

**OTIF**



**ORGANISATION INTERGOUVERNEMENTALE POUR  
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN  
INTERNATIONALEN EISENBAHNVERKEHR**

**INTERGOVERNMENTAL ORGANISATION FOR  
INTERNATIONAL CARRIAGE BY RAIL**



**INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF  
PRIVATE LAW**

**INSTITUT INTERNATIONAL POUR L'UNIFICATION DU  
DROIT PRIVE**

**COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF  
A DRAFT PROTOCOL TO THE DRAFT UNIDROIT CONVENTION ON  
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS  
SPECIFIC TO RAILWAY ROLLING STOCK**

**First Joint Session**

**(Berne, 15 and 16 March 2001)**

**REPORT**

(prepared by the Secretariats of OTIF and UNIDROIT)

## Opening

The first Joint Session of the Committee of governmental experts for the preparation of a draft Protocol on Matters specific to Railway Rolling Stock (Rail Protocol) was attended by 38 participants of 20 States and six observers from four international Organisations (see Attachment A - List of participants).

The session was opened by Mr H.R. Isliker, Director General, on behalf of OTIF, and Professor H. Kronke, Secretary-General, on behalf of UNIDROIT.

Mr Isliker emphasised the importance of a global view in the railway sector even if OTIF was not an Organisation with worldwide membership. He also mentioned the connection between the railway reform process, especially in Europe, and the new financing models for investment in railway stock (Opening speech of Mr Isliker; see Attachment D).

Mr Kronke pointed out that legal and economic factors made the work on the UNIDROIT Convention on international interests in mobile equipment necessary and encouraged the hope that this work would be successful. He expressed his gratitude to Mr H. Rosen, Prof. K.F. Kreuzer and Sir Roy Goode for their important contributions to this project (Opening speech of Mr Kronke; see Attachment E).

Mr Mutz, Deputy Director, responsible for this matter within OTIF, addressed a warm welcome to participants and made a few practical announcements concerning the organisation of the meeting and its schedule. He then drew the attention of the participants to the working papers (see Attachment B).

The main working paper was the “Preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock” (OTIF/JGR/2 – UNIDROIT 2000 Study LXXIIIH – DOC. 4). This preliminary draft Rail Protocol had been discussed and established by the Rail Working Group (RWG), co-ordinated and chaired 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. It is attached to this report (Attachment F).

Mr Mutz congratulated the RWG and Mr Rosen for their excellent work, and especially Mr Rosen for his particular efforts and his dedication to duty. Mr Mutz expressed his conviction that the preliminary draft would be a very useful basis for the discussions at the meeting.

The preliminary draft Rail Protocol had been sent out to the Governments of Member States of OTIF and to the Governments of Member States of UNIDROIT on 15 December 2000.

Despite the fact that the working language of this first Joint Session of governmental experts was English only, the OTIF Secretariat had prepared a French and a German version, since those languages were also working languages of OTIF. All three language versions had been made available on the OTIF homepage on the Internet.

In addition to the main working paper, the basic draft UNIDROIT Convention (Doc. 3), in English and French only, had been enclosed with the letter of invitation. These texts - as well as the draft Aircraft Protocol which was not enclosed with OTIF's invitation - were available on the UNIDROIT homepage.

### **Agenda Item 1: Election of a Chairman**

Prof. Karl F. Kreuzer (Germany) was elected Chairman (proposal of Finland, supported by Canada), Prof. Inés M. Weinberg (Argentina), Deputy Chairperson (proposal of Germany, supported by Sweden) and Prof. Sir Roy Goode (United Kingdom) was elected Rapporteur (proposal of the Chairman).

### **Agenda Item 2: Adoption of the Agenda**

The agenda was adopted as proposed (Attachment C).

### **Agenda Item 3: Presentation of the draft UNIDROIT Convention on International Interests in Mobile Equipment**

The Chairman of the RWG explained the **economic background** of the Convention and in particular the need to have a Rail Protocol. To achieve more efficiency, the railway sector needed not to depend exclusively on State budgets. An international legal framework which gave security to private investors should encourage private investment in the railway sector (Speech of Mr H. Rosen; see Attachment G).

Mr Mutz drew the attention of participants to the economic impact assessment study on the proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to aircraft equipment through the Protocol on Matters specific to Aircraft Equipment (Aircraft Protocol); an executive summary of this study, which had been prepared in 1998, had been attached to the letter of the Aviation Working Group (AWG) of 14 March 2001 addressed to Mr Isliker and Mr Kronke. A copy of it had been distributed to participants at the session (Attachment I). Because of the similar basic structures used in aircraft and rail financing, this study could be of interest to the railway sector too.

A presentation of the **Eurofima system** of financing of railway rolling stock was given by Mr J.-P. Phan (Attachment H). Besides some information on the constitution, structure and present activities of Eurofima Mr Phan mentioned some organisational, financial and functional aspects as well as data access and security aspects in the event that Eurofima became the Registry Operating Entity under the Rail Protocol.

Ms Tosto (Canada) gave a brief presentation of the **legal systems in Canada and in the USA** as far as the protection of interests in railway rolling stock was concerned. These systems were not identical but comparable, especially in regard to the ability to register, the ability to search and insolvency protection. She announced that some more detailed written information would be supplied following the meeting.

The Rapporteur gave a general overview of the **UNIDROIT Convention**. As there was no harmonised legal regimen in regard to security interests from one country to another, the basic idea of the Convention consisted in creating an international regimen and setting up a registration system in order to ensure the international recognition of such interests. The main principles of the new international regimen as proposed were as follows:

- practicability
- predictability (clear, simple rules were to be established)
- transparency (meaning public access to the registry) and

- sensitivity to existing legal cultures (the possibility of opting out or opting in by means of declarations).

As a result of lengthy discussions, the concept of a base Convention supplemented by specific Protocols for various equipment sectors had been chosen in order to meet the specific needs of the various categories of equipment. These specific Protocols were regarded as the appropriate instruments in which to include specific definitions, define the subject in the framework of each specific sector, provide for modifications and exceptions where necessary and in particular the identification criteria for the relevant category of equipment. This concept assumed that the application of the Convention to a specific sector would be determined by the entry into force of the Protocol specific to that sector.

The Convention governed interests arising under three types of agreement, namely a security agreement, a conditional sale agreement and a leasing agreement. Since registration of an interest was against the object, not the debtor, the Convention was necessarily confined to existing and uniquely identifiable objects. The Convention applied to such interests when the debtor was situated in a Contracting State. The requirement for the constitution of an international interest was simple, and a national interest would usually concurrently constitute an international interest. An international registry was designed to protect these interests against claims of third parties.

An important part of the system serving to protect creditors was the set of provisions containing default remedies. In principle, the chargee could exercise such remedies as the taking of possession of the object, the selling or granting of a lease of the object, the collecting or receiving of any income or profits from the management or use of the object, provided that the chargor had so agreed (Article 7). Similar remedies were available to a conditional seller or a lessor (Article 9). However, there were some legal systems which did not allow the creditor to exercise such remedies without recourse to the court. Those countries could make use of a declaration regarding remedies (Article 52) stipulating that any remedy could only be exercised with the leave of the court.

The Convention, the Aircraft Protocol and the Rail Protocol provided for speedy relief which the creditor could obtain from a court, pending final determination of his claim, to the extent that the debtor had so agreed.

As far as the registration system was concerned, the Convention provided general rules in regard to registration requirements, when registration took effect, who could register, searches, discharge of registration and other issues. Railway rolling stock was intended to have a registration system of its own.

In addition to the rules relating to registration, the Convention made provision for the two institutions responsible for administering the international registration system: the Supervisory Authority and the Registrar. While the Supervisory Authority was given immunity (Article 26), the Registrar would be liable for compensatory damages (Article 27).

Finally, the Rapporteur mentioned the effects of an international interest as against third parties. He stressed the following rules as important principles of the Convention:

- A registered interest had priority over any other interest subsequently registered and over an unregistered interest (Article 28).

- A creditor would not lose his interest because of his debtor's insolvency (Article 29).

The Convention also contained rules on the assignment of international interests and jurisdiction rules.

Mr Stanford, Principal Research Officer, UNIDROIT, informed the Committee of the status of the overall project and the next steps to be carried out (see also agenda item 5, p. 12):

- The aircraft industry was interested in seeing the new international regimen come into force for aircraft equipment at the earliest possible opportunity. Preparation of the Convention and the Aircraft Protocol was at the final stage. They were due to be adopted at a Diplomatic Conference to be held from 29 October to 16 November 2001 in Cape Town.
- The Space Protocol was almost ready to be transmitted to the Governments of member States of UNIDROIT but its compatibility with the existing space treaties was still to be examined before its consideration by the UNIDROIT Governing Council, at its 80<sup>th</sup> session to be held in Rome from 17 to 19 September 2001.
- It was planned that a second Joint Session of governmental experts (UNIDROIT/OTIF) would be convened in April 2002 to go on with the examination of the Rail Protocol.

After the adoption of the Convention and the Aircraft Protocol other additional Protocols could be adopted either by a traditional Diplomatic Conference or via a fast-track procedure.

At its 34<sup>th</sup> session, to be held in Vienna from 25 June to 13 July 2001, the UN Commission on International Trade Law (UNCITRAL) was due to finalise the draft Convention on Assignment in Receivables Financing. In order not to create future conflicts between the draft Convention and the UNIDROIT Convention, it would be important to exclude receivables covered by the UNIDROIT Convention as implemented by the relevant equipment-specific Protocols. In this connection, Mr Stanford invited all delegations present to co-ordinate the position of their representatives to UNCITRAL. He drew attention to the 28 March 2001 deadline for the submission of written comments on the draft UNCITRAL Convention.

The Chairman invited delegations to give their general views on the draft Convention and the preliminary draft Rail Protocol.

Notwithstanding some criticism of the decision to hold the session in English only (to the exclusion of one working language of UNIDROIT and two working languages of OTIF), two delegations expressed their appreciation of the efforts of both Organisations in organising the first Joint Session and praised in particular the merits of those who had done the drafting work. They expressed the interest of their Governments in the project and their readiness to contribute to its further development. One delegation however regretted that there had not been enough time to consult all the bodies and institutions concerned.

#### **Agenda Item 4: Examination of the preliminary draft Protocol on Matters specific to Railway Rolling Stock (preliminary draft Rail Protocol)**

Before beginning consideration of the preliminary draft Rail Protocol, Mr Rosen pointed out that the RWG had tried to draw a balance between the Common law and continental Civil law approaches to this subject. Compromise solutions had been preferred to derogations. In the end, the influence of the Common law was less evident than in the Aircraft Protocol. Further

differences with the Aircraft Protocol were to be seen in the public service issue, which seemed to be much more important in the rail sector than in the aircraft sector. One delegation expressed doubts as to whether the public service issue was really that more important in the rail sector, as in some States of South America the public sector played an important role in carriage by air too.

The Joint Session thereafter considered the text of the preliminary draft Rail Protocol, each Article being introduced by the Rapporteur and the Chairman of the RWG.

## CHAPTER I - GENERAL PROVISIONS

### Article I (2) - Definitions

It was noted that

- the definitions in *sub-paragraphs (a), (b) and (e)* took account of the existing registration systems;
- according to the definition in *sub-paragraph (c)* the concept of *primary jurisdiction* was in principle based on the place where the debtor was located, which corresponded to the rule existing in most States of Europe; however, it was formulated in a more general manner;
- the definition of *railway rolling stock* in *sub-paragraph (d)* consciously avoided including any minimum value criterion;
- the definition in *sub-paragraph (f)* took account of the *transnational rail networks* in North America which were already operational;
- the definition of *unique identification criteria* in *sub-paragraph (g)* was based on the idea of **one** security interest over **one** asset.

One delegation found a certain contradiction between the term defined in *sub-paragraph (b)*, i.e. *‘local personal property register’* and Article 11 where the term “Registry Operating Entity” was used.

In response to a question, the Chairman of the RWG explained that the term “transnational” used in *sub-paragraphs (a) and (e)* had been preferred in this case to the term “international” in order to avoid any confusion, as the term “international” was used in “international interest”. Furthermore, he confirmed the opinion of another delegation that, for example, the network covering the whole continent of Europe, including the United Kingdom, could be regarded as a transnational rail network. Another member of the RWG added that initially the draft had made use of the term “regional”. Following this discussion, a suggestion was made to use the term “continental rail network”.

Several participants discussed the question how far rolling stock and especially locomotives could move within such a transnational or continental rail network. It was noted that specially designed locomotives (i.e. with multiple voltage) would be able to cross the whole continent.

Two delegations expressed the view that only a rail network and not a *transnational rail network* was defined in *sub-paragraph (f)*. One of them therefore suggested completing the text by the words “to cross the border”.

Several questions were raised regarding the definition of *railway rolling stock* (sub-paragraph (d)). Following a question from one delegation, it was clarified that containers were not intended to be included in the current definition of railway rolling stock. It was noted that this interpretation was not however clear with regard to high-value maintenance equipment on tracks; it was agreed that consideration might be given to the desirability of including such equipment.

One delegation drew attention to the definitions in Appendices F and G to COTIF as amended by the 1999 Protocol where a clear and simple definition of “railway vehicle” could be found. The Chairman of the RWG doubted whether this definition would be generally acceptable for the purposes of the Rail Protocol.

The question was raised whether manuals should be included in the definition of railway rolling stock. For two delegations manuals seemed to be a key element. The Rapporteur suggested that sub-paragraph (d) could specify that manuals “relating to rolling stock” were included whilst one participant suggested the formulation “manuals identified to the item”, which the Rapporteur agreed was better still.

The Chairman of the RWG noted that the definition of *unique identification criteria* (sub-paragraph (g)) had proven very controversial during the preparation of the preliminary draft Protocol. The RWG realised that each manufacturer of railway rolling stock had its own description system. It was agreed that the identification criteria to be employed had to be fixed and visible on the equipment. The definition in sub-paragraph (g) was a general one; the chassis number would be the most likely practical solution as an identification criterion.

## **Article II - Application of Convention as regards railway rolling stock**

This Article was designed to underline the relationship between the Convention and the Protocol; it was noted that there was no need to discuss it at this stage.

## **Article III - Sphere of application**

This Article gave rise to no discussion. The Chairman of the RWG noted that the question as to which provisions should be made mandatory and where derogations should be allowed would need to be reviewed at a later stage.

## **Article IV - Description of railway rolling stock**

Paragraphs 1 and 3 gave rise to no discussion. With respect to paragraph 2, the issue of the consequences of a change in the description of railway rolling stock was discussed. One delegation indicated that this issue might be of particular importance for a subsequent party dealing with used equipment. It was pointed out that a change of description should not affect the rights of the creditor. It was also emphasised that the debtor had formally to notify formally such a change to the Registrar in any case; there was no provision for the case where the creditor knew or should have known of the change.

After further discussion, the issue remained open as to whether a creditor lost priority if he were notified of the change and failed to register within a given period. However, it was noted that, if the register provided a genealogy for an asset, the second creditor should be able to verify its position.

## **Article V - Representative capacities**

The Rapporteur pointed out that this Article might need some fine tuning since an agent not acting as principal was not party to the contract. Nevertheless, the concept was intended to be the same as that of Article VI of the Aircraft Protocol although the words “or a sale” had been left out in the Rail Protocol.

One delegation doubted whether it was correct to begin the second sentence with the words “In such case”; it suggested that the link to the first sentence should be expressed differently.

Another delegation expressed concern at the concept of a person acting in an agency capacity being able to exclude an action of the person represented. It suggested replacing the words “to the exclusion of the person or persons represented” by the words “on behalf of the person or persons represented”. A third delegation noted that the issue involved was one between the principal and the agent and was not a definition problem.

The Rapporteur and the Chairman of the RWG agreed with the third delegation. The Chairman of the RWG stressed the fact that principals and agents were in a different position in relation to the asset. He explained that the RWG had been aware of the different ways in which an agent was treated in the various legal systems; it had tried to express the representative capacities in a clear, uniform manner. According to the Rapporteur the words “to assert rights and interests ... to the exclusion of the person or persons represented” should be interpreted as meaning that a representative and only a representative was entitled to assert these rights and interests. The Chairman of the RWG added that in syndicated financing it would cause chaos if every person represented was able to act personally. However, it was noted that the issue could be reconsidered.

## **CHAPTER II - DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

### **Article VI - Modification of default remedies**

The Rapporteur and the Chairman of the RWG explained that the intention was to enable the creditor to exercise a remedy when he was in a position to do so, by way of self-help and without the necessity of going through the courts. Repossession was no problem for the Aircraft Protocol since the asset could easily be flown out of a given country. However, the RWG had realised that some legal regimes, unlike the USA, in particular Germany, were reluctant to admit self-help. Therefore, the Rail Protocol stipulated that “the creditor may obtain an order from the court”. Besides that, it was important to specify that the creditor could move the railway rolling stock without the need for any co-operation from the debtor.

It was pointed out that there was a difference in the two Protocols as regards the notice period for the purpose of Article 7 (3) of the Convention: a notice period of 10 days (see Article IX (4) of the Aircraft Protocol) was considered too short; according to Article VI (4), a notice period was to be deemed reasonable if no fewer than 14 calendar days.

One delegation doubted whether it would be practical to move a carriage/wagon or a locomotive out of the State where it was located. In the event of the bankruptcy of a railway company, the equipment necessary to move the rolling stock could be out of operation. Furthermore, the use of foreign infrastructure might be necessary; in some countries free



access was granted, but in others it was not. Of course, it was easier to move an aeroplane than a locomotive. The question of whether the lender had the appropriate means to repossess and bring the asset out of the country where it was located at the time was a problem of risk assessment.

The Chairman of the RWG replied that the court had to issue an order against the debtor to grant a right of access or transit, but nevertheless practical problems could arise in the event of the bankruptcy of the debtor.

One delegation underlined that self-help was available as the general rule under the Convention.

Another delegation expressed the concern that the exercise of a remedy could cause a public service blockage. The issue remained open whether, and if so, to what extent and in which way public service rolling stock should be protected from the exercise of default remedies.

It was made clear that the terms “a debtor and a creditor” as used in paragraph 3 comprised a chargor and a chargee too. The Rapporteur confirmed that the terms “chargor and chargee” were used in Articles 7 and 8 of the base Convention.

#### **Article VII - Choice of law**

The Rapporteur remarked that this rule was common to all legal systems, but should rather be relocated to the end of Chapter I, as was the case with the Aircraft Protocol. The Chairman of the RWG pointed out that this Article reflected practice in giving the parties a large measure of freedom of contract; even a law having no relation to the transaction could be chosen. Two Swiss parties, for example, could contract to make U.K. law applicable in the interest of the standardisation of the applicable law system (same documentation, single legal system).

Following a question from the Chairman, the Rapporteur confirmed that Article VII was intended to cover both purely internal situations as well as situations with a foreign element.

Two delegations emphasised the need to take account of the fact that there were mandatory provisions of national law; the parties could be prevented from choosing a foreign law if they were both subject to the mandatory provisions of national law. One such delegation pointed out that the provisions of the Rome Convention on the Law Applicable to Contractual Obligations 1980 should also be taken into consideration.

The Rapporteur noted that international mandatory law overrode purely internal mandatory law. Article XIX provided that the Convention took precedence over the Rome Convention.

The Chairman of the RWG noted that it would nevertheless be desirable to provide the possibility of choosing rules which the market required or understood; it was conceivable that two parties might wish to conclude a leasing agreement in a State which had no rules on such transactions; in such a case the parties should have the possibility of choosing a more suitable law. It was agreed that the text should be amended so as to make it clear that the parties had this right at any time.

The Chairman concluded that this provision would have to be reviewed.

### **Article VIII - Speedy judicial relief**

Following a comment by the Chairman, the Chairman of the RWG agreed that the heading of this Article should be brought into line with the heading of Article 12 of the Convention (Relief pending final determination) and Article X of the Aircraft Protocol (Modification of the provisions regarding relief pending final determination).

The Rapporteur and the Chairman of the RWG further agreed that the need for the consent of the debtor according to Article 12 (1) of the Convention was not realistic and was somewhat contradictory; however, it was open to the court to set conditions.

It was noted that sensitivity to local law and recognition of the need to safeguard public services had played a role in the drafting of this Article. Nevertheless, one delegation and the Chairman expressed concern as to whether the public service issue had been dealt with adequately. Another controversial issue was that of jurisdiction, as the jurisdiction where the assets were located which was the main insolvency jurisdiction could be different from the primary jurisdiction as understood by Article 1 (2) (c). The preservation of the asset, on the one hand, and the protection of the creditor's interests, on the other hand, represented a public policy issue in certain States.

It was agreed that this provision needed to be reviewed accordingly.

### **Article IX - Remedies on Insolvency**

The Rapporteur and the Chairman of the RWG pointed out that the Aircraft Protocol contained optional provisions regarding the remedies on insolvency (Article XI - Alternatives A and B). Contracting States could choose either a "hard" or a "soft" option. More financing of high-value equipment was likely in those States which opted for the hard version and in this way afforded better protection to creditors. This system had already yielded positive results in the USA. That is why similar provisions had been included in the preliminary draft Rail Protocol.

Two delegations expressed concern at the absence of an opting-out provision in addition to this version which seemed too "hard".

The Chairman of the RWG pointed out that an opting-out clause would mean less effective protection of creditors. He stressed that this provision could be very important for States with a less developed law regarding the protection of creditors and great need for the financing of new railway rolling stock. If this version was not acceptable, it would be preferable to seek a compromise consisting in the "softening" of the provision rather than providing for an opting-out clause.

As regards the words in square brackets in paragraphs 9 and 10, one delegation and the Chairman proposed bringing the wording into line with the Aircraft Protocol, which would mean deleting the brackets in paragraph 9, keeping the words "to terminate the agreement" and deleting the words in brackets in paragraph 10 "and no doctrine of reputed ownership shall defeat registered interests". The Rapporteur expressed the opinion that this provision was not necessary since Article 29 (3) of the Convention provided a general rule to this effect.

It was recognised that further amendments of the wording might be necessary after reconsideration at a later stage.

### **Article X - Insolvency assistance**

The question of the relationship between Articles IX and X was raised, in particular in comparison with the Aircraft Protocol. The question was raised whether a more general obligation to co-operate should be provided for, independently of a possible opting out under Article IX. One delegation suggested replacing the words “in carrying out the provisions of Article IX” by the words “in carrying out any remedies on insolvency”.

Another delegation thought that what was needed was not a more general but a more binding formulation; the words “shall ... co-operate to the maximum extent possible” seemed vague and might be replaced by the words “have to co-operate ...”. The Chairman expressed the opinion that this Article could be seen as an “obligation des moyens”. The Rapporteur explained that the *ratio legis* was to ask the court to make orders - controlled by the law of the Contracting State - to assist foreign courts. One delegation disagreed, pointing out that this formulation respected the principle of the independence of the courts. In addition, it suggested that this provision should be moved into the Convention, as it might be applicable to other equipment too.

The Chairman concluded that it would be necessary to reconsider the wording of this Article as well as its location.

## **CHAPTER III - RAILWAY ROLLING STOCK REGISTRY PROVISIONS**

### **Article XI - Supervisory Authority and the Registrar**

A number of views were expressed regarding paragraph 1 which provided - provisionally in square brackets – for the Intergovernmental Organisation for International Carriage by Rail (OTIF) to act as the initial Supervisory Authority. These were as follows:

- OTIF seemed to be an appropriate Organisation at the intergovernmental level to perform this task;
- the designated Organisation should be kept in square brackets, since there were other possibilities which had not to date been examined;
- the wording should be restricted to “intergovernmental Organisation”; the question had not to date been discussed whether only one or, as appropriate, two or three (continental) Supervisory Authorities should be provided for;
- it was premature to take a general decision on the bodies to perform the functions of Supervisory Authority and Registrar; the choice of the appropriate bodies should be made on the basis of cost effectiveness; the responsibility might have an influence on the cost and this issue had not to date been discussed.

The Chairman of the RWG invited delegations to indicate other appropriate Organisations that might be able to perform the functions of Supervisory Authority. The Chairman concluded that paragraph 1 should be kept in square brackets at this stage.

As regards paragraph 2, which provided - provisionally in square brackets – for the European Company for the Financing of Railroad Rolling Stock (Eurofima) to act as the initial Registrar and provided for the creation of a Registry Operating Entity, a number of opinions were expressed. These were as follows:

- first, a general question was raised as to whether the Protocol should designate the initial Registrar. The preliminary draft Protocol assumed that it made sense for the Protocol to do so, although in principle it was not necessary;
- two delegations favoured keeping paragraph 2 in square brackets and extending them to cover the second sentence (concerning the Registry Operating Entity) as this was dependent on the first sentence;
- some doubts were expressed as to whether Eurofima as a financing company was an appropriate body to perform the functions of Registrar, in that there might be a conflict of interests;
- the functions of Registrar should be performed by a body which already had some experience regarding railway rolling stock;
- any organisation or company should be able to apply to perform the functions of Registrar; the one to be chosen should be that offering to perform these functions in the most efficient manner.

The Chairman of the RWG noted that the RWG had anticipated Eurofima's involvement because of its practical experience in this sphere – it already ran a railway rolling stock register. The question whether there could be a conflict of interests was arguable. In his opinion, the choice of Eurofima as Registrar would not create a conflict of interests. Furthermore, there were the matters of establishing requirements for a Registrar and setting up the procedure as soon as possible. It was a question of cost.

The representative of Eurofima insisted that, should it be asked to serve as Registrar, its duties as Registrar would be kept wholly separate from its other activities. Eurofima was aware that it was still premature for a decision to be taken. However, it expressed concern with regard to the costs involved. It declared its unwillingness to invest large sums in a future system without knowing whether it would be appointed Registrar or not. He pointed out that it would make a difference to those costs if Eurofima was obliged to participate in future meetings of the participation in meetings regarding the Protocol and to make a larger investment in terms of system development.

The Chairman concluded from the discussion that all paragraph 2 should be deleted because the appointment of the Registrar was already mentioned in paragraph 1. As a consequence, the reference to paragraph 2 in paragraph 1 and paragraph 3 had to be deleted too.

As regards paragraph 5, the view was expressed that it would be useful to fix a specific time for the term of office of the first Registrar. The Chairman of the RWG pointed out that, in view of the necessary investment in such matters as software, training and organisation and the desire that the first Registrar would have to recoup this investment, the period of five years provided for in the Aircraft Protocol seemed too short. Two delegations favoured giving the Supervisory Authority the power to fix the appropriate period.

The Chairman concluded that the words inside the first square brackets in paragraph 5 (“of ten years from the date of entry into force of this Protocol”) should be deleted while the words

inside the second square brackets (“that the Supervisory Authority considers appropriate but in any event not exceeding ten years”) should be kept but without square brackets.

Following a short discussion regarding the need for paragraphs 6 and 7 and the question as to whether functional immunity should apply to a service provider according to paragraph 7, these paragraphs were provisionally kept with parts of the wording in square brackets.

### **Article XII - First Regulations**

This Article gave rise to no discussion, except a drafting comment, regarding the lack of terminological coherence between the heading and the wording of this Article (first/initial regulations).

### **Article XIII - Access to Registry**

#### **[Article XIV - Autonomous Transnational Registries]**

It was agreed it would not make sense to embark on a detailed discussion of these Articles without a preliminary analysis of existing and possible registration systems. It was agreed that this technical analysis should be carried out by a task force to provide the basis for the taking of a political decision at a later stage (see agenda item 5). Consideration of these Articles was accordingly postponed.

Nevertheless, the delegations of those States which already had operational registration systems made a general statement. This was as follows. First, it would have to be decided whether to establish a universal, regional or continental registration system. Account would need to be taken of the fact that railway rolling stock was hardly likely to move from one continent to another. This favoured a continental system. Moving to a larger system would have serious implications regarding costs, uncertainty and transparency, at least during a transitional period, for States which were not starting from scratch. An assessment would need to be made whether the benefits of the transition to a new system would outweigh the risks involved.

It was recognised that the experience of States with operational registration systems would be helpful to the work of the task force.

### **Article XV - Additional Modifications to Registry provisions**

The Rapporteur and the Chairman of the RWG gave some explanations regarding this Article, especially paragraphs 1 to 6; these gave rise to no discussion. It was noted that paragraphs 7 and 8 regarding the liability of the Registrar, especially liability for consequential loss, and its insurance would need further discussion. For lack of time, consideration of this provision as well as the following Articles was postponed.

### **Agenda Item 5: Future work**

(see also agenda item 3, p. 4 - information of Mr Stanford)

The Secretary-General of UNIDROIT emphasised that the main forthcoming event was the Diplomatic Conference, to be held from 29 October to 16 November 2001 in Cape Town, for the adoption of the base Convention and the Aircraft Protocol. It would not make sense to

organise a second Joint Session of governmental experts for the preparation of a draft Rail Protocol until after the Conference. A suitable date for such a second Joint Session would be April 2002. Before the Diplomatic Conference in Cape Town Governments would be invited to formulate comments on the base Convention and the Aircraft Protocol. Governments would need to ensure co-ordination so that the interests of all the sectors concerned - not only those of the aircraft industry - were taken into account. It would also be desirable for representatives of international Organisations dealing with carriage by rail - governmental and non-governmental – to attend the Diplomatic Conference.

**The Secretary-General of UNIDROIT expressed his conviction that an economic impact assessment study like the one elaborated for the Aircraft Protocol would be useful for the future Rail Protocol. Such a study could be launched and discussed at a seminar, that might perhaps be organised in conjunction with international rail organisations (UIC, CIT) and/or the North American railway industry.**

Besides that, the preliminary draft Rail Protocol should be revised by a small unofficial drafting group to reflect the discussions at the session. It was agreed that every effort should be made to complete this revision by Summer 2001.

Participation in the Registry Task Force that would be set up pursuant to the discussion on agenda item 4 (see above) would be open to all Governments interested.

The Director General of the Secretariat of OTIF shared the views of the Secretary-General of UNIDROIT as far as the programme of future work was concerned. Following comments made by an observer, he confirmed the need for co-ordination of the different registers designed for various purposes, including the data bank established under Article 13 of the ATMF Uniform Rules (Appendix G to COTIF). At this stage, the different operational and commercial needs could be defined and considered from the point of view of the extent to which data banks designed for different purposes could be combined and where specific solutions might be needed.

One delegation suggested informally that the Registry Task Force might be set up and work informally, using e-mail as its main means of communication.

This suggestion was accepted by Plenary. After the break during which the Task Force was set up and e-mail addresses exchanged, the Chairman announced that Italy and the USA would be co-chairmen of the Task Force.

One delegation stressed how important it would be, before the Task Force commenced its task, for each member to study the Aircraft Protocol and all the material prepared by the Aviation Working Group, insofar as so many of the problems involved in setting up a registry system were common to both aircraft equipment and railway rolling stock. The members of the Registry Task Force could learn from the experience acquired on the Aircraft Protocol. This same delegation underlined that the fundamental political decision as to whether the registry system should be an intercontinental, a continental or a regional one should be taken prior to dealing with the question of how to set up the register.

Despite their understanding of this concern, two other delegations saw no obstacle to starting discussion of general problems concerning, for example, information technology, organisation of the registry and the attribution of codes straight away. One observer spoke about the

ongoing work on the extension of the existing code system in view of the increasing number of private and semi-private railway undertakings.

Although recognising that it was useful to update the codification system, one delegation, supported by another delegation, repeated its view that the political decision regarding the Registrar would have an influence on the technical issues.

Another delegation agreed with the suggestion that the Task Force should begin by studying the solutions found in the Aircraft Protocol and follow them unless special solutions were found to be necessary for specific issues in the railway sector. It also shared the view that it would be preferable first to obtain answers to such questions as how many registers would be necessary and how they should work together.

The Chairman of the RWG drew the attention of participants to the fact that a great number of points of substance would depend on how the final base Convention would look. It was obvious that this would not be clear until the end of the Diplomatic Conference.

Following a question from the Director General of the Secretariat of OTIF, the Chairman of the RWG gave some information on who would be carrying out the projected economic impact assessment study, in particular the Center for the Economic Analysis of Law, Washington, D.C., and highlighted some of the problems involved (limited resources, confidential character of certain data regarding railway undertakings). He expressed the hope that he would be able to present such a study within three months so that the economic benefits to the railway sector could be taken into consideration by the Diplomatic Conference. As far as the launching and discussion of this study were concerned, South Africa declared that it would be able to organise a seminar on the African continent in order to inform and involve more African States in the project.

The Chairman pointed out that it would be for the two Secretariats to make the necessary arrangements for the setting up of the small drafting group.

Following brief discussion, the **“Terms of Reference of the Registry Task Force”** were agreed as follows:

“To report to governmental experts on the following matters:

- the extent to which the conclusions of the [International Registry task force] on the operation of the Aviation Registry could be applied to the operation of the railway rolling stock registry;
- an analysis of existing or potential railway rolling stock regional registration systems
- the various advantages and disadvantages of making special provisions for registration systems in unified transnational railway networks;
- the Unique Identification Criteria and how they are registered;
- the utility and cost of a lexicon of equivalent descriptions of rolling stock

and any other technical or operational issues and the relevant legal implications.

*The Task force is not authorised to make decisions on policy issues arising from the Protocol.”*

### **Agenda item 6: Miscellaneous**

Considering the opinions expressed before and during the first Joint Session of the Committee of governmental experts for the preparation of a draft Rail Protocol, the Director General of the Secretariat of OTIF informed participants that all efforts would be made to ensure simultaneous translation into the two other working languages of OTIF at the following Joint Session.

### **Closure**

The Chairman expressed his gratitude for the co-operation of delegations and the organisers. He believed that the excellent way in which the first session had gone gave ample hope for the successful further prosecution of this work.

The Chairman of the RWG thanked and congratulated the Chairman of the Joint Session for his excellent chairmanship; he also addressed his thanks to all those who had given him support and thus contributed to the success of this first Joint Session.