23 of the Convention, the categories of preferred non-consensual creditors shall be searchable by the name of the declaring Contracting State.
3. For the purposes of Article 25 (2) of the Convention, and in the circumstances there described, the holder of a registered prospective international security interest or a registered prospective assignment of an international security interest shall take such steps as are within

⁹ Alternatives proposed:

Alternative No. 1:

4. Notwithstanding any other provision of the Convention or this Protocol, a Contracting State may designate its national personal property register or that of another Contracting State or a joint regional registry as a regional registry authority. Such regional registry authority shall be the exclusive means, for railway rolling stock operating in the geographic region covered by the designated registry, of registering an interest governed by the Convention [and of access to the International Registry.]

Alternative No. 2.

4. Notwithstanding any other provision of the Convention or this Protocol, a regional registry authority for equipment situated in Canada shall be the Registrar General of Canada, acting pursuant to section 105 of the Canada Transportation Act; and a regional registry authority for equipment situated in the United States of America shall be the Surface Transportation Board of the United States Department of Transportation, acting pursuant to section 11301 of Title 49 of the United States Code. Such regional registry authority shall be the exclusive means, for railway rolling stock operating in the geographic region covered by the designated registry, of registering an interest governed by the Convention and of access to the International Registry.

5. A regional registry authority so designated as provided in this Article XIII (4), shall not be subject to rules and regulations of the Supervisory Authority, Registry Operating Entity or the Registrar. The Supervisory Authority shall have the obligation of ensuring that registration through either a designated national or joint regional registry established as a regional registry authority pursuant to this Article XIII (4) shall be transmitted to and be available for search at the International Registry. Said obligation shall include, but not be limited to, ensuring that the Registrar establish and fund all systems necessary to receive, at the International Registry, registration information transmitted from such a regional registry authority in the form prescribed by the regional registry authority.

¹⁰ Possible addition:

“; provided, however, that notwithstanding the foregoing, the search criterion for railway rolling stock registered at a regional registry authority designated pursuant to Article XVI of this Protocol shall be the search criterion used by such regional registry authority.”

¹¹ Review Data Protection Issues

its power to procure the discharge of the registration no later than ten calendar days after the receipt of the demand described in such paragraph.

4. For purposes of Article 21 of the Convention, registration of an international security interest shall, unless discharged or unless otherwise agreed, remain effective for an indefinite period of time.

5. For the purposes of Article 20 (2) of the Convention

- (a) any subordination shall comply with the provisions of Article 7 (a) – (c) of the Convention; and
- (b) Article 25 (1) of the Convention shall also apply in respect of a subordinating party *mutatis mutandis* as if it was a debtor and the registration related to the subordination of an interest.

6. The regulations shall prescribe the manner in which the following provisions of the Convention shall apply:

Article 16 (2) (d);
[Article 17;
Article 21;]¹²
Article 22 (1) and (2);
Article 23; and
Article 24.

7. The insurance referred to in Article 26 *bis* (3) shall be [full insurance].¹³

Article XV International Registry Fee

1. The Registrar shall, subject to the approval of the Supervisory Authority, set and may from time to time amend:

- (a) the fees to be paid on filing of an international security interest with the International Registry
- (b) the fee schedule to be paid by the users of the International Registry or a regional registry authority; and
- [(c) the annual fees to be paid as compensation for the operation and administration of the International Registry and the registration facilities.]

2. The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to recover the costs of operating the International Registry or a regional registry authority as appropriate and, in the case of the initial fee schedule, of designing and

¹² [To review if these are needed](#)

¹³ The term “full insurance” will need to be defined more precisely.

implementing the International Registry system over ten years [provided that nothing herein shall preclude the service provider operating for profit].¹⁴

3. The fees and amounts referred to in paragraph 1 of this Article XV may be amended by the registrar taking into account changes economic conditions provided that any increase of the fees and amounts by more than [ten] per cent shall require the approval of the Supervisory Authority.

Article XVI

— ~~[intentionally left blank]~~ —

Modification of assignment provisions

1. Article 31(1) of the Convention applies with the omission of sub-paragraph (c).
2. Article 34 of the Convention applies as if the words following the phrase “not held with an international interest” were omitted.

CHAPTER IV **JURISDICTION**

Article XVII

Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Articles 40 or 41 of the Convention or relating to enforcement of rights and interests relating to railway rolling stock under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.
2. A waiver under the preceding paragraph must be in a[n authenticated] written form that contains a description of the railway rolling stock in the terms as specified in Article IV of this Protocol.

CHAPTER VIII **RELATIONSHIP WITH OTHER CONVENTIONS**

Article XVIII

Relationship with the 1988 Unidroit Convention on International Financial Leasing

The Convention shall, for Contracting States which are parties to it, in the event of any conflict, take precedence over the Unidroit Convention on International Financial Leasing of

¹⁴ A proposed initial fee schedule should be developed and transmitted to governments in the information package accompanying this Protocol.

1988 as relates to railway rolling stock to the extent that convention is in force among them and that convention's terms are inconsistent with the provisions of the Convention.

Article XIX
Relationship with other Conventions

The Convention shall supersede:

- (a) the Rome Convention on the Law Applicable to Contractual Obligations 1980;
~~and~~
- (b) the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1988
- ~~(b)(c)~~ the Inter-American Convention on the Law Applicable to International Contracts 1994
- (d) the Convention Concerning International Carriage by Rail 1980 as modified by the Protocol of modification of 3 June 1999

to the extent that such conventions are in force and are inconsistent with the provisions of the Convention.

CHAPTER ~~IXVI~~
[OTHER] FINAL PROVISIONS

Article XX
Adoption of Protocol

1. This Protocol is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Protocol to the Unidroit Convention on International Interests in Mobile Equipment on Matters specific to railway rolling stock and will remain open for signature by all Contracting States at [...] until [...].
2. This Protocol is subject to ratification, acceptance or approval of Contracting States which have signed it.
3. This Protocol is open for accession by all States which are not signatory Contracting States as from the date it is open for signature.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.¹⁵

Article XXI
Entry into force

¹⁵ It is recommended that a resolution be adopted at, and contained in the Final Acts and Proceedings of, the Diplomatic Conference, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for the making and/or withdrawing of declarations and reservations

1. This Protocol enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. For each Contracting State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that Contracting State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article XXII
Territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which this Protocol extends.

3. If a Contracting State makes no declaration under paragraph 1, this Protocol is to extend to all territorial units of that Contracting State.

Article XXIII
Temporal application

This Protocol applies in a Contracting State to rights and interests in railway rolling stock created or arising on or after the date on which this Protocol enters into force in that Contracting State.

Article XXIV
Declarations and reservations

No declarations or reservations are permitted except those expressly authorised in this Protocol.

Article XXV
Declarations disapplying certain provisions

1. A Contracting State at the time of ratification, acceptance, approval of, or accession to this Protocol

- (a) may declare that it will not apply any one or more of the provisions of Articles VII to IX of this Protocol;

- (b) may declare that it will impose other conditions on the application of Articles VII [, V(1)] and VIII to IX as specified in its declaration.]

2. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the State which is the primary jurisdiction.

Article XXVI
Subsequent declarations

1. A Contracting State may make a subsequent declaration at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of [twelve] months after the date of deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of that subsequent declaration.

Article XXVII
Withdrawal of declarations and reservations

Any Contracting State which makes a declaration under, or a reservation to this Protocol may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of [three] months after the date of the receipt of the notification by the depositary.

Article XXVIII
Denunciations

1. This Protocol may be denounced by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of [twelve] months after the date of deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the

effective date of that denunciation.

Article XXIX
Review of the Protocol

[At the request of not less than twenty-five per cent of the Contracting States, conferences of the Contracting States shall be convened from time to time.] [A standing conference of Contracting States shall be established pursuant to this Protocol] to consider:

- (a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of railway rolling stock;
- (b) the judicial interpretation given to the terms of the Convention, this Protocol and the regulations;
- (c) the functioning of the international registration system and the performance of the Registrar and its oversight by the Supervisory Authority; and
- (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

Article XXX
Depositary arrangements

1. This Protocol shall be deposited with the [Supervisory Authority].
2. The [Supervisory Authority] shall:
 - (a) inform all Contracting States which have signed or acceded to this Protocol and [...] of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) each declaration made in accordance with this Protocol;
 - (iii) the withdrawal of any declaration;
 - (iv) the date of entry into force of this Protocol; and
 - (v) the deposit of an instrument of denunciation of this Protocol together with the date of its deposit and the date on which it takes effect;
 - (b) transmit certified true copies of this Protocol to all signatory Contracting States, to all Contracting States acceding to the Protocol and to [...];
 - (c) provide the Supervisory Authority with the contents of each instrument of ratification, acceptance, approval or accession so that the information contained therein may be made publicly accessible; and
 - (d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Protocol.

**TEXT OF THE PRELIMINARY DRAFT PROTOCOL TO THE
PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL
INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO
RAILWAY ROLLING STOCK**

(as established by a working group organised, at the invitation of the President of UNIDROIT, by Mr H. Rosen, expert consultant on international rail finance matters to the UNIDROIT Study Group for the preparation of uniform rules on international interests in mobile equipment)

PRAEMBLE

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**PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON
MATTERS SPECIFIC TO RAILWAY ROLLING STOCK**

(as established by Mr H. Rosen, expert consultant on international rail finance matters to the UNIDROIT Study Group for the preparation of uniform rules on international interests in mobile equipment and co-ordinator of the Rail Working Group, on the basis of the discussions of the Steering and Revisions Committee which met in Rome on 16/17 March 2000)

PREAMBLE

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the UNIDROIT Convention on International Interests in Mobile Equipment, as it relates to railway rolling stock, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance,

HAVE AGREED upon the following provisions relating to railway rolling stock:

CHAPTER I

GENERAL PROVISIONS

Article I

Defined terms

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. In this Protocol the following terms are employed with the meanings set out below:

(a) “local registry authority” means the authority or agency, whether governmental or acting pursuant to governmental authority, responsible for the administration of a local personal property register;

(b) “local personal property register” means a registry in a Contracting State, whether national or local in a jurisdiction forming part of a state, in which an interest in railway rolling stock governed by the Convention may be registered;

[(c) “primary jurisdiction” means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be the place of the debtor’s seat or domicile unless proved otherwise;]¹

(d) “railway rolling stock” means vehicles moveable on or confined to movement on or directly above a fixed railway track or guideway, or superstructures or racks installed or designed to be installed on such vehicles, including all traction systems, engines, brakes, axles, bogies, and pantographs, and in each case including accessories and other components equipment and parts installed or incorporated therein or attached thereto and all operating and technical data manuals, notebooks and other records relating to all or part of any of the foregoing;

(e) “regional registry authority” means the authority, or authorities acting collectively, maintaining a local personal property register (or a number of such registers acting collectively) designated pursuant to Article 17(3) of the Convention and as provided for in Article XIII (2) herein for the purposes of acting as a portal into the International Registry

(f) “regional rail network” means a geographical area out of which it is not possible for railway rolling stock to move on, or directly above, rails;

(g) “unique identification criteria” means any of the following namely (i) the manufacturer's serial number or works number and its manufacturer’s model designation; (ii) a number and description allocated by a regional registry authority and approved by the Supervisory Authority as sufficient to enable railway rolling stock to be uniquely identified; or (iii) such other identification criteria as the Supervisory Authority may prescribe or approve from time to time in regulations.

Article II

Application of Convention as regards railway rolling stock

1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.

2. The Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the UNIDROIT Convention on International Interests in Mobile Equipment as applied to railway rolling stock.

¹ May be moved to Convention

Article III
Sphere of application

1. In their relations with each other, the parties may by agreement in writing, derogate from or vary any of the provisions of this Protocol except, Articles IV and VI (2).

Article IV
Description of railway rolling stock

1. A description of railway rolling stock that includes the unique identification criteria is necessary and sufficient to identify the object for purposes of sub-paragraph (c) of Article 7 of the Convention.

2. Any change to such description shall be notified by debtor to the Registrar on or before such change takes place but any claim of a creditor in relation to railway rolling stock where its description has been changed, shall be subject to any prior right registered in favour of a creditor in relation to the previous description or descriptions.²

3. Any modification, renewal or alteration to railway rolling stock shall not affect the rights of creditors.

Article V
Representative capacities

A person may enter into an agreement and register an international interest in railway rolling stock created or provided for by the agreement in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention to the exclusion of the person or persons represented.³

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article VI
Modification of default remedies

1. In addition to the remedies specified in paragraph 1 of Article 8 and in Article 10 and 14 (1) of the Convention, the creditor may obtain an order from the court in the jurisdiction in which the railway rolling stock is physically located, directing immediate

² There remains an open issue as to how transfers of assets from one restricted rail region to another should be handled if the unique identification criteria change. Further it is noted that there is (for the moment) no sanction if the change is not notified.

³ May be moved into the Convention

delivery of the railway rolling stock to a location within or outside of such jurisdiction where thereafter the creditor can move the railway rolling stock into the relevant regional rail network where the railway rolling stock is then located without the need of traction to be provided by the defaulting debtor or any party related to or acting in concert with it.

2. The creditor may not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. For the purposes of Article 8 (2) of the Convention an agreement between a debtor and a creditor as to what is commercially reasonable shall be conclusive.

4. For the purposes of Article 8 (3) of the Convention, the chargor and chargee may agree in writing a notice period which shall be deemed to be reasonable if not less than 14 calendar days ⁴.

Article VII *Choice of Law*

1. The parties to an agreement may agree on the law to govern their contractual rights and obligations, wholly or in part. The agreement and transaction referred to therein need not bear a relationship to the selected body of national law.

2. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

Article VIII *Speedy judicial relief*

1. Notwithstanding the provisions of Article 14(1) of the Convention, relief shall not be dependent upon the consent of the debtor.⁵

2. Relief given under Article 14(1) (a) of the Convention may specifically include directions as to normal maintenance and other necessary repair or modification of the object.

3. Judicial relief under Article 14(1) of the Convention may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another [Contracting] State unless its application would contravene an international instrument binding on either Contracting State.⁶

⁴ The AWG has suggested 10 days but the rail working group considers this as being too short.

⁵ This may be implemented in the Convention and therefore not be required in the Protocol

⁶ Open for discussion

Article IX
Remedies on Insolvency

1. For the purposes of this Article, “insolvency date” means the earliest date on which one of the events specified in paragraph 2 shall have occurred.

2. This Article applies where:

(a) any insolvency proceedings against the debtor have been commenced by the debtor or another person in a Contracting State which is the primary insolvency jurisdiction of the debtor; or

(b) the debtor is located in a Contracting State and has declared its intention to suspend, or has actually suspended, payment to creditors generally.

3. Within a period not exceeding sixty days from the insolvency date (the “cure period”) the debtor or an insolvency administrator, shall:

(a) cure all defaults, and agree to perform all future obligations under the agreement and related transaction documents; or

(b) give possession of the railway rolling stock to the creditor save where otherwise previously agreed in writing and otherwise in accordance with, and in the condition specified in the agreement and related transaction documents.

4. Unless and until the creditor is given possession under paragraph 3:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

5. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve and maintain it and its value.

6. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period, it has cured all defaults and has agreed to perform all future obligations under the agreement. A second cure period shall not apply in respect of a default in the performance of such future obligations.

7. No exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

8. No obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

9. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law [to terminate the agreement].

10. No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 38 of the Convention, shall have priority in the insolvency over registered interests⁷ [and no doctrine of reputed ownership shall defeat registered interests].

11. Nothing in this Article shall operate to modify Article 28(3) of the Convention to which this Article shall be subject.

12. Article VI of this Protocol and Article 8 of the Convention as modified by Article VI of this Protocol, shall apply to the exercise of any remedies under this Article.

Article X *Insolvency assistance*

The courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX.

CHAPTER III

RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XI *Supervisory Authority and the Registrar*

1. The initial Supervisory Authority shall be [the Intergovernmental Organisation of Carriage by Rail or such successor organisation or other body as it may appoint]. [Subject to paragraph 2 below,] the Supervisory Authority shall appoint a Registrar.

2. [The initial Registrar hereby designated to operate the International Registry shall be Eurofima European Company for the Financing of Railroad Rolling Stock]. The Registrar shall subject to paragraph 4 below, create an independent special purpose affiliate or division for the purpose of operating the International Registry to be known as the Registry Operating Entity.

3. The Registry Operating Entity shall be organised in consultation with the Supervisory Authority. Its constitutive documents shall contain provisions which:

- (a) restrict it to acting as Registrar and performing ancillary functions;
- (b) ensure that it has no greater duties (fiduciary or otherwise) to its members than to any other person or entity in the performance of its functions as Registrar⁸

⁷ See also comment below on Article XXV

⁸ In the operations agreement with the Registrar there should be a requirement that it operates under a general duty of fairness and impartiality.]

4. In relation to the initial Registrar or any successor Registrar, the appointment shall be subject to regulations made by the Supervisory Authority from time to time and to an operations agreement entered into with the Supervisory Authority setting out the basis on which the registry should function.

5. The initial Registrar shall operate the International Registry for a period [of [ten] years from the date of entry into force of this Protocol][that the Supervisory Authority considers appropriate but in any event not exceeding ten years]. Thereafter, the Registrar shall be appointed or re-appointed for such period that the Supervisory Authority considers appropriate (but in any event not exceeding ten years)⁹.

6. Notwithstanding the foregoing, the Supervisory Authority shall be entitled to appoint a replacement Registrar in the event that the Registrar (a) shall resign (b) shall become insolvent or generally be unable to pay its debts (c) shall be dissolved or (d) does not [materially] comply with its obligations herein, under the operations agreement or under regulations set out by the Supervisory Authority.

7. The Registrar shall be entitled to contract out its duties to a third party “service provider” subject to the identity of the service provider [and to the conditions under which the service provider carries out duties on behalf of the Registrar] being accepted by the Supervisory Authority by a declaration in writing prior to such contracting out. Contracting out of its duties shall not relieve the Registrar of its obligations hereunder or under the regulations but the service provider shall become an additional party to the operations agreement entered into between the Supervisory Authority and the Registrar.

Article XII *First Regulations*

The initial regulations shall be issued no later than the date that is [three months] prior to the entry into force of this Protocol. Prior to issuing regulations, the Supervisory Authority shall publish draft regulations in good time for review and comment and thereafter consult with representatives of manufacturers, operators and financiers thereon.

Article XIII *Access to Registry*

1. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

2. [A Contracting State] [All states in the area covered by a regional rail network, provided that they act jointly and are all Contracting States,] may designate one or more (acting jointly) local personal property registers as a regional registry authority [for the entire relevant regional rail network] subject to the terms of this Protocol. Any designation, to be effective, shall be subject to a written undertaking, given to the Supervisory Authority from

⁹ This allows some discretion bearing in mind the investment in training and software which will be required by the Registrar

the regional registry authority, agreeing to comply with the obligations of a regional registry authority as set out herein. The registration facilities provided by a regional registry authority shall be operated and administered during working hours in its territory. Any regional registry authority designated pursuant to this paragraph 2 shall ensure that registration through it shall automatically result in delivery of information to the International Registry as the Registrar shall reasonably require and, if it comprises more than one registry facility, shall provide equal access and full co-ordination between the respective facilities but, subject to paragraph 3 below, the regional registry authority shall conduct its affairs and shall be free to set such requirements as to form and nature of filings made through it as it as it considers appropriate.

3. The Supervisory Authority shall by regulations accept the unique identification criteria proposed by the regional registry authority where they comply with the rules of a uniform and unique system of identification of railway rolling stock in the relevant regional rail network, apply exclusively within such network and are sufficient to comply with the basic informational requirements of the Registrar in operating the International Registry.

4. Any regional registry authority shall be the exclusive access (for the purposes of registration) to the International Registry in relation to the regional rail network covered by it.

Article XIV

Additional Modifications to Registry provisions

1. For purposes of Article 19 (6) of the Convention, the identification criterion for railway rolling stock shall be the description required to identify the equipment set forth in Article IV (1) herein and the search criterion at the International Registry shall be established by the Supervisory Authority. In the event that railway rolling stock has different unique identification criteria depending on which regional rail network it is located in, the Registrar shall maintain a lexicon showing the equivalent descriptions, which shall be open to inspection.

2. For purposes of Article 23 of the Convention, the categories of preferred non-consensual creditors shall be searchable by the name of the declaring Contracting State.

3. For the purposes of Article 25 (2) of the Convention, and in the circumstances there described, the holder of a registered prospective international security interest or a registered prospective assignment of an international security interest shall take such steps as are within its power to procure the discharge of the registration no later than ten calendar days after the receipt of the demand described in such paragraph.

4. For purposes of Article 21 of the Convention, registration of an international security interest shall, unless discharged or unless otherwise agreed, remain effective for an indefinite period of time.

5. Article 25 (1) of the Convention shall also apply in respect of a subordinating party mutatis mutandis as if it was a debtor and the registration related to the subordination of an interest.

6. The regulations shall prescribe the manner in which the following provisions of the Convention shall apply:

Article 16 (2) (d);
 [Article 17;
 Article 21;]¹⁰
 Article 22 (1) and (2);
 Article 23; and
 Article 24.

7. The insurance referred to in Article 26 *bis* (3) shall be [full insurance].¹¹

Article XV *International Registry Fee*

1. The Registrar shall, subject to the approval of the Supervisory Authority, set and may from time to time amend:

(a) the fees to be paid on filing of an international security interest with the International Registry directly or through a regional registry authority

(b) the fee schedule to be paid by the users of the International Registry;
 and

[(c) the annual fees to be paid as compensation for the operation and administration of the International Registry and the registration facilities.]

2. The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to recover the costs of operating the International Registry and, in the case of the initial fee schedule, of designing and implementing the International Registry system over ten years provided that nothing herein shall preclude the service provider operating for profit.¹² If filings are made through a regional registry authority, such authority shall collect such fees and shall account to the Registrar therefor.

3. The fees and amounts referred to in paragraph 1 of this Article XV may be amended by the Registrar taking into account changed economic conditions provided that any increase of the fees and amounts by more than [ten] per cent shall require the approval of the Supervisory Authority.

¹⁰ To review if these are needed

¹¹ The term “full insurance” will need to be defined more precisely.

¹² If the duties are outsourced, it is unrealistic to stipulate that the service is provided without profit. The charges will however be monitored by the Supervisory Authority and we leave it open for Contracting States to decide as a policy issue as to whether the Registrar should be permitted to offer its services at a profit.

Article XVI
Modification of assignment provisions

1. [Article 31(1) of the Convention applies with the omission of sub-paragraph (c)]¹³.
2. Article 34 of the Convention applies as if the words following the phrase “not held with an international interest” were omitted.¹⁴

CHAPTER IV
JURISDICTION

Article XVII
Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Articles 40 or 41 of the Convention or relating to enforcement of rights and interests relating to railway rolling stock under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. A waiver under the preceding paragraph must be in a[n authenticated] written form that contains a description of the railway rolling stock in the terms as specified in Article IV of this Protocol.¹⁵

CHAPTER V
RELATIONSHIP WITH OTHER CONVENTIONS

Article XVIII
Relationship with other Conventions

The Convention shall, for Contracting States which are parties to it, in the event of any conflict, take precedence over

- (a) the Rome Convention on the Law Applicable to Contractual Obligations 1980;
- (b) the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 (as amended from time to time);

¹³ This may move into the Convention

¹⁴ Pending review of Article 34.

¹⁵ As this is an area of general concern, this may be moved up into the Convention.

(c) the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1988;

(d) the Inter-American Convention on the Law Applicable to International Contracts 1994;

(e) the Convention Concerning International Carriage by Rail 1980 as modified by the Protocol of modification of 3 June 1999; and

(f) the UNIDROIT Convention on International Financial Leasing of 1988

as they relate to railway rolling stock, to the extent that convention is in force among them and that convention's terms are inconsistent with the provisions of the Convention.¹⁶

Article XIX

[Deliberately left blank]

CHAPTER VI

[OTHER] FINAL PROVISIONS

Article XX

*Adoption of Protocol*¹⁷

1. This Protocol is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to railway rolling stock and will remain open for signature by all Contracting States at [...] until [...].

2. This Protocol is subject to ratification, acceptance or approval of States which have signed it.

3. This Protocol is open for accession by all States which are not signatory States as from the date it is open for signature.

¹⁶ Generally subject to review by UNIDROIT Secretariat. Each convention will be reviewed to ensure that under their respective terms, Contracting States which are parties or subject thereto may agree to this Article. Possible conflicts with EU Regulations should also be reviewed.

¹⁷ Subject to review in relation to the fast track procedure on adoption of protocols

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.¹⁸

Article XXI
Entry into force

1. This Protocol enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. For each State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article XXII
Territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which this Protocol extends.

3. If a Contracting State makes no declaration under paragraph 1, this Protocol is to extend to all territorial units of that Contracting State.

Article XXIII
Temporal application

This Protocol applies in a Contracting State to rights and interests in railway rolling stock created or arising on or after the date on which this Protocol enters into force in that Contracting State.¹⁹

¹⁸ It is recommended that a resolution be adopted at, and contained in the Final Acts and Proceedings of, the diplomatic Conference, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for the making and/or withdrawing of declarations and reservations (but see above).

¹⁹ Subject to rules outstanding regarding the priority of security interests in equipment created prior to the Protocol entering into force in a Contracting State (unregistered prior interests). The Rail Working Group favours a system whereby there is a significant transition period (e.g. 10 years) during which unregistered prior interests are accorded priority under the Protocol of the date of creation of the interest.

Article XXIV
Declarations and reservations

No declarations or reservations are permitted except those expressly authorised in this Protocol.

Article XXV
*Declarations modifying the Protocol or certain provisions thereof*²⁰

1. A Contracting State at the time of ratification, acceptance, approval of, or accession to this Protocol

(a) may declare that this Protocol shall not apply in the case of a purely internal transaction, namely in relation to railway rolling stock so long as it is only capable, in its normal course of use, of being operated on a single railway system within that Contracting State because of track gauge, other elements of the design of such railway rolling stock, or lack of connection to other railway systems.

(b) may declare that it will impose other conditions on the application of Articles VII to IX as specified in its declaration.

2. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the State which is the primary jurisdiction.

Article XXVI
Subsequent declarations

1. A Contracting State may make a subsequent declaration at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of [six] months after the date of deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of that subsequent declaration.

²⁰ There remains an open question as to whether the overreaching powers and rights of persons or entities appointed under statute and acting under public law (e.g. Franchising Director in the United Kingdom) will need to be specifically acknowledged in the Protocol (and Convention) or whether this is the case anyway under general principles concerning application of a private law convention.

Article XXVII
Withdrawal of declarations and reservations

Any Contracting State which makes a declaration under, or a reservation to this Protocol may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of [three] months after the date of the receipt of the notification by the depositary.

Article XXVIII
Denunciations

1. This Protocol may be denounced by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of [twelve] months after the date of deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of that denunciation.

Article XXIX
Review of the Protocol

[At the request of not less than twenty-five per cent of the Contracting States, conferences of the Contracting States shall be convened from time to time,] [A standing conference of Contracting States shall be established pursuant to this Protocol] to consider:

(a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of railway rolling stock;

(b) the judicial interpretation given to the terms of the Convention, this Protocol and the regulations;

(c) the functioning of the international registration system and the performance of the Registrar and its oversight by the Supervisory Authority; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable

and shall, after expiry of [ten] years after this Protocol is first adopted by a Contracting State, be entitled to replace the Supervisory Authority by resolution [agreed to by two thirds of the Contracting States at that time], such resolution giving not less than one year notice of replacement to the Supervisory Authority.

Article XXX
Depositary arrangements

1. This Protocol shall be deposited with the [UNIDROIT] [Supervisory Authority].
2. The [Supervisory Authority] [UNIDROIT] shall:
 - (a) inform all Contracting States which have signed or acceded to this Protocol and [...] of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) each declaration made in accordance with this Protocol;
 - (iii) the withdrawal of any declaration;
 - (iv) the date of entry into force of this Protocol; and
 - (v) the deposit of an instrument of denunciation of this Protocol together with the date of its deposit and the date on which it takes effect;
 - (b) transmit certified true copies of this Protocol to all signatory States, to all States acceding to the Protocol ²¹ and to [...];
 - (c) provide the Registrar with the contents of each instrument of ratification, acceptance, approval or accession so that the information contained therein may be made publicly accessible; and
 - (d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Protocol.

²¹

See above; also subject to modifications due to implementation of fast track system.