

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 CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS
SPECIFIC TO RAILWAY ROLLING STOCK**

Second Joint Session

(Rome, 17 - 19 June 2002)

REPORT

(prepared by the Secretariats of UNIDROIT and OTIF)

Opening

The second session of the Joint OTIF/UNIDROIT Committee of governmental experts (hereinafter referred to as the “Joint Committee of governmental experts”) for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (hereinafter referred to as “the preliminary draft Rail Protocol”) was attended by 45 delegates, representing 25 States, and by four Organisations⁽¹⁾ (cf. Attachment A for the list of participants).

The session was opened on 17 June 2002 by the Joint Secretariat, represented by Mr Gerfried Mutz, Deputy Director, on behalf of OTIF, and by Mr Herbert Kronke, Secretary-General, on behalf of UNIDROIT.

Ms Inès M. Weinberg de Roca (Argentina) chaired the second session of the Joint Committee of governmental experts and Mr Antti T. Leinonen (Finland) was elected Deputy Chairman on a proposal from Argentina seconded by Germany and supported by the United States of America. The *Rapporteur* was Sir Roy Goode (United Kingdom) and the Chairman of the Drafting Committee was Mr Karl F. Kreuzer (Germany).

The Joint Secretariat pointed out that the Diplomatic Conference held in Cape Town had been a great success and underlined the fact that the large amount of States having signed the Convention on International Interests in Mobile Equipment (hereinafter referred to as “the Convention”) and of its Protocol on Matters specific to Aircraft Equipment (hereinafter referred to as “the Aircraft Protocol”) to date was a positive sign for the advancement of the work on the preliminary draft Rail Protocol. It was also pleased to note that a greater number of participants were attending the second session and that German had been added, as an official language of OTIF, for the meeting.

It then drew the attention of the participants to the main events that had taken place since the first session of the Joint Committee of governmental experts held in Berne in 2001. First, the Convention and the Aircraft Protocol had been opened to signature and this would facilitate work on the preliminary draft Rail Protocol. Secondly, the Drafting Committee of the Joint Committee of governmental experts had met from 4 to 6 February 2002 in Rome and the UNIDROIT/OTIF Rail Registry Task Force had met in Rome from 20 to 22 March 2002.

The Joint Secretariat concluded by saying that at this stage of the project important consideration must be given to the fact that work on the preliminary draft Rail Protocol should include consideration of its economic aspects.

Basic working documents

The main working paper of the second session of the Joint Committee of governmental experts was the preliminary draft Protocol on Matters specific to Railway Rolling Stock (OTIF/JGR/4 – UNIDROIT 2002 Study LXXIII- Doc.6, cf. Attachment B). This document was the result of the revision by the Drafting Committee and the UNIDROIT Secretariat of the text of the preliminary draft Rail Protocol as submitted to the first session of

¹ The European Commission, the Association of American Railroads, the Rail Working Group and the Union of European Railway Industries (UNIFE).

the Joint Committee of governmental experts (OTIF/JGR/2 – UNIDROIT 2000 Study LXXIIIH - Doc. 4).

Agenda Item No. 1: Adoption of the draft agenda

The Joint Committee of governmental experts adopted the draft agenda (cf. Attachment C).

Agenda Item No. 2: Presentation of the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment adopted at Cape Town

The *Rapporteur* started with a presentation of the Convention and the Aircraft Protocol and illustrated some of the key elements of the system such as the remedies available to the creditor in the event of default by the debtor, the creation of an international registration system, the establishment of a system of priorities regarding these newly created international interests and the introduction of the concept of assignment of rights and non-consensual rights and interests. He then explained that the dual structure chosen permitted a specific Protocol to modify the Convention so as to accommodate special needs of the relevant industry. As an example of how a Protocol could modify the Convention, he mentioned how the Aircraft Protocol extended the application of the Convention to outright sales and gave the creditor certain additional remedies, in particular in the event of insolvency.

The *Chairman of the Drafting Committee* summarised the work accomplished by the Drafting Committee and the Rail Working Group in collaboration with the Joint Secretariat since the first Joint Session of the Joint Committee of governmental experts in March 2001. The Drafting Committee had reviewed Articles I to XV of the preliminary draft Rail Protocol so as to reflect the discussions of the Joint Committee during its first session and the changes needed after the adoption in Cape Town on 16 November 2001 of the Convention and the Aircraft Protocol. After the meeting of the Drafting Committee the UNIDROIT Secretariat had further reviewed those Articles, as well as Articles XVI to XXX, with a view to bringing the text of the preliminary draft Rail Protocol into line, where appropriate, with the wording of the final versions of the Convention and Aircraft Protocol, as verified by the UNIDROIT / ICAO Joint Secretariat as specified in the Final Act of the Diplomatic Conference, which were not available at the time when the Drafting Committee met in Rome.

Then one of the two *Co-Chairmen of the UNIDROIT/OTIF Rail Registry Task Force* reported that that body had met in Rome from 20 to 22 March 2002 to discuss the technical questions relating to the development of an efficient registration system. In particular, the Task Force had to examine to what extent the solutions chosen in the Aircraft Protocol would apply to the preliminary draft Rail Protocol, to look into the different registry systems around the world and to assess some of the advantages and disadvantages, as the case may be, of implementing such systems. The question of the utility and costs of establishing a fully integrated system versus a decentralised registry system, including unique identification criteria, was also on the agenda and was in fact identified as a source of concern.

Only two delegations (the United States of America and Canada) provided some guidance about their systems of registration, which had been in existence for decades. These were paper-based systems (no searches could be carried out, for example, by Internet). One issue that had been raised was the fact that both the Canadian and American systems were not asset-based systems as opposed to a debtor-based system, that is, that a search of an international interest would under both systems lead to the debtor and creditor and not to a particular asset (cf. Attachments D for Canada and E for the United States of America).

The question of the establishment of unique identification criteria was an example of how pointing out the differences between regional systems was relevant for the viability of the railway industry, as opposed, for instance, to the aircraft sector. For the latter, the practice was to “label” every piece of equipment with a serial number (in the sense that every piece of equipment could be identified), which was not the case for railway rolling stock.

As it appeared that the main reason why many questions raised remained without an answer was lack of information, the Registry Task Force decided to draft a questionnaire on existing rail registries to be given in the first instance to the participants in the meeting, focussing on the financing of railway rolling stock, the registration of financial interests in railway rolling stock and on potential interest in the preliminary draft Rail Protocol (cf. Attachment F).

Finally, the *Co-ordinator of the Rail Working Group* (RWG) identified the five following key points as requiring consideration during the second session of the Joint Committee of governmental experts:

1. The concepts of “public service authority” and “public service rolling stock”;
2. The concept of bankruptcy: how the preliminary draft Rail Protocol should be influenced by national laws on bankruptcy;
3. The concept of unique identification criteria concerning registry provisions;
4. The reconciling of an integrated registry with regional registries;
5. Finally, the application of rules on transactions taking place at the very time the Protocol comes into force.

Agenda Item No. 3: Examination of the preliminary draft Protocol on Matters specific to Railway Rolling Stock

General remarks

One delegation and one observer emphasised the fact that, while there was, at present, no Community legislation governing security agreements in general, the preliminary draft Rail Protocol contained provisions which could, for example, affect the Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and the Council Regulation of 29 May 2000 on insolvency proceedings.

One delegation pointed out that new powers had been conferred on the European Community in the field of judicial co-operation in civil matters and that consequently Member States of the European Union were no longer entitled to contract obligations with non-Member States which might affect such matters. European Union Member States nevertheless wished to contribute in a provisional manner to the discussions of the Joint Committee of governmental experts and they recognised the great benefits that the European railway industry could derive from the preliminary draft Rail Protocol.

The Joint Secretariat invited certain delegations to indicate to the Joint Committee of governmental experts the state of development of their railway industry and the extent to which they believed it would benefit from the future international regimen. The delegations of Libya, Tunisia and Ethiopia responded to this invitation.

The delegation of Libya stated that his Government was planning to build two railway lines in the African continent over the following 10 years. As the first phase of the project was focussed on financing, new legislation had been passed making it possible for any country to invest in railway rolling stock in Libya. Once opened for signature, the future Rail Protocol would be submitted to the Libyan Authorities for approval. In this context, the delegation of Libya expressed the wish to have more information on OTIF.

The delegation of Tunisia indicated that the railway industry in Tunisia was not privatised but stated that his Government might eventually permit the entrance of the private sector in the industry in order to facilitate financing.

The delegation of Ethiopia indicated that the Ethiopian and Djibouti Governments had equal shares in the Ethio-Djibouti Railway Organisation, established 105 years ago by a French company. Since the war between Ethiopia and-Eritrea, this Organisation had played a vital role in transporting import-export goods, transporting almost 30% of the total of such goods. He added that the Organisation financed or re-financed its railway rolling stock out of its income and, to a considerable extent, through aid granted by the French Government and the European Union. The railway rolling stock was not financed through floating charges and the Organisation did not lease railway rolling stock. Financial interests in railway rolling stock were registered in the section of the Ethio-Djibouti Railway Organisation known as the financial administrative Direction. Another committee had the task of counting and identifying the assets but these assets were still not uniquely defined and the information on registration was not available to the public (cf. Attachment G).

The Joint Committee of governmental experts thereafter considered the text of the preliminary draft Rail Protocol, each Article being introduced by the *Rapporteur* and, where necessary, by the Chairman of the Drafting Committee.

CHAPTER I – GENERAL PROVISIONS

Re Article I(2) – Defined Terms

The Joint Committee of governmental experts decided to postpone discussion on *sub-paragraph (a)* (“autonomous transnational registry authority”) pending consideration of Article XIV.

Sub-paragraph (b) (“insolvency-related event”) was added to the text, the wording for this addition being taken from Article I(2)(m) of the Aircraft Protocol. However, one delegation queried the need for the addition of the words “in relation to a debtor”.

A proposal to delete *sub-paragraph (e)* (“public service authority”) was put forward by one delegation as a consequence of the new Article VII *bis*. Another delegation drew the attention of the Joint Committee of governmental experts to the need to consider footnote 6. The Joint Committee of governmental experts at this stage decided to postpone discussion on both *sub-paragraphs (e) and (f)* (“public service rolling stock”). Following discussion on Article VII *bis* it was decided that sub-paragraph (e) should be deleted and that sub-paragraph (f) should be kept as a new Article XXII *bis*.

Two issues were raised concerning *sub-paragraph (g)* (“railway vehicle”). First, one delegation submitted that in some countries (for example, Chile and Argentina) some transportation systems used not only railway vehicles but also trucks and that the definition should accordingly also contemplate this kind of transportation. The Joint Secretariat pointed out that, if a part of a transportation system could not be moved on a guideway or a fixed railway track as described in sub-paragraph (g), then such a sub-system or a combined system could not be included in the definition of “railway vehicle”.

One delegation enquired whether a sub-system of fixed infrastructure designed to support the main system should be associated with the definition in sub-paragraph (g). The Joint Secretariat recalled that the international interest created by the Convention was designed in part to solve the problem of non-fixed equipment capable of being transported from one country to another. In consequence, fixed equipment should not be included in the definition of “railway vehicle”.

The definition of “unique identification criteria” (*sub-paragraph (k)*) also gave rise to some specific comments, such as the question whether it would be possible to have two different numbers. It was decided that any discussion on this matter should be postponed, mainly because of the uncertainty regarding the scope to be given to the expression “unique”. Though there was general acceptance of the definition of this expression (meaning a criterion which cannot be interchanged and excluding all other criteria), the Joint Committee of governmental experts indicated that letters (i), (ii) and (iii) were not alternatives and that the drafting should stress that letter (iii) was the most important. It was finally decided to refer sub-paragraph (k) to the Drafting Committee.

One observer drew the attention of the Joint Committee of governmental experts to footnote 1, wondering whether a definition of the term “power to dispose” employed in Article 7(b) of the Convention should be added in the preliminary draft Rail Protocol. The Joint Committee of governmental experts agreed that this term should be interpreted in a broad sense as the power to sell or to lease, stressing that clarification should be provided in the explanatory notes on this provision. As a result, no special definition of this term for the purposes of the preliminary draft Rail Protocol would be necessary.

Re Article II – Application of Convention as regards railway rolling stock

The *Rapporteur* explained briefly that this Article had been aligned on Article II of the Aircraft Protocol. The Joint Committee of governmental experts agreed to retain this new drafting.

Re Article III – Derogation

The wording of this Article implied that some decisions would have to be taken as to whether the Articles in square brackets should be made mandatory and where derogation should be allowed. The *Rapporteur* cautioned against allowing derogations in provisions which concerned the contractual relationship between two parties.

The Joint Committee of governmental experts concluded that the square brackets should remain pending further consideration but without any reference to specific Articles.

Re Article IV – Representative capacities

The *Rapporteur* explained that this provision was not totally in line with Article VI of the Aircraft Protocol, first, in that it had been felt that registration should not be limited to the international interest and, secondly, in that the last sentence had been deleted following the discussions that had taken place at the first Joint Session.

Some delegations questioned the need for this Article in the preliminary draft Rail Protocol and proposed its deletion, either on the ground that local legislation provided for such a representative mechanism or on the ground that local legislation could enter into conflict with this Article. One observer indicated that he would be in favour of retaining this provision, by reference to the circumstances in which Article IV had been drafted and stressing three particularities of the special relationship established between the representative and another person:

1. the provision protected confidentiality in such a relationship;
2. asset-financing provided under only one finance contract and the role to be played by the representative in such a situation;
3. syndicated financing, where a specific case of representation was created.

Two delegations suggested placing the provision in square brackets pending the following Joint Session, whereas others proposed reverting to the drafting of Article VI of the Aircraft Protocol, while noting that the words “In such case” at the beginning of the second sentence would not be appropriate.

Concluding that no agreement had been reached concerning the substance of the Article and the choice of policy relating thereto, the Joint Committee of governmental experts decided to revert to the wording of Article VI of the Aircraft Protocol and to refer the provision to the following meeting of the Drafting Committee, which it invited to try to adjust the provision in question in such a way as to broaden the scope of registration beyond the

international interest. The new text would then be reconsidered by the Joint Committee of governmental experts at its following session.

Re Article V – Description of railway rolling stock

Because of the interaction between the concept of “unique identification criteria” and the powers of the Supervisory Authority ², the Joint Committee of governmental experts decided to postpone its consideration of the substance of Article V pending its consideration of Chapter III (Railway rolling stock registry provisions).

Re Article VI – Choice of law

The *Rapporteur* explained that this Article had been moved from Chapter II to Chapter I following the discussion at the first Joint Session, as was the case with the Aircraft Protocol. He also indicated that the last sentence of paragraph 1 had been deleted as not being considered to be necessary in the light of the standard reflected in private international law Conventions. It was self-evident that internationally mandatory rules of the forum would be applicable. He finally noted that the wording was not entirely in line with that of the Aircraft Protocol in that paragraph 1 of Article VIII of the Aircraft Protocol applying the provision only in the event of a declaration by a Contracting State had been omitted and that the words “at any time” had been added in paragraph 1 of Article VI of the preliminary draft Rail Protocol.

One observer indicated that this provision had a potential impact on European Community law (in the fields of jurisdiction and insolvency) and submitted that it was accordingly a question that fell under the competence of the European Union. He added that the European Commission had in May 2002 adopted a recommendation to the Council of Ministers of the European Union for a decision authorising it to negotiate parts of the preliminary draft Rail Protocol on behalf of the European Community. The Council of Ministers had not however yet taken a decision.

The words “at any time” had been added at the request of the Joint Committee at its first session. However, as these words did not appear in the final version of the Aircraft Protocol and as their deletion would not change the substance of the provision, the Joint Committee of governmental experts decided to delete the words in question. One observer welcomed this decision, in particular because their addition would have brought the preliminary draft Rail Protocol into conflict with the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

As to the absence of a paragraph on the opt-in declaration, the Chairman of the Drafting Committee pointed out that the preliminary draft Rail Protocol was intended to allow for a minimum of declarations by Contracting States, unlike the Aircraft Protocol. Some delegations wished to think further on the introduction of such a paragraph and the Chairman of the Drafting Committee accordingly suggested that such a provision be introduced in square brackets.

² As, for example, the fact that the search criteria were to be established by the Supervisory Authority under Article XV(2) of the preliminary draft Rail Protocol.

The Joint Committee of governmental experts consequently decided that a new paragraph 1 should be inserted in square brackets along the lines of paragraph 1 of Article VIII of the Aircraft Protocol in order to permit delegations further to consider the effect of the provision (and, in particular, in matters of insolvency proceedings and the enforcement of judgments in civil and commercial matters). It was also agreed that paragraphs 1 and 2 should be retained as proposed and renumbered with the deletion of the words “at any time” in paragraph 1.

CHAPTER II – DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

***Re* Article VII – Modification of default remedies provisions**

Paragraph 1

The *Rapporteur* explained the change in the reference to the Convention (Chapter III as opposed to three Articles) introduced following the adoption of the Convention and the Aircraft Protocol.

One delegation expressed concern that the delivery of railway rolling stock to another location under Article VII would imply that such railway rolling stock might have to pass through many entities or jurisdictions: not only could the rights of third parties not be respected in such cases but the procedure under Article VII would eventually confer upon the court more power or authority than the debtor had. Another delegation observed that, in any case, in many jurisdictions the debtor could not interfere with the rights of another party.

The *Rapporteur* also wondered how long the whole procedure under this provision would take. He also noted that the duty to deliver the railway rolling stock was incumbent on the debtor and that this fact was not reflected in the Article. One observer also emphasised that it should be made clear in the text that an order had to be directed to the defaulting debtor.

One delegation proposed a solution whereby the defaulting debtor would be under a duty to take all reasonable measures to deliver or procure the delivery of the railway rolling stock without undue delay, without further need of traction (cf. UNIDROIT/OTIF CGERail2/Int.Int/WP3Corr. and 5 in Attachment H). The Joint Committee of governmental experts concluded that this new Article VII(1) should be placed in square brackets.

Paragraph 3

This paragraph had been inserted to bring the text of the preliminary draft Protocol into line with Article IX(3) of the Aircraft Protocol but it appeared in square brackets pending a decision of the Joint Committee of governmental experts. The latter decided to maintain the provision, removing the square brackets.

Paragraph 4

This provision was taken from Article IX(4) of the Aircraft Protocol with two adjustments, concerning, first, the way in which the length of the notice to be given of a proposed sale or lease was expressed and, secondly, the omission in the preliminary draft Rail Protocol of the words “or a guarantor” in the second sentence.

One observer noted that the expression “ten or more working days’ prior written notice” had been replaced by the words “fourteen or more calendar days’ prior written notice”, which, albeit involving different words, expressed the same length of time. This decision had been taken by the Joint Committee of governmental experts at its first session, for the reason that the concept of “working days” differed from one country to another whereas that of “calendar days” did not. The Joint Committee of governmental experts endorsed this decision, noting that there was no good reason why the Aircraft Protocol should be followed slavishly on all matters.

The Chairperson then enquired why the words “or a guarantor” had been omitted from the second sentence with the effect that only the chargee and the chargor could agree to a longer period of prior notice. One observer recalled that, at the very beginning of work on the preparation of the preliminary draft Rail Protocol, the question had been raised as to whether or not guarantee contracts should be included but it had finally been decided that they should be left out. As there was consequently no definition of a “guarantee contract” or of a “guarantor” in the preliminary draft Rail Protocol, he argued that it would not be appropriate to include a reference to a guarantor in this provision. The Joint Committee of governmental experts, following discussion, nevertheless decided to introduce the words “or a guarantor” in square brackets, with the idea of reconsidering the question and the possible consequences of such a change elsewhere in the text at its following session.

It was also decided to add the words “as defined in Article 1(m)(ii) of the Convention” after “interested persons” in the first sentence of this paragraph. One delegation pointed out that the definition of “guarantor” included in the Aircraft Protocol was already covered by Article 1(m)(ii) of the Convention.

Finally, the Joint Committee of governmental experts agreed to delete the square brackets around paragraph 4 so as to bring it into line with the wording of the Aircraft Protocol, subject to the adjustments agreed.

Re Article VIIbis – Public service rolling stock

One observer recalled that the public service issue had been mentioned several times during the first session of the Joint Committee of governmental experts, in particular during discussion of the Articles on “Modification of default remedies” (one delegation had expressed concern that the exercise of a remedy could block the provision of a public service) and “Speedy judicial relief”. On that occasion, whilst it had been acknowledged that sensitivity to local law considerations and recognition of the need to safeguard public services had played a part in the drafting of the Articles in question, it had nevertheless been felt that the public service issue had not been adequately dealt with in those Articles. The RWG had accordingly proposed a new Article VIIbis, which appeared in square brackets to flag the fact that it had not been considered by the Drafting Committee, which had felt that it should first

be considered and decided upon by the Joint Committee of governmental experts. The RWG's particular area of concern in this context was that of passenger services.

In illustrating the thinking behind the RWG's proposed new Article *VIIbis*, the Co-ordinator of the RWG explained that there would be some situations which would preclude the repossessing of railway rolling stock. In proposing the new Article, the RWG was concerned to strike a balance between the rights of creditors (compensation to cover the case where they could not repossess the asset) and public policy needs (keeping services running even where the debtor was in default). The idea was to enable the creditor to exercise the remedies specified in Chapter III subject, however, to the relevant public service authority being notified thereof and the court consenting thereto. The court would have clear directions but also a certain amount of room for manoeuvre.

Whilst all delegations pronounced themselves to be in agreement with the general principles underlying this proposal, several delegations raised concern regarding its practical application. Some delegates found the system of State intervention supported by a system of compensation extremely complicated and feared lest it would create insecurity in capital markets.

One delegation suggested following by analogy the solution provided in the Aircraft Protocol, Article XXIV of which permitted Contracting States to continue to avail themselves of the protection afforded by the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft. This would mean that railway rolling stock necessary for public service could not be seized by a creditor in the event of default by the debtor.

Another delegation also suggested that the time (not less than seven calendar days) the public service authority was allowed, under sub-paragraph 1(a), to respond to, or otherwise act in response to the notification was too short and that a period of 28 days would be more appropriate.

A further delegation submitted a proposal for an alternative Article *VIIbis* based on a declaration permitting Contracting States to exclude the application of the preliminary draft Rail Protocol to railway rolling stock needed for the running of public passenger services (cf. UNIDROIT/OTIF CGERail2/ Int.Int./WP 1 in Attachment I).

An Informal Working Group was accordingly asked to draft a new Article *VIIbis*, the purpose of which would be to simplify the original proposal tabled by the RWG, in the light of the comments and proposals made during the discussion of this matter by the Joint Committee of governmental experts (cf. UNIDROIT/OTIF CGERail2/Int.Int WP/4 in Attachment J). Under the proposed new Article submitted by the Informal Working Group the concept of "public service authority" embodied in Article I(2)(e) would be deleted but Article I(2)(f) ("public service rolling stock") would be retained. The Informal Working Group's proposal should be seen as answering the two key questions as to, first, the time when a creditor should be entitled to exercise remedies and, secondly, whether a State could use the provision to uphold certain public services. Under the proposed new Article submitted by the Informal Working Group it would be for the individual Contracting State to declare whether the remedies provided in Chapter III were not to be exercisable in relation to public service rolling stock as defined by that State.

Some delegations however argued that the application of the proposed new Article would sometimes not be easy in practice, especially when it came to a State having to classify each and every asset according to whether or not it was affected to public service.

In the light of these considerations, it was agreed that Article *VIIIbis* should be deleted and be replaced by a new Article *XXIIbis* (Chapter VI – [Other] Final provisions) in square brackets. It was also agreed to refer that Article to the Drafting Committee, with a view to that body clarifying the public service rolling stock intended to be covered by this provision.

Re Article VIII – Modification of provisions regarding relief pending final determination

Paragraph 1

The *Rapporteur* recalled that it had been agreed at the first session of the Joint Committee of governmental experts that the need for the consent of the debtor according to Article 13(1) of the Convention was not realistic and somewhat contradictory.

Paragraph 3

The preliminary draft Rail Protocol provided for two alternative versions of paragraph 3, designed to elucidate the requirements of “speedy relief” for the purposes of Article 13 of the Convention. Alternative A was taken from Article X(2) of the Aircraft Protocol while Alternative B was proposed by the RWG.

The *Rapporteur* underlined that a provision imposing a specific time limit (Alternative B) might send a signal to Contracting States that they had the obligation to ensure that a creditor who adduced evidence of default by the debtor might, pending final determination of its claim, obtain from the court “speedy relief” in the form of one of the orders mentioned in Article 13 of the Convention.

However, two delegations expressed their concerns about the constitutional viability of Alternative B, noting that under their legal system it was not possible to impose restrictions, such as the provision of a specific time-limit, upon courts.

The Joint Committee of governmental experts wondered whether the application of this provision should be subject to the making of a declaration by a Contracting State, as under Article X of the Aircraft Protocol. The Joint Committee of governmental experts emphasised the importance of such a provision in the context of the problem of delays in court proceedings, which could be very different from one country to another, and agreed that paragraph 3 should contain a maximum time-limit of 60 days; a proposal was also made to provide for the possibility of a negative choice by virtue of an opt-out declaration.

In the light of these considerations, the Joint Committee of governmental experts concluded that this paragraph should stay unchanged, although with the addition of the possibility of opting out. At the end of the session it was agreed that only paragraphs 2, 3 and 5 should be subject to opting out for the time being but that the question could be reconsidered at the following session of the Joint Committee of governmental experts.

Paragraph 4

The Joint Committee of governmental experts agreed to keep this paragraph, which was taken from Article X(3) of the Aircraft Protocol, albeit with a small adjustment (the insertion of the words “of the object” in sub-paragraph (e)), stressing that it was important for financial circles, but the question was raised whether a choice should be provided as under the Aircraft Protocol.

Paragraph 5

The Joint Committee of governmental experts decided that this provision, taken from Article X(4) of the Aircraft Protocol, should be subject to opting out.

Paragraph 6

An observer raised two questions concerning paragraph 6. First, he wondered whether the expression “international instrument” (binding a Contracting State in the event of insolvency proceedings) should be understood as covering only international Conventions or also European Community instruments. Secondly, referring to the expression “notwithstanding the commencement of insolvency proceedings in another [*Contracting*] State [...]”, he noted that for the application of Article IX (Remedies on insolvency) the primary insolvency jurisdiction (see Article IX(1)) would not in all cases correspond to one of the Contracting States.

The *Rapporteur* agreed that the wording of Article VIII(6) would need to be revised in order to provide greater clarification.

In the light of the foregoing, the Joint Committee of governmental experts concluded that the word “Contracting” in square brackets should be deleted and referred the expression “international instrument” to the Drafting Committee for clarification.

The Joint Committee of governmental experts also decided to delete the first sentence of paragraph 6 in square brackets (“Subject to Article 30(3)(b) of the Convention”), as a policy issue.

***Re* Article IX – Remedies on insolvency**

The Chairman of the Drafting Committee indicated that this provision was quite different from the similar provision in the Aircraft Protocol (Article XI) but that this was due to a policy decision made by the Joint Committee of governmental experts at its first session.

The RWG proposed further amendments to this provision the effect of which would be to return to the two Alternatives A and B of Article XI of the Aircraft Protocol (modified to take account of railway rolling stock) and to add a new Alternative C, representing a compromise between the hard and soft rules contained in Alternatives A and B respectively of Article XI of the Aircraft Protocol (cf. UNIDROIT/OTIF CGE2Rail/Int.Int./ WP 2, Article IX in Attachment K).

The RWG favoured the adoption of a rule that could be acceptable to Contracting States as being compatible with international norms on insolvency without any need for the provision of either an opt-out or even an opt-in mechanism. This approach –based on an inclusive system with only limited opt-out possibilities – should also, in the view of the RWG, involve authorising the insolvency administrator to refuse repossession of the railway rolling stock, subject to this not adversely affecting the economic interests of the creditor.

For instance, the insolvency administrator or the debtor would, under paragraph 3 of the RWG proposal, have the right to apply to the court for an order suspending its obligation under sub-paragraph 2(b) for a period commencing from the end of the cure period and on such terms as the court considered just, provided that the insolvency administrator or the debtor had undertaken to the court to pay all sums and perform all other obligations accruing to the creditor during the suspension period.

This then raised the question for the Joint Committee of governmental experts as to whether it should follow what had been decided for the Aircraft Protocol or whether it should rather endorse, either totally or in part, what had been submitted by the RWG, even if this would mean going back on the decision taken in Berne.

The Joint Committee of governmental experts finally decided to go back to the corresponding provisions of the Aircraft Protocol, modified however to take account of railway rolling stock, and to add, as an Alternative C, the proposal for such an alternative rule put forward by the RWG. The Drafting Committee was invited to draft a new text for consideration by the Joint Committee of governmental experts at its third session. It was however agreed that the text of Alternative C to be drafted by the Drafting Committee, should be presented in such a way as to make it clear that it represented a proposal of the RWG.

Re Article X – Insolvency assistance

The Joint Committee of governmental experts agreed to maintain this provision, noting that it differed from the corresponding provision of the Aircraft Protocol (Article XII), the application of which was subject to a declaration by a Contracting State, and that it was intended as a declaration of good will.

Re Article Xbis – Modification of assignment provisions

This provision had not appeared in the preceding version of the preliminary draft Rail Protocol: it had been added to take account of the corresponding provision of the Aircraft Protocol introduced in Cape Town. A footnote indicated to the Joint Committee of governmental experts that it was however at variance with the text of Article XV of the Aircraft Protocol.

The Joint Committee of governmental experts nevertheless endorsed the text of Article *Xbis* as proposed.

Re Article Xter – Debtor provisions

One observer explained that this provision had been inserted in the preliminary draft Rail Protocol to bring it into line with the corresponding provision introduced into the Aircraft Protocol in Cape Town. Various delegations in Cape Town had supported recognising the debtor's right of quiet possession in the case where it was a lessee under a leasing agreement in respect of which an international interest had been registered. The observer however considered that the way in which the definition of "leasing agreement" had been amended at the diplomatic Conference could give rise to practical difficulties and this was why the RWG proposed that consideration should be given to supplementing Article Xter as proposed.

In support of this proposal, the observer explained that it was not unusual for railway rolling stock to be made available to another party on a short-term basis. In Europe, railway rolling stock crossing borders might no longer be controlled by the debtor and might be required legally to be made available to an operator having the right to operate the rolling stock in the jurisdiction into which it travelled. He further explained that the short-term user would then expect quiet possession but it was the view of the RWG that it would be impractical to require registration of an interest in these cases, which could otherwise be required to preserve the user's rights against any creditors registering an international interest after the date of the registration of the interest pursuant to which the debtor had been granted the right to use the assets concerned.

The RWG therefore suggested the insertion of a new definition of a short-term leasing agreement in Article I of the preliminary draft Rail Protocol and additional wording in Article Xter (cf. Attachment K).

It was agreed that the proposal of the RWG should be referred to the Drafting Committee and that meanwhile Article Xter should be placed in square brackets, with the addition of a footnote indicating that further consideration of this question would be necessary at the third session of the Joint Committee of governmental experts.

CHAPTER III – RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Introduction: Presentations on registration systems by the OTIF Secretariat, the delegation of Canada and the observer representing the American Association of Railroads

The representative of the OTIF Secretariat gave a brief overview of the UIC numbering system used in most European countries, and more specifically concerning the manner in which interests in assets were controlled under this system. He also indicated that similar systems existed in the Eastern Europe (the Organisation for the co-operation of railways (OSShD)), where an hybrid institution had been set up. Asset registration systems also existed in the Russian Federation and China.

He finally drew the attention of the Joint Committee of governmental experts to the fact that a study had been commissioned by the European Communities with a view to the creation of a unique European system, adding however that it was anticipated that regional differences regarding registration and identification would remain under such a system.

The Canadian delegation insisted on the specificity of the registration systems existing in North America and briefly described the Canadian system (cf. Attachment D). The Association of American Railroads (AAR)³ did the same for the American system (cf. Attachment E).

An observer indicated that two issues were fundamental in this regard, first, the unique identification criteria and, secondly, the question as to how the North American system should be integrated into the system to be created under the preliminary draft Rail Protocol. As regards the first of these points, the objective had to be to permit a searching party to know exactly which asset was affected by the creditor's rights and to ensure the establishment of a workable unique system. Concerning the second point, on the other hand, the North-American registration system could be an entry point for the international registration system provided that it could be converted into an asset-based system.

It was agreed that further discussion of this question could not be fruitful in the absence of more information. It was recalled in this context that a questionnaire had been prepared by the UNIDROIT/OTIF Rail Registry Task Force and the Co-Chairmen of this Task Force urged participating States to complete this questionnaire as soon as possible so as to permit it to see how existing railway registry systems worked and to explore alternative methods (for example, the designation of a regional system as an entry point or a self-contained regional registry system and the relationship between the regional system and the International Registry) and the relative advantages and disadvantages of such methods (cf. Attachment F).

The Co-Chairmen of the UNIDROIT/OTIF Rail Registry Task Force invited the Joint Committee of governmental experts to identify and discuss new terms of reference for the Task Force. An Informal Working Group was set up for the purpose of drafting new terms of reference designed to help the Task Force in its future work. The effect of the new terms of reference proposed by the Informal Working Group was to authorise the Task Force to ascertain the operation of existing systems, to explore alternative methods, to identify criteria to ensure uniqueness, to consider certain features of the international registration system envisaged by the Convention and to prepare recommendations and a draft text for consideration by the Drafting Committee (cf. Attachment L). The terms of reference as proposed were endorsed by the Joint Committee of governmental experts.

The representative of the OTIF Secretariat stated that, pursuant to the request that the Rail Registry Task Force had addressed to it at its first meeting held in Rome in March 2002, he had prepared draft regulations which had been sent out to all members of the Task Force. These draft regulations had been prepared on the basis of those prepared for the International Registry for aircraft equipment, with the necessary adjustments for railway rolling stock. He had not however received any reactions from members of the Task Force to date. One delegation welcomed this initiative and informed participants that the regulations for the International Registry for aircraft equipment were approaching finalisation and should be ready by Spring 2003. The Chairperson asked the Joint Secretariat to distribute the draft regulations to all participants (cf. Attachment M).

³ The AAR is an association of railroads that has facilitated financing in the rail industry and has existed for many decades. Its members include all the large freight railroads in Canada, Mexico and the United States of America as well as non-governmental passenger operators in the latter.

Re Article XI – The Supervisory Authority and the Registrar

Paragraph 1

One observer noted that OTIF had been provisionally designated as the Supervisory Authority, being the only intergovernmental body specialising in rail matters. While convinced that OTIF would do an excellent job, he stressed the fact that, unlike the International Civil Aviation Organization (ICAO) which had been invited by the Cape Town diplomatic Conference to accept the functions of Supervisory Authority under the Aircraft Protocol and which then had 187 Contracting States, OTIF's constituency at present comprised only 41 States located in Europe and the Maghreb. He suggested that this might cause non-member States of OTIF legitimate concern in that the body responsible for controlling the operation of the international registration process had no accountability to either them or their representatives. The RWG accordingly proposed a material change to paragraph 3 in order to obviate this problem and to introduce a system of accountability (cf. Attachment K).

The representative of the OTIF Secretariat specified that his Organisation could not yet indicate whether it would be prepared to accept an invitation to act as Supervisory Authority. He suggested that it would probably be necessary to find mechanisms that would permit all States to co-operate in recognising OTIF as the only international rail Organisation for this purpose. The Statute of OTIF had been modified in 1999 in order to permit associated members to co-operate in its activities, albeit without the right to vote but this new system was not yet into force.

In these circumstances, the Joint Committee of governmental experts decided to keep the reference to “the Intergovernmental Organisation for International Carriage by Rail” in square brackets for the moment.

One delegation noted that the words “or such successor organisation or other body as [the Supervisory Authority] may appoint” did not appear in the Aircraft Protocol and disagreed with this addition. The giving of this possibility to the Supervisory Authority without any need for it to seek approval from States was not acceptable to that delegation, which accordingly proposed the deletion of the words in question. The Joint Committee of governmental experts agreed to their deletion.

Paragraph 2

The *Rapporteur* noted that the immunity provided for under this paragraph was only functional for the time being but if OTIF were to become Supervisory Authority and enjoyed a broader measure of immunity the provision would have to be modified accordingly. In line with the decision taken in respect of paragraph 1, it was decided that this provision too should also remain in square brackets.

Paragraph 3

One observer drew attention to the proposal made by the RWG in Working Paper 2 (cf. Attachment K) for the modification of paragraph 3, by providing for the establishment of a mechanism permitting all signatory and Contracting States to assist the Supervisory Authority in the discharge of its functions.

It was agreed that this paragraph should remain in square brackets with the addition of a footnote flagging the proposal of the RWG.

Paragraph 4

As stated in footnote 42 to Doc. 6, the Joint Committee of governmental experts was of the opinion that, although an operations agreement would be required, this could possibly be left to the Supervisory Authority and that it would not therefore require specific treatment in the preliminary draft Rail Protocol.

It was accordingly agreed to delete this paragraph.

Paragraph 5

The *Rapporteur* took the view that the replacement of the corresponding words in the previous version of this paragraph by the words “not exceeding ten years” represented an improvement, even if the precise number of years might be open to question. He noted in this context that the corresponding period provided for under the Aircraft Protocol was five years. Noting that the second sentence of the paragraph seemed to open up the possibility that the Registrar might be reappointed for a period of time longer than its initial appointment, he suggested the addition of the word “each” before the words “not exceeding ten years” at the end of the second sentence.

A proposal was made to revert to the wording of the Aircraft Protocol, notwithstanding the reduced degree of flexibility permitted thereunder, with the periods of appointment and re-appointment being left in square brackets. It was agreed that further thought was required but that in the meantime this paragraph should be set out in two alternatives, one of which would be the text of Article XVII(5) of the Aircraft Protocol with the number “five” in square brackets and the other would be the text before the Joint Committee of governmental experts with the insertion of the word “each” before the words “not exceeding ten years” at the end of the second sentence.

Paragraphs 6 and 7

The Joint Committee of governmental experts questioned the necessity or utility of these paragraphs. It noted that agreements on these matters between the Supervisory Authority and the Registrar would in any case be necessary and that this was already envisaged by the Convention. It was agreed in these circumstances that these paragraphs should be deleted.

Re Article XII – First Regulations

In view of the lack of information on some matters concerning the potential constitution of autonomous transnational registry authorities, it was agreed to defer consideration of this provision until the following session of the Joint Committee of governmental experts.

Re Article XIII – Access to Registry

Paragraph 1 of this Article gave rise to some discussion. It was felt that, if the International Registry was to be operated and administered by the Registrar on a twenty-four hour basis, as stated at present, this would necessarily require the establishment of a “back-up” system, which, it was noted, was moreover technically possible. The question was whether a specific rule on this issue was necessary. It was noted that this matter fell under the terms of reference of the UNIDROIT/OTIF Rail Registry Task Force.

The Secretary-General of UNIDROIT indicated that the International Registry for aircraft equipment was about to be set up so that participants should know more about how a system intended to be operated on a twenty-four hour basis would work at the following session of the Joint Committee of governmental experts.

In these circumstances, it was decided to refer Article XIII in its entirety to the Task Force for discussion.

Article XIV – Autonomous Transnational Registries

Discussion of this Article by the Joint Committee of governmental experts was put off pending the carrying out of the work on this subject given to the UNIDROIT/OTIF Rail Registry Task Force under the new terms of reference of that body.

Article XV – Additional modifications to Registry provisions

Some delegations took the view that this provision raised policy issues concerning the structure of the future International Registry for railway rolling stock. They were for this reason reluctant to approve Article XV as it stood.

Paragraph 4

One delegation questioned the need for paragraph 4 in that the duration of registration was already determined by Article 21 of the Convention. The Joint Committee of governmental experts accordingly agreed on the deletion of paragraph 4.

Paragraph 5

The *Rapporteur* explained that paragraph 5 was designed to fill a gap left by Article 25 of the Convention, which had been drafted in a more general way.

Some delegations, whilst indicating that they were in agreement with the concept of this paragraph, stated that they were not satisfied with its wording. A proposal was made to replace the expression of the time within which discharge of the registration was to be procured in terms of a specific number of days (“ten calendar days”) by the more general expression “without undue delay” employed in Article 25 of the Convention.

In these circumstances, it was decided to refer Article XV to the Drafting Committee for redrafting, in the light of the comments made during the discussion thereof by the Joint Committee of governmental experts.

Article XVI – International Registry fee

The *Rapporteur* suggested that different types of fee from those listed in Article XVI(1) (a), (b) and (c) would need to be considered later during the negotiations.

One delegation indicated that the fees and costs would differ depending on the structure to be given to the International Registry: should it be decided to have regional registries, then the costs and fees would be regional in their implications, whereas the situation would be quite different with an International Registry.

The Joint Committee of governmental experts finally decided that it was premature at this stage to discuss International Registry fees and to revert to it at a future session.

CHAPTER IV – JURISDICTION

Article XVII – Waivers of sovereign immunity

Paragraph 2

The *Rapporteur* indicated that the wording of paragraph 2 differed from that of Article XXII(2) of the Aircraft Protocol, in particular in the addition of the word “[authenticated]” in the first line of that paragraph. He suggested that this addition might not be considered to be necessary but, should it be retained, then a definition of the term would have to be added in the preliminary draft Rail Protocol.

The Joint Committee of governmental experts in the event decided to delete the word “[authenticated]” from paragraph 2, not least because its meaning might not necessarily be clear in certain legal systems.

The Joint Committee of governmental experts also agreed to revert to the wording of the Aircraft Protocol by replacing the words “in a written form” by “in writing” but to maintain the words “in the terms as specified in Article V of this Protocol” at the end of paragraph 2.

Agenda Item No. 4: Organisation of future work

Following consultations between the two Secretariats, it was noted that it was hoped to make the report on the second session of governmental experts available in English and French by the end of August 2002 and that the German translation of this would follow as soon as possible thereafter.

It was further noted that the Drafting Committee would be meeting at the seat of UNIDROIT in Rome from 23 to 25 October 2002 and that its work would on that occasion be to

implement the decisions taken by the Committee of governmental experts at its second session and, if at that time possible, any decisions reached by the UNIDROIT/OTIF Rail Registry Task Force on those provisions of the preliminary draft Protocol referred to it by the Committee of governmental experts on the occasion of its second session. The plan was then, in either late January or early February 2003, for the two Secretariats to circulate among the member States of the two sponsoring Organisations and the interested international Organisations the text of the preliminary draft Protocol as revised by the Drafting Committee, in English, French and German. On that occasion States and Organisations would furthermore be invited to formulate comments on the revised text, for consideration by the Committee of governmental experts at its third session. In this way, such comments would provide a valuable starting point for the deliberations of the Committee of governmental experts at its following session.

The third session of the Committee of governmental experts would be held in Berne, where OTIF has its seat, from 5 to 13 May 2003. The intention in allowing a longer time for the third session than had been allowed for the two previous sessions was to accommodate also within that session both a session of the Drafting Committee – to implement on the spot those decisions taken during the session of the Committee of governmental experts – and, if judged appropriate, a session of the UNIDROIT/OTIF Rail Registry Task Force. It was considered that concentrating meetings of all three bodies in one place and at the same time could only be to the advantage of all concerned, in particular Governments.

Whilst it was understood from the Co-chairmen of the Rail Registry Task Force that provisional plans were afoot for a session of that body to be held in Washington, D.C. in September 2002, it was felt that it was better not to tie its hands for the time being, given the importance for the following stage of its work of its receipt of answers to the questionnaire on railway registries that it had sent out to selected persons in what it saw as three key geographical areas for the future of the project, namely Africa, Asia and Latin America.

Copies of the questionnaire having been distributed to those States represented at the second session, their representatives were urged to ask their Authorities to respond thereto and forward their replies to the UNIDROIT/OTIF Rail Registry Task Force at the earliest possible opportunity.

The Secretariats finally noted the importance of consensus-building in respect of the preliminary draft Protocol, in particular in those parts of the world that were to date underrepresented on the Committee of governmental experts, before it could be considered ripe for submission for adoption. It was accordingly suggested that the time between the second and third sessions might usefully be employed in seeking to organise seminars in each of the three key geographical areas mentioned above.

It was noted that completion of the economic impact assessment study - designed to demonstrate the benefits that were likely to flow from adoption of the new international regimen for railway rolling stock - under consideration by the Rail Working Group, would doubtless be a key factor in the mounting of such a consensus-building exercise. The Rail Working Group was accordingly urged to do all in its power to seek to bring about completion of this study at the earliest possible opportunity. Once completed, it was suggested that consideration might usefully be given to launching it at a seminar, perhaps organised in conjunction with the International Union of Railways, as the international Organisation representative of all the different rail networks.

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LISTE DES PARTICIPANTS

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ATTACHMENT B

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

(as established by a Drafting Group of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome from 4 to 6 February 2002, on the basis of a draft submitted by Mr H. Rosen, expert consultant on international rail finance matters to UNIDROIT and co-ordinator of the Rail Working Group, reflecting discussions of the Committee of governmental experts in Berne, 15/16 March 2001 and changes needed after the adoption of the Convention on International Interests in Mobile Equipment on 16th November 2001 in Cape Town)

PREAMBLE

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

(as established by a Drafting Group of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome from 4 to 6 February 2002, on the basis of a draft submitted by Mr H. Rosen, expert consultant on international rail finance matters to UNIDROIT and co-ordinator of the Rail Working Group, reflecting discussions of the Committee of governmental experts in Berne, 15/16 March 2001 and changes needed after the adoption of the Convention on International Interests in Mobile Equipment on 16th November 2001 in Cape Town)

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the Convention on International Interests in Mobile Equipment (hereinafter referred to as *the Convention*) 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:¹

(a) [“autonomous transnational registry authority” means a transnational registry authority which has been designated as an autonomous transnational registry authority pursuant to Article XIV herein];²

[(b) “insolvency-related event” in relation to a debtor means:

(i) the commencement of the insolvency proceedings; or

¹ It is to be expected that the official commentary to Article 7(b) of the Convention will make clear that the “power to dispose” includes the power to permit the use of any object. It is open whether a definition or similar provision should be added in this Protocol to confirm this position.

² The use and wording of this definition is dependent on the policy decision (Article XIV) as to what special provisions, if any, should be taken for regional registration systems within a continent.

- (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;]³

(c) ["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;]⁴

(d) ["primary insolvency jurisdiction" means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;]⁵

(e) ["public service authority" means a department of a Contracting State or an authority or agency or other body designated by it,⁶ appointed under statute or acting under public law to oversee the public interest in respect of public service rolling stock;

(f) "public service rolling stock" means railway rolling stock habitually used for transporting the public on scheduled services or otherwise utilised by a Contracting State directly (and not provided, other than incidentally, to be used by third parties) in each case together with locomotives and ancillary railway rolling stock habitually used to provide traction therefor;]⁷

(g) ["railway vehicle " means a vehicle moveable on or confined to movement on or directly above a fixed railway track or guideway, or fixed 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;]⁸

(h) "railway rolling stock" means railway vehicles and all operating and technical data manuals, notebooks and other records identifiable in relation to a specific railway vehicle;]

(i) ["transnational registry authority"⁹ 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 18(5) of the Convention and as provided for in Article[s] XIII (2) [and XIV] herein;]¹⁰

(j) ["transnational rail network"¹¹ means a geographical area out of which it is not possible for any railway rolling stock to move on, or directly above, rails;]¹²

(k) "unique identification criteria" means any of the following namely:

- (i) the manufacturer's serial number or works number and the manufacturer's model designation;

³ Wording of sub-paragraph (b) taken from Article I(2)(m) of the Aircraft Protocol.

⁴ See footnote 2.

⁵ Added wording taken from Article I(2)(n) of the Aircraft Protocol. See also Article IX(1) of the Rail Protocol.

⁶ It would seem inappropriate to grant this intervention right to agencies of States which are not Contracting States.

⁷ The definitions (e) and (f) have been submitted in Rome by the Rail Working Group but the Drafting Group has not addressed their drafting. It is waiting for the Joint Committee of governmental experts to have the opportunity to discuss and decide the issue.

⁸ Consider a de minimis weight or value criterion.

⁹ Alternative suggestion: "continental registry authority".

¹⁰ See footnote 2.

¹¹ Alternative suggestion: "continental rail network".

¹² See footnote 2.

- (ii) [a description of railway rolling stock that includes reporting marks, road numbers or similar identification conforming to the description of railway rolling stock in the transnational rail network in which the relevant railway rolling stock is located, approved or accepted by a transnational registry authority as sufficient to enable railway rolling stock to be uniquely identified;]¹³ or
- (iii) such other unique 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 known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock.

Article III

Derogation

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 – VIII].¹⁴

Article IV

Representative capacities

A person entering into an agreement in an agency, trust or other representative capacity may effect a registration in its own name.¹⁵

Article V

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 Article 7 (c) of the Convention.
2. Any change to the description referred to in the preceding paragraph shall be notified by debtor [or creditor] 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. In the event that railway rolling stock moves out of a transnational rail network¹⁶, such relocation shall be

¹³ See footnote 2.

¹⁴ This Article needs further consideration in order to decide which provisions should be mandatory and where derogations should be allowed.

¹⁵ The Committee of governmental experts wished to reconsider the issue. The Drafting Group considered that this Article should be moved to Chapter III.

¹⁶ See footnote 2.

notified by debtor [or creditor] to the Registrar immediately after such change takes place, specifying the unique identification criteria appropriate to the new location.¹⁷

3. Any refurbishment or alteration of railway rolling stock shall not affect the rights of creditors.¹⁸

Article VI
Choice of law

1. The parties to an agreement or a related guarantee contract or subordination agreement may, at any time, agree on the law which is to govern their contractual rights and obligations, wholly or in part.¹⁹

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.

CHAPTER II
DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article VII
Modification of default remedies provisions

1. In addition to the remedies specified in Chapter III 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 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 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 shall 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. [Article 8(3) of the Convention shall not apply to railway rolling stock. Any remedy given by the Convention in relation to railway rolling stock shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.]²⁰

¹⁷ If this paragraph is necessary, should there be a duty with no sanction? An open issue is whether a creditor loses priority if notified of the change (actual or constructive knowledge would no be sufficient) and fails to register within a given period. If the registry provides a genealogy for an asset, the second creditor should be able to verify its position.

¹⁸ If this paragraph is necessary, it should be placed in a specific Article.

¹⁹ The second sentence has not been considered to be necessary following the standard in private international conventions. It is self evident that internationally mandatory rules of the forum will be applicable.

²⁰ Wording taken from Article IX(3) of the Aircraft Protocol.

4. [A chargee giving fourteen or more calendar days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor from agreeing to a longer period of prior notice.]²¹

[Article VIIbis
Public service rolling stock

1. A creditor shall not exercise in relation to public service rolling stock any of the remedies specified in Chapter III of the Convention (as modified by this Protocol) or Article IX of this Protocol unless it has:

(a) notified the relevant public service authority in writing, giving it not less than seven calendar days to respond or otherwise act; and

(b) received the prior consent of the court, which consent shall be denied if it receives a public service application within seven calendar days of the said notification and makes the directions requested therein (which it shall make unless they are manifestly unreasonable, unlawful or impractical).

2. The public service application shall be an application by a public service authority in the Contracting State in which the public service rolling stock concerned regularly operates, shall be made to a court in that State and shall include:

(a) a certificate that the railway rolling stock, the subject matter of an application, qualifies as public service rolling stock;

(b) a legally enforceable undertaking from the public service authority to compensate the creditor, within a reasonable period of time, for amounts

(i) outstanding at the date of the application from the debtor and

(ii) due in the future from the debtor to the creditor from the date of the application in each case assuming no default but including usual (but not default) interest at not less than the rate stated or implicit in the agreement; and

(c) a proposal for directions for further dealing with such public service rolling stock.]²²

Article VIII
Modification of provisions regarding relief pending final determination

1. Relief under Article 13(1) of the Convention shall not be dependent upon the agreement of the debtor.

2. Relief under Article 13(1)(a) of the Convention may specifically include directions as to normal maintenance and other necessary repair or modification of the object.

²¹ Wording taken from Article IX(4) of the Aircraft Protocol with adjustments.

²² This Article has been submitted in Rome by the Rail Working Group but the Drafting Group has not addressed its drafting. It is waiting for the Joint Committee of governmental experts to have the opportunity to discuss and decide the issue.

[Alternative A

3. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of [working] [calendar] days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.²³

Alternative B

3. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within sixty [working] [calendar] days from the date of filing of the application for relief.]²⁴

4. [Article 13(1) of the Convention applies with the following being added immediately after subparagraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”,

and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.]²⁵

[5. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.²⁶

6] . [Subject to Article 30(3)(b) of the Convention,] ²⁷ [J][j]udicial relief under Article 13(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 the first mentioned Contracting State.

Article IX Remedies on insolvency

[1. This Article applies only in a Contracting State which is the State of the primary insolvency jurisdiction.]²⁸

2. Within a period not exceeding sixty days ²⁹ from the date of the insolvency-related event [occurring in the primary insolvency jurisdiction] ³⁰ (the “cure period”), the debtor or the insolvency administrator, shall:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

²³ Wording taken from Article X(2) of the Aircraft Protocol.

²⁴ Alternative solution proposed by the Rail Working Group.

²⁵ Wording taken from Article X(3) of the Aircraft Protocol with adjustments.

²⁶ Wording taken from Article X(4) of the Aircraft Protocol.

²⁷ This policy issue should be considered by the Joint Committee of governmental experts.

²⁸ The adoption of this paragraph should be considered.

²⁹ The official commentary should stress that this period of sixty days cannot be modified by the applicable law.

³⁰ The wording in brackets has been proposed after the meeting by the Rail Working Group.

(b) give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law.³¹

3. ³²

4. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(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 other than a default constituted by the opening of insolvency proceedings 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.³³

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.³⁴

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 non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in the insolvency proceedings over registered interests.³⁵

11. Nothing in this Article shall operate to modify Article 30(3) of the Convention to which this Article shall be subject.

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

³¹ Changes to Article IX(1)(a) and (b) have been done to align the provisions with Article XI(2)(a) and (b) of Alternative B in the Aircraft Protocol.

³² The Rail Working Group will provide a proposal to be incorporated in this Article which will give the debtor or the insolvency administrator the ability to apply to the court for an order permitting the debtor or the insolvency administrator to retain possession on terms which continue to protect the interests of the creditor. In the light of such a provision, it might be necessary to reconsider paragraphs 7 and 8 of this Article.

³³ Has to be conformed to paragraph 3 of this Article.

³⁴ Has to be conformed to paragraph 3 of this Article.

³⁵ Wording taken from Alternative A of Article XI(12) of the Aircraft Protocol.

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.

*Article X bis*³⁶
Modification of assignment provisions

1. [Article 33(1) of the Convention applies as if the following were added immediately after subparagraph (b):

“and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person”]³⁷.

[*Article X ter*³⁸
Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:

(a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and

(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.

2. ³⁹

3. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.]

CHAPTER III
RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XI
The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be [the Intergovernmental Organisation for International Carriage by Rail or such successor organisation or other body as it may appoint].

³⁶ This Article has been moved from Chapter III.

³⁷ Note this is at variance with the course taken by the Aircraft Protocol in Article XV thereof.

³⁸ Wording of paragraphs (1) and (3) taken from Article XVI of the Aircraft Protocol.

³⁹ The Rail Working Group will propose a provision protecting the quiet possession of a short-term lessee and the priority of a short-term lessor. In case of adoption of such a provision, the Joint Committee of governmental experts will determine where it should go in the Protocol.

[2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise, but in any event shall enjoy functional immunity from legal or administrative process.]⁴⁰

[3. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.]⁴¹

4. The appointment of the first Registrar by the Supervisory Authority 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.]⁴²

5. The first Registrar shall be appointed for a period not exceeding ten years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods not exceeding ten years.

6. Notwithstanding the foregoing, the Supervisory Authority shall:

(a) as soon as is reasonably possible, appoint a replacement Registrar in the event that the Registrar

(i) shall resign;

(ii) shall become insolvent or generally be unable to pay its debts;

(iii) shall be dissolved; and

(b) be entitled to appoint a replacement Registrar in the event that the Registrar does not [materially] comply with its obligations herein, [under the operations agreement or]⁴³ under regulations set out by the Supervisory Authority.⁴⁴

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.⁴⁵

⁴⁰ This paragraph is necessitated by a change in the draft Convention and the current wording is drawn on the Aircraft Protocol (Article XVII(3)) up to “otherwise”.

⁴¹ Wording taken from the Aircraft Protocol (Article XVII(4)).

⁴² Although an operations agreement will be required, this could possibly be left to the Supervisory Authority to stipulate and would not require specific mention in the Protocol.

⁴³ See footnote 42.

⁴⁴ Compare with Art 17 (2) (b) of the Convention.

⁴⁵ The functional immunity of the Registrar has been deleted in the Convention and not provided for in the Aircraft Protocol. It remains formally open as to whether the Protocol should ascribe any functional immunity to either the Registrar or the service provider.

Article XII
First Regulations

The first regulations shall be made by the Supervisory Authority no later than [three months] prior to the entry into force of this Protocol and shall be made so as to take effect upon the entry into force of this Protocol. ⁴⁶ 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*⁴⁷
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. All States in the area covered by a transnational rail network ⁴⁸, provided that they act jointly and are all Contracting States, may designate one or more (acting jointly) local personal property registers as a transnational registry authority for the entire relevant transnational rail network subject to the terms of this Protocol. Any designation, to be effective, shall be subject to written notice, given to the Supervisory Authority by the relevant Contracting States advising it thereof; and [unless a designation is made pursuant to Article XIV,] a written undertaking, given to the Supervisory Authority from the transnational registry authority, agreeing to comply with the obligations of a transnational registry authority as set out herein. The registration facilities provided by a transnational registry authority shall be operated and administered during working hours in its territory.
3. [Except where it has been designated as an autonomous transnational registry authority pursuant to Article XIV below,] any transnational registry authority designated pursuant to this paragraph 2 shall
 - (a) be the exclusive access (for the purposes of registration of an international interest) to the International Registry in relation to the transnational rail network covered by it; and
 - (b) ensure that registration through it shall automatically result in delivery of information to the International Registry as the Registrar shall reasonably require. If it comprises more than one registry facility, the transnational registry authority shall provide equal access and full co-ordination between the respective facilities but, subject to paragraph 5 below, shall otherwise conduct its affairs and shall be free to set such requirements as to form and nature of filings made through it as it considers appropriate. ⁴⁹
4. For the purposes of Article V (2), notification shall [also] be given to any relevant transnational registry authority which is effectively designated hereunder where the railway rolling stock is located in the transnational rail network. ⁵⁰
5. The Supervisory Authority shall by regulations accept the unique identification criteria proposed by the transnational registry authority [where they comply with the rules of a uniform and unique system of identification of railway rolling stock in the relevant transnational rail network,

⁴⁶ The new text has been added to be consistent with the Aircraft Protocol.

⁴⁷ Not yet considered.

⁴⁸ See footnote 2.

⁴⁹ See footnote 2.

⁵⁰ See footnote 2.

apply exclusively within such network and are sufficient to comply with the basic informational requirements of the Registrar in operating the International Registry].⁵¹

[Article XIV⁵²
*Autonomous Transnational Registries*⁵³

1. Notwithstanding Article XIII, all states in the area covered by a transnational rail network, provided that they act jointly and are all Contracting States, may declare that a designated transnational registry authority shall be autonomous from the International Registry and accordingly shall not be subject to the jurisdiction, rules and regulations of the Supervisory Authority or the Registrar provided that such declaration is included in the written notice required under Article XIII(2).

2. In the event a transnational registry authority is designated pursuant to paragraph 1 above, the undertaking to the Supervisory Authority set out in Article XIII paragraph 2 shall not be required and in respect of railway rolling stock located in the transnational rail network relating thereto, registration of an international interest shall only be at such authority.

3. At the request of the Supervisory Authority, registration information at an autonomous transnational registry authority may be obtained by the International Registry. In such instance, the Supervisory Authority shall have the obligation of ensuring that such registration information at an autonomous transnational registry authority shall be received by and be available for search at the International Registry either directly or through an internet or other similar electronic link. Said obligation shall include, but not be limited to, ensuring that, if and where appropriate, the Registrar establish and fund all systems necessary to transmit registration information by the autonomous transnational registry authority and to receive, at the International Registry, registration information transmitted from such an autonomous transnational registry authority in the form required by the Registrar. The autonomous transnational registry authority shall be required to finance its operation [as required by this Protocol] but shall not be required to incur any investment or operating costs or expenses relating to the transmission of registration information to the International Registry.]

⁵¹ The Rail Working Group suggests that if Article XIV is accepted, the words in square brackets should be removed. But this is not an automatic corollary and this modification would effectively not just grant autonomy to a transnational registry in operational issues but also remove the oversight obligation of the Supervisory Authority. See also footnote 2.

⁵² Not yet considered.

⁵³ This Article XIV is proposed by the North American members of the RWG and relates to an alternative approach in relation to the operation of the protocol in practice. The RWG's starting point has been to create a system which permits all locally created security interests to be registered in one centralised international registry, using any local industry specific registry as a portal *into the International Registry*. The Aviation Working Group has adopted this approach in relation to Aircraft Equipment although it should be noted that aircraft can move virtually anywhere whereas rolling stock is unlikely to move outside of a transnational rail network. However Article XIV contemplates creating an autonomous local registry system when and where it exists in relation to a closed area (transnational rail network) and merely to provide a[n internet] link between the International Registry and such registry system operated by the relevant transnational registry authority, effectively delegating the registration function to such authority and making the International Registry a portal *into the local registry* operated by the transnational registry authority. This has the **consequence** of effectively permitting the local existing rail registration procedures to remain in place undisturbed provided that they are accepted by all states within the network concerned but with the **result** of possibly losing the unified approach and also control of the application of the Protocol's provisions by the Supervisory Authority.

Article XV
Additional modifications to Registry provisions

1. In the event that railway rolling stock has different unique identification criteria depending on which transnational rail network it is located in, the Registrar [shall] [may], at its expense, maintain a lexicon showing the equivalent descriptions, which shall be open to inspection.
2. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by the Supervisory Authority.
3. For the purposes of Article 25 (2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international 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 the purposes of Article 21 of the Convention, registration of an international interest shall, unless discharged or unless otherwise agreed, remain effective for an indefinite period of time.⁵⁴
5. Where a subordination has been registered and the obligations of the debtor to the beneficiary of the subordination have been discharged, the beneficiary shall procure the discharge of the registration no later than ten calendar days after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
6. Notwithstanding Article 28 (1) of the Convention, [there shall be no liability of the Registrar for consequential loss]⁵⁵ and in respect of any loss arising from an error or omission by a transnational rail registry, the transnational registry authority shall assume the liability of the Registrar thereunder.⁵⁶
7. [The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall, in respect of each event, not be less than the maximum value of an item of railway rolling stock as determined by the Supervisory Authority.]⁵⁷
8. [Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.]⁵⁸

Article XVI
International Registry fee

1. By way of modification of Article 17 (2)(h) of the Convention, 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 interest with the International Registry directly [or through a transnational registry authority];
 - (b) the fee schedule to be paid by the users of the International Registry; and

⁵⁴ Could be deleted and left to the Convention (Article 21).

⁵⁵ This should remain open for discussion although it may be difficult to insure for loss if consequential loss is included; it may be necessary to define or discuss the concept of consequential loss.

⁵⁶ See footnote 2.

⁵⁷ Wording taken from Article XX(5) of the Aircraft Protocol.

⁵⁸ Wording taken from Article XX(6) of the Aircraft Protocol.

[(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 establishing and implementing (amortised over ten years), operating [and regulating] the International Registry as well as the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 17(2) of the Convention provided that nothing herein shall preclude the service provider operating for profit.⁵⁹ [Except where it is an autonomous transnational registry authority] if filings are made through a transnational registry authority, such authority shall collect such fees and shall account to the Registrar therefor.⁶⁰

3. The fees and amounts referred to in paragraph 1 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. Amounts payable relating to the Supervisory Authority's costs shall be amended on the same basis when required by the Supervisory Authority. Amounts collected relating to the Supervisory Authority's costs shall be remitted by the Registrar to the Supervisory Authority after collection thereof as agreed between them.

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 Article 42 or Article 43 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 V of this Protocol.⁶¹

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

⁵⁹ 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. If the Registrar is a government agency, it is assumed that it will not be operating at a profit.

⁶⁰ This will not be appropriate if Article XIV applies since in that case the transnational registry authority will only need to recover its own costs [but *quare* if the Supervisory Authority's costs need to be recovered by them].

⁶¹ The wording of paragraph 2 departs from that of the Aircraft Protocol.

- (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);
- (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;
- (f) the UNIDROIT Conventions on International Factoring and International Financial Leasing 1988;
- (g) [the UNCITRAL Convention on Assignment of Receivables in International Trade 2001; and
- (h) the Hague Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 2002]

[as well as European Union Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and the European Union Council regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,] as they relate to railway rolling stock, to the extent that convention or regulation is in force among them and that convention's or regulation's terms are inconsistent with the provisions of the Convention.⁶²

CHAPTER VI [OTHER] FINAL PROVISIONS

*Article XIX*⁶³

Signature, ratification, acceptance, approval or accession

1. This Protocol shall be open for signature in _____ on _____ by States participating in the Diplomatic Conference to Adopt a Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock held at _____ from _____ to _____. After _____, this Protocol shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article XXII.
2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Protocol may accede to it at any time.

⁶² Generally subject to review by the 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.

⁶³ Wording taken from Article XXVI of the Aircraft Protocol.

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

5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

*Article XX*⁶⁴

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

*Article XXI*⁶⁵

Entry into force

1. This Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.

2. For other States this Protocol enters into force 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.

⁶⁴ Wording taken from Article 48 of the Convention and Article XXVII of the Aircraft Protocol.

⁶⁵ Wording taken from Article XXVIII of the Aircraft Protocol.

*Article XXII*⁶⁶
Territorial units

1. If a Contracting State has 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 modify its declaration by submitting another declaration at any time.
2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.
4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.
5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:
 - (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;
 - (b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which the Convention and this Protocol apply; and
 - (c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply and any reference to the local personal property register [or to the autonomous transnational registry authority] in that Contracting State shall be construed as referring to the register applicable to[, or to the autonomous transnational registry authority having jurisdiction in,] the territorial unit or units to which the Convention and this Protocol apply.

Article XXIII
Transitional Provisions

Notwithstanding Article 60 of the Convention, [ten] years after the date this Protocol is in force between certain States in accordance with Article XXII (1), this Protocol will apply to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a Contracting State in accordance with Article 60(2)(b).

⁶⁶ Wording taken from Article XXIX of the Aircraft Protocol.

*Article XXIV*⁶⁷
Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XXII, XXV, XXVI and XXVII may be made in accordance with these provisions.
2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

Article XXV
Declarations modifying the Convention or certain provisions thereof

1. Notwithstanding the provisions of Article 54 of the Convention, no declarations shall be permitted under this Protocol in relation to Articles 8, 13 and 55. Declarations made under the Convention, including those made under Articles 39, 40, 50, 52, 53, 54, 57, 58 and 60, shall be deemed to have also been made under this Protocol unless stated otherwise.
2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will impose other conditions on the application of Articles VI and VIII as specified in its declaration.⁶⁸
3. For the purposes of Article 50(1) of the Convention an “internal transaction” shall also mean, in relation to railway rolling stock, a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant object 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 or other elements of the design of such railway rolling stock.⁶⁹

*Article XXVI*⁷⁰
Subsequent declarations

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXV under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.

⁶⁷ Wording taken from Article XXXII of the Aircraft Protocol.

⁶⁸ The paragraph is to be reviewed to consider whether the provisions are necessary for each Article referred to and, if so, wording will need to be reviewed to ensure that “conditions” do not create a mechanism for Contracting States effectively to opt out of the Articles concerned but merely assist with implementation of the Articles into local law.

⁶⁹ Due to the changes made in Cape Town, the definition of “internal transaction” is now restrictive and is dependent on a local asset registration system (which does not exist for the rail sector). However, the RWG notes that some States may wish to exclude certain types of “domestic transactions”. It would discourage this but if this exclusion is required, we suggest it should be by reference to the object and not its mission. So a standard locomotive which happens to be operating in a closed domestic loop but which could be moved into an open network could not be excluded but trams and underground trains which are not able to operate outside of a domestic system potentially could be excluded by declaration subject to the general provisions of Article 50(2). Note also that a radical approach to solving the problem in Article XIV above, would be to modify the “internal transaction” definition in the Convention to include debtor related registries, thereby giving the North American states to possibility of making an Article 50(1) declaration in this context.

⁷⁰ Wording, except paragraph 4, taken from Article XXXIII of the Aircraft Protocol.

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 receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

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

[4. Declarations made pursuant to Articles 39 and 40 of the Convention shall be subject to this Article.]⁷¹

*Article XXVII*⁷²
Withdrawal of declarations

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXV under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

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

*Article XXVIII*⁷³
Denunciations

1. Any State Party may denounce this Protocol by notification in writing to 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 receipt of the notification by 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 any such denunciation.

*Article XXIX*⁷⁴
Review Conferences, amendments and related matters

1. The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

⁷¹ Needed?

⁷² Wording taken from Article XXXIV of the Aircraft Protocol.

⁷³ Wording taken from Article XXXV of the Aircraft Protocol.

⁷⁴ Wording taken from Article XXXVI of the Aircraft Protocol.

2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

(a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;

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

(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and

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

3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by three States in accordance with the provisions of Article XXI relating to its entry into force.

Article XXX⁷⁵
Depositary and its functions

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.

2. The Depositary shall:

(a) inform all Contracting States of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) the date of entry into force of this Protocol;

(iii) each declaration made in accordance with this Protocol, together with the date thereof;

(iv) the withdrawal or amendment of any declaration, together with the date thereof; and

(v) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Protocol to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

⁷⁵ Wording taken from Article XXXVII of the Aircraft Protocol.

- (d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

AGENDA

1. Adoption of the draft agenda
2. Presentation of the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment adopted at Cape Town
3. Examination of the draft Protocol on Matters specific to Railway Rolling Stock
4. Future work
5. Miscellaneous

CANADIAN RAIL EQUIPMENT SYSTEM

Rail Registry Task Force Meeting – Rome, March 2002

The terms of reference of the Railway Registry Task Force, as agreed to in Bern, Switzerland in March 2001, dictate that the registry working group provide a review to government experts on the following matters:

1. 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.
2. An analysis of existing potential railway rolling stock regional registration systems.
3. Advantages and disadvantages of making special provisions for registration systems in unified transnational railway networks.
4. Unique identification criteria and how they are registered.
5. Utility and cost of a lexicon of equivalent descriptions of rolling stock.

The Canadian delegation, having considered the foregoing terms of reference, wishes to provide the following preliminary comments with respect to such items.

Applicability of Aviation Registry Concepts to Rolling Stock Registry

We have completed only a very preliminary analysis of the applicability of aircraft registry concepts in the railway registry. The aircraft registry and the rail registry should have some core similarities. Fundamental legal concepts will likely be consistent as between the two registries and technology used by the registries may even be modular and therefore adaptable to both sectors.

Significant differences will exist however in certain areas and these issues have already been examined both by the Railway Working Group and in the First Joint Session held in Bern in March, 2002.

First and foremost, unlike in the air sector, no international industry infrastructure is in existence. Because the movement of rail is primarily continental as opposed to global, no one existing organisation is viewed as a logical candidate for the position of Registrar (or Supervisory Authority). Nothing comparable to ICAO or IATA with a global constituency exists in the rail sector. This raises transparency/accountability issues particularly for North America where registry systems are already in place. In the absence of an organization with global reach forming, registry issues in the rail sector may best be dealt with through regional structures within one unified protocol. The identity of the Supervisory Authority presents similar challenges. Disposition of these “architectural” issues are seen as critical to moving forward in a meaningful way.

Second, an analysis of international financing products and techniques is probably necessary to determine market differences globally. That is to say, how do, if at all, the financing practises and products in North America differ from what is common in Europe, Asia, South America, Africa or Australia. While this information could likely be assembled relatively easily, it would be helpful to help anticipate future challenges. Aircraft financing may occur using more widely- accepted international financing products whereas rolling stock financings may occur using regional or continental financing products.

In addition, the scope of rail sector finance is different from air finance in the sense that an aircraft financing may consist of tens or hundreds of airplanes or engines whereas quite frequently, a railcar finance transaction can consist of thousands of railcars. Identification of collateral is therefore an issue in terms of the technology used and perhaps even the methodologies used to register and search.

Aircraft and engines are identified by serial number. A global practice is in place with respect to equipment identification. In North America at least, rolling stock is identified using an UMLER system of numbering; this is not the case beyond North America. (See below for a discussion of the identification criteria.)

There are other smaller matters which will have to be reconciled. For example, whereas the state of registry is relevant in the air sector, it is not relevant and has no comparable concept in the rail sector. Similarly, the name of the manufacturer is extremely relevant in the context of an aircraft financing but is usually not relevant in the context of rail sector finance. Title registration appears to be an integral part of the aircraft protocol but may not be as relevant in the rail protocol.

It is also notable that while fees are paid by users of the current Canadian registry system, the fees have not historically been gauged on a cost-recovery basis. As a result, the cost to industry of a new registry system with different cost axis will have to be examined very carefully in Canada and by affected Canadian market participants. In addition, the absence of any existing collaborative body within the global rail sector and therefore a track record of collaborative cost-sharing may make the construction of an integrated global registry more challenging certainly as compared with the experience in the aircraft sector.

Analysis of Existing Rolling Stock Registration Systems

Overview: In Canada, Part III, Division III of the Canada Transportation Act (“CTA”) includes provisions with respect to financial transactions. Section 105 of Division III in particular is the foundation for a publicly-accessible rolling stock registry which has existed in Canada for over 130 years and indeed predates Canadian confederation. The text of Section 105 is attached hereto as Appendix A. No regulations have been promulgated with respect to Section 105 at the time of this memorandum. A comprehensive policy is in place with respect to CTA filing procedures and that policy is attached hereto as Appendix B.

The Canadian registry, currently administered through the Office of the Registrar General of Canada which is housed within Industry Canada, facilitates the deposit of documents, or summaries of documents, which are typically involved in lease finance or secured transactions pertaining to rolling stock. Because the registry is a depository for both rolling stock finance documents as well as railway mortgages generally (see discussion on Section 104 below), it contains some of the most important historical documents relevant to Canada’s development as a nation and the evolution of its internal infrastructure.

Section 105 is relied upon by both federally-regulated railways and other railways (i.e. those railways which do not have a certificate of fitness pursuant to the CTA including US and Canadian short line and regional railways) who deposit lease or security documentation as a result of a structured finance transaction.

While deposits of sale documentation is permissible pursuant to Section 105, it does not purport to be a title or ownership registry and indeed no ownership registry exists in Canada, either provincially or federally for rolling stock.

Searching: Searches are conducted pursuant to Section 105 prior to the closing of lease or secured transactions to ensure the absence of prior registrations. The system maintained in Canada pursuant to Section 105 is a database. All current and past documents filed pursuant to Section 105 have been scanned into the database in their entirety.

When conducting a search, a party enters the name of all current and prior owners into the database. A wider array on the search is possible depending on the circumstances: for example; some parties search lessees and lessors depending on the nature of the interests involved. The database then produces a list of documents in the database which include, anywhere in their text, the name of the prior or current owner. The searcher must then review the noted documents to determine if the collateral is indeed the same collateral as the transaction in question. The Canadian system does not function with an index system of primary and secondary documents as appears to be in place in the U.S. Searches are conducted typically by law firms as opposed to the Registrar's Office.

Searches cannot be done on-line. Specific searches against rolling stock cannot be done both because of limitations within the technology but also because of the nature and extent of collateral descriptions.

Deposits: Deposits are made pursuant to Section 105 of certain transaction documentation or more typically memoranda including key information from same. The memoranda generally include only the names of the parties, a brief description of the interest created, an address for the purposes of contacting an individual to see full copies of the document, signatures of the contracting parties (usually, all the contracting parties) and the equipment list. Typically, two originals of a document are deposited with the Registrar but photocopies are permitted with one stamped copy being returned to the filer. The Registrar then creates a one page database summary noting the parties names as well as the effective date of the documents, filing date and time of filing. Each deposit is filed one minute apart. The Registrar does not conduct any substantive review of deposits.

In addition to the filing of documentation evidencing leases, sales, conditional sales, mortgages, hypothecs, bailments and security interests, Section 105 also contemplates the filing of amendments, assignments or discharges of such registrable interests. The filing of these documents is not mandatory but obviously advisable to ensure the integrity of the underlying document and the interest created therein.

The system is not self-expunging i.e. an interest, unless the document that describes it contains a clear indication of term or expiry, will remain in the registry and therefore as a notice to third parties until it is discharged.

Effect of Deposit: Any deposit made pursuant to Section 105 obviates the need for any comparable filing under other Canadian statutes including provincial property security acts. The section has become a one-stop destination for perfection of interests in rolling stock. Legal opinions are provided in Canada, as they are in the US, confirming the absence of prior liens or other interests affecting the financed equipment and

confirming that beyond the CTA filing, no other filing is necessary to protect the interests of the lessor/lender.

While Section 105 does not, per se, create a priorities system, any valid deposit thereunder clearly constitutes notice to all persons. Legal opinions rarely if ever comment on the priority of Section 105 filings and regard is paid to common law determinations of the effect of notice to determine priority.

Rolling Stock: Notably, Section 105 pertains to rolling stock as it is defined in Section 6 of the CTA. That definition is as follows:

“Rolling Stock” includes a locomotive, engine, motorcar, tender, snowplow, flanger and any car or railway equipment that is designed for movement on its wheels on the rails of a railway.”

The definition of “railway” in turn is rather tortured, consisting both of a statutory definition and common law analysis.

Documentation relating to accessories or appurtenances relating to rolling stock is also registrable pursuant to Section 105. There is no clear statutory or common law guidance in terms of what constitutes an accessory or an appurtenance in the rail context but common practise seems to suggest that autoracks and engines may satisfy these definitions but equipment like hopper car covers may not.

The statutory definition of rolling stock does not include additional collateral descriptions one might find in typical lending documentation such as proceeds, warranties and documentation. Some legal circles have interpreted these grants of peripheral collateral as being included in the scope of Section 105 but that interpretation has not gained wide-spread acceptance.

While most current railway finance products only involve the grant of specific interests in enumerated collateral (specific fixed charges), some finance products include a charge on after-acquired property. Arguably, registration of such interests is not valid pursuant to Section 105 and resort may be had to Section 104 (see below). Because these products are rarely used, legal practice on this matter is unsettled.

For rolling stock which does not meet the CTA definition of either rolling stock, accessories or appurtenances, filings are generally made in the various provincial personal property security regimes to perfect the interests of a lender and in certain cases lessor. For the purposes of brevity, we will not provide an overview of Canadian provincial personal property regimes in these materials.

Comparison of Canada and US Systems: Section 105 has evolved in tandem with comparable provisions in the United States. Given the inter-continental flow of rail traffic in Canada and particularly the frequency of cross-border rail traffic between Canada and the United States, the existence of comparable regimes to assist lessors and lenders in transactions has been important. The degree to which the regimes in Canada and the U.S. are complementary has greatly assisted in the availability and cost of capital to lessees and to borrowers in the rail sector.

Curiously, the railway regulatory regimes which exist in Canada (i.e. licensing and to a lesser extent, safety) are not terribly symmetrical with the federal regime in the US. Licensing requirements, transfer and abandonment processes and major transaction notifications are quite different in the applicable Canadian regimes compared with the US.

In Canada, regulation of licensing and safety derives from jurisdiction. That is to say, if a railway is federally-regulated, it will be subject to the CTA, its licensing requirements and the safety requirements of the Railway Safety Act. If a railway is provincially-regulated, it will be subject to provincial licensing and safety regimes (though many provincial safety regimes replicate the federal regime). Determining federal or provincial regulation can be a difficult constitutional exercise, one which is largely dependant on location of railway track, historical designation and ownership structure. Determining jurisdiction is apparently not an issue in the US with the federal power occupying the field.

Bankruptcy applicability: Determining jurisdiction also determines the applicability or non-applicability of Sections 106 through 110 of the CTA which is the insolvency regime. These sections are reproduced at Appendix A. A federally-regulated railway may avail itself of the special CTA bankruptcy provisions; all other railways must have recourse to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, both federal statutes dealing with insolvency. Section 106 of the CTA includes special stay provisions with respect to repossession of rolling stock. Some of the legal opinions referred to above also include opinion language on the applicability or non-applicability of the CTA bankruptcy regime and the ramifications of its provisions.

Additional Provisions: It is also worth noting that Section 104 of the CTA, attached as Appendix A, both exists and is relevant in the financing of rolling stock. Section 104 permits the registration of mortgages and hypothecs issued by railway companies. Unlike Section 105 which has been interpreted in many legal circles to apply to both federally-regulated and other railways, Section 104's provisions clearly apply only to federally-regulated railways. Typically, real property mortgages are the subject matter of Section 104 filings. But, while industry practise is generally to finance railway equipment separately from the other undertakings of a railway, it is possible for financing documents, which include both rolling stock and non-rolling stock collateral, to be filed pursuant to Section 104.

Section 104 filings, which are far more infrequent than Section 105 filings, are merged into the same database as Section 105 filings and are handled by the Canadian Registrar in identical fashion. Also, when searches are conducted, results will include both Section 104 and 105 filings.

Unique Identification Criteria

It remains vitally important to Canadian railroads that the North American AAR and the Universal Machine Language Equipment Register (UMLER) system of equipment identification be recognized and preserved in any future rail protocol. Rail equipment is placed in service by the operator at its discretion. There is an entirely private system in North America which is maintained to account for rail freight cars and locomotives placed in service. Any freight car or locomotive which is, or may be, interchanged between or among railroads in North America must be registered in UMLER. This registry is maintained on behalf of the AAR in Washington, D.C. and it contains various physical characteristics and operational and mechanical requirements or restrictions relating to rail equipment. Because the equipment must be registered in UMLER before it can be interchanged, this system insures that the equipment meets appropriate mechanical and safety standards and that equipment ownership information is available for the payment of car hire (equipment rental) and repair charges.

The UMLER system uses alphabetic "reporting marks", assigned by the AAR, to identify equipment owners and numeric road numbers, assigned by equipment owners, to identify individual units of rail equipment. UMLER is an established system in North America which does not rely on, and is not related to, manufacturers' identification numbers or any other designation by a government agency or registrar.

Utility and Cost of Lexicon

Again, we have considered the issue of both the utility and cost of a lexicon in a very preliminary way. Given the divergent identification methodologies used globally, the rail protocol will have to be adaptable to permit searching and registration using different identification criteria. It is inconceivable that any one region would be willing to re-stencil all collateral in its territory to conform to a standardized system - the cost implications (to the railways) would be enormous. A transitional plan to harmonize identification techniques would be advisable though the transition would be lengthy (i.e. 20 years or more).

APPENDIX A

DIVISION III

FINANCIAL TRANSACTIONS OF RAILWAY COMPANIES -- ss. 104 to 110

Mortgages and Hypothecs

[1999, c. 31, s. 37] -- s. 104

Deposit and notice of mortgage or hypothec -- s. 104(1)

History

104. (1) A mortgage or hypothec issued by a railway company, or an assignment or other document affecting the mortgage or hypothec, may be deposited in the office of the Registrar General of Canada, and notice of the deposit must be published in the Canada Gazette without delay.

Other filing, deposit or registration not necessary -- s. 104(2)

(2) The mortgage or hypothec, assignment or other document need not be deposited, registered or filed under any other law or statute respecting real or personal property if it has been deposited and a notice has been published in accordance with subsection (1).

1999, c. 31, s. 38.

Documents Dealing with Rolling Stock -- s. 105

Deposit of documents -- s. 105(1)

105. (1) A document, or a copy or summary of a document, evidencing any of the following transactions may be deposited in the office of the Registrar General of Canada:

(a) a lease, sale, conditional sale, mortgage, hypothec, bailment or security agreement relating to rolling stock or any accessories or appurtenances relating thereto; and

(b) an amendment, assignment or discharge of a document mentioned in paragraph (a).

Contents of summary -- s. 105(2)

(2) A summary of a document must include any information that the Governor in Council may prescribe by regulation.

Effect of deposit -- s. 105(3)

(3) Once the deposit is made, the document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the document is valid against all persons.

Notice of deposit -- s. 105(4)

(4) Notice of the deposit must be published in the Canada Gazette without delay.

Insolvent Railway Companies -- ss. 106 to 110

Scheme may be filed in Federal Court -- s. 106(1)

106. (1) If a railway company is insolvent, the directors may prepare a scheme of arrangement between the company and its creditors and may file it in the Federal Court.

May affect shareholders and capital -- s. 106(2)

(2) The scheme may include provisions for settling and defining any rights of shareholders of the railway company as among themselves and for raising additional share and loan capital, if necessary.

Documents to be filed -- s. 106(3)

(3) There must be filed with the scheme

(a) a declaration in writing to the effect that the railway company is unable to meet its engagements with its creditors; and

(b) an affidavit made by the president and directors of the company, or by a majority of them, that the declaration is true to the best of their knowledge.

Federal Court may restrain action -- s. 106(4)

(4) After the scheme is filed, the Federal Court may, on the application of the railway company, restrain any action against the company on any terms that the Federal Court considers appropriate.

Limitation -- s. 106(5)

(5) No order of the Federal Court or any other court restraining action against the railway company affects the right of any person to take possession of the rolling stock of the company as a creditor under a security agreement, bailment, mortgage or hypothec or as a lessor or conditional vendor, whether as trustee or otherwise, unless

(a) within 60 days after filing the scheme of arrangement, or any extended period to which the person may agree, the railway company agrees to perform all its obligations under the security agreement, bailment, mortgage, hypothec, lease or conditional sale agreement; and

(b) any event that occurred before or after the scheme was filed and that constitutes a default under the security agreement, bailment, mortgage, hypothec, lease or conditional sale agreement is cured before the later of

(i) 30 days after the event, and

(ii) the end of the period mentioned in paragraph (a).

Extension of 60 day period -- s. 106(6)

(6) An extension of the 60 day period under paragraph (5)(a) does not prejudice the right to take possession of the rolling stock.

Assent to scheme -- s. 107(1)

107. (1) The scheme is assented to when it is both assented to by the ordinary shareholders of the railway company at a special meeting called for that purpose and assented to in writing by three quarters in value of the holders of

(a) mortgages, hypothecs, bonds and debenture stock of the company;

(b) any rent charge, or other payment, charged on the receipts of or payable by the company in consideration of the purchase of the railway of another company; and

(c) each class of guaranteed or preferred shares of the company.

Assent of lessor -- s. 107(2)

(2) If the railway company leases a railway from another company, the scheme is assented to by the other company when it is assented to

(a) by the ordinary shareholders of the other company at a special meeting called for that purpose; and

(b) in writing by three quarters in value of the holders of mortgages, hypothèques, bonds and debenture stock of the other company and each class of guaranteed or preferred shares of that company.

No assent required from class not interested -- s. 107(3)

(3) Assent to the scheme is not required by a class of holders mentioned in subsection (1) or another company mentioned in subsection (2) if the scheme does not prejudicially affect any right or interest of that class or company.

Application for confirmation of scheme -- s. 108(1)

108. (1) The directors of the railway company may apply to the Federal Court for confirmation of the scheme if, at any time within three months after the scheme is filed, or within any extended time that the Federal Court may allow, the directors consider the scheme to be assented to in accordance with section 107.

Notice of application -- s. 108(2)

(2) Notice of the application must be published in the Canada Gazette.

Confirmation of Federal Court -- s. 108(3)

(3) The Federal Court, after hearing the directors and any other persons whom it considers entitled to be heard on the application, may confirm the scheme, if it is satisfied that

(a) the scheme has been assented to in accordance with section 107 within the period mentioned in subsection (1); and

(b) no sufficient objection to the scheme has been established.

Registration in Federal Court -- s. 108(4)

(4) When the scheme is confirmed, it shall be registered in the Federal Court, and from then on it is binding on the company and all persons.

Notice -- s. 108(5)

(5) Notice of the confirmation and registration of the scheme must be published in the Canada Gazette.

Rules of practice -- s. 109

109. The judges of the Federal Court may, with the approval of the Governor in Council, make general rules governing the practice and procedure of the Court under sections 106 to 108.

Copies of the scheme to be kept for sale -- s. 110

110. The railway company shall keep at its principal or head office printed copies of the scheme when confirmed and registered, and shall provide a copy to any person who requests one and pays a fee not exceeding the cost of making the copy.

APPENDIX B

PROCEDURES PURSUANT TO SECTIONS 104 AND 105 OF THE CANADA TRANSPORTATION ACT OFFICE OF THE REGISTRAR GENERAL OF CANADA

PART I

Introduction

[1.01] These procedures are intended for use by corporations, railway companies, law firms and other professional advisors who make deposits pursuant to sections 104 and 105 of the *Canada Transportation Act* (referred to throughout this document as the CTA) with the Office of the Registrar General of Canada (referred to throughout this document as the Registrar). Section 104 of the CTA allows for the registration of mortgages and hypothecs. Section 105 of the CTA allows for registration of certain contracts respecting rolling stock.

[1.02] The issues raised in this document are procedures only. Unless otherwise indicated, they do not have the force of law. In issuing these procedures, the Registrar does not express any legal opinions or offer any definitive clarifications in respect of the legislation. Because of the brevity of the statutory regime and the relative lack of regulatory guidance, individuals using the CTA deposit systems frequently request certain information and ask various questions of the Registrar's staff. As a result, these procedures have been formulated to both assist in ease of filing and, in the interests of fairness, to ensure the consistent application of rules and procedures by the Registrar's staff. **Notwithstanding the existence of these procedures, individuals using the deposit systems are welcome to contact the Registrar's staff directly at any time.**

PART II - STATUTORY REFERENCES

Section 104 of the CTA

[2.01] Section 104 of the CTA deals with deposits of mortgages, hypothecs, assignments and other instruments relating thereto. The section reads as follows:

(1) A mortgage or hypothec issued by a railway company, or an assignment or other document affecting the mortgage or hypothec, may be deposited in the Office of the Registrar General of Canada, and notice of the deposit must be published in the *Canada Gazette* without delay.

(2) The mortgage or hypothec, assignment or other document need not be deposited, registered or filed under any other law or statute respecting real or personal property if it has been deposited and a notice has been published in accordance with subsection (1).

Section 105 of the CTA

[2.02] Section 105 of the CTA allows for registration of certain contracts respecting rolling stock. It reads as follows:

(1) A document, or a copy of a summary of a document, evidencing any of the following transactions may be deposited in the Office of the Registrar General of Canada:

(a) a lease, sale, conditional sale, mortgage, hypothec, bailment or security agreement relating to rolling stock or any accessories or appurtenances relating thereto; and

(b) an amendment, assignment or discharge of a document mentioned in paragraph (a).

(2) A summary of a document must include any information that the Governor in Council may prescribe by regulation.

(3) Once the deposit is made, the document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the document is valid against all persons.

(4) Notice of the deposit must be published in the *Canada Gazette* without delay.

PART III - PROCEDURES FOR FILING OF DEPOSITS UNDER BOTH SECTIONS 104 AND 105 OF THE CTA

The Registrar's Office

[3.01] Deposits made under sections 104 and 105 of the CTA are currently made with the Registrar. The Minister of Industry, has, by statute, been designated as the Registrar. The functions of the Registrar are currently carried out by the Corporations Directorate of Industry Canada. Enquiries and appointments can be made by contacting the Registrar's Office at the following numbers:

Appointments: (613) 941-9489

Manager: (613) 941-9053

Enquiries may also be directed generally to the Corporations Directorate at (613) 941-4550 where no members of the Registrar's staff are available.

[3.02] Registration may be effected in person, by courier, by mail or by fax, in accordance with section 3.04 of these Procedures, provided the original document is received within five business days thereafter. It is to be noted that although the deposit date will correspond with the date the Registrar receives the fax and a faxed copy will be temporarily accepted, the Registrar encourages the avoidance of faxing documents where possible and particularly where the length of the documents may make the process burdensome. Deposits cannot be filed electronically at the present time.

[3.03] Documents for registration may be directed to the attention of:

Registrar General of Canada
c/o Corporations Directorate, Industry Canada
10th Floor, Jean Edmonds Towers South
365 Laurier Avenue West
Ottawa, Ontario K1A 0C8

Attention: Jacqueline Gravelle, Manager

Manner of Registration

[3.04] The Corporations Directorate's Reception is open between 7:30 AM and 5:00 PM. The Registrar's office is open to accept deposits between the hours of 8:00 AM to 4:00 PM and is open for the purpose of searches, by appointment, between the hours of 9:00 AM to 4:00 PM. Each document presented for deposit under either section 104 or 105 of the CTA will be given a time and date of deposit. Documents delivered by courier, or by mail will be deemed to be deposited on the date and time of actual receipt in the Registrar's Office (which will likely be later than the date of receipt by Industry Canada). **Documents registered in person between 4:00 PM and 5:00 PM will be deemed deposited on the following working day.** Therefore, to ensure a specific time and date of deposit, it is important that an appointment is made with Registration staff to hand deliver the document directly to the Registrar's Office on the 10th Floor between 8:00 AM and 4:00 PM.

Letter of Transmittal

[3.05] Every document or batch of documents presented for registration shall be accompanied by a letter of transmittal addressed to the Registrar indicating under which section, either section 104 or 105 of the CTA, the documents are to be registered. Filings which either lack a letter of transmittal or include a letter of transmittal which does not clearly indicate the precise section under which the documents are to be registered, will be considered deficient. Beyond the requirement to indicate the relevant statutory section, the form of letter of transmittal is not prescribed.

Proof of Filing

[3.06] Proof of filing of documents under sections 104 or 105 of the CTA may take two forms, a preliminary confirmation and an acknowledgement letter. In the case of deposits effected by hand, the bearer of the document will deliver the document for deposit along with the letter of transmittal to the Registrar's staff as indicated in paragraph 3.04 of these Procedures. At the time of deposit, a notation will be made manually on the letter of transmittal indicating the time and date of filing of each document and including the initials of the Registrar's staff who accepted the deposit. A photocopy of the letter of transmittal (referred to as a preliminary confirmation) will then be immediately returned to the individual making the deposit.

[3.07] Where documents are deposited by mail, by courier or by facsimile transmission, a preliminary confirmation will not be sent to the individual mailing the deposit.

[3.08] In the case of deposits made either by hand, by mail, by courier or by facsimile transmission, the Registrar will issue a letter (referred to as an acknowledgement letter) by regular mail to the party which signed the letter of transmittal approximately **five working days following the date of filing**. This five-day period is exclusive of time the document may spend in the post. Included with such

acknowledgement letter will be duplicate stamped copies of the deposited documents bearing the stamp of the Registrar on each page which has a signature. Filers who have a regularly scheduled courier pick-up with the Corporations Directorate may request that their acknowledgement letter be left in the courier system. Filers who do not have such service will receive their acknowledgement letter by regular mail.

[3.09] The acknowledgement letter will recite the documents deposited including the names of each of the deposits, the parties thereto, the section of the CTA under which the deposit was made, the effective dates of each of the deposits, the date of registration of each deposit as well as confirmation of payment of the filing fee, in accordance with section 3.14 of these Procedures.

[3.10] Any errors in the contents of the acknowledgement letter should be brought to the attention of the Registrar immediately on receipt of same by the filer.

Effective Date

[3.11] Subject to the provisions of this paragraph, documents presented for deposition may bear any effective date. The Registrar requests that the effective date be **clearly stated** in the first paragraph of every document presented for deposition or otherwise on the face of the document. Documents which bear an effective date after the date of delivery to the Registrar will be accepted for registration, subject to section 3.12.

Execution Date

[3.12] Documents deposited under sections 104 or 105 of the CTA are not subject to any timing restrictions and will therefore be accepted for deposit at any time **following** execution. No deposit will be accepted for registration before it has been properly executed.

Attestations

[3.13] Documents deposited under sections 104 and 105 of the CTA are frequently accompanied by acknowledgements, attestations or affidavits of execution. These attestations have resulted, in part, because of historical practice and, in part, because of a long-standing requirement of the Surface Transportation Board (successor to the Interstate Commerce Commission) in the United States for a certificate of a notary public confirming signature of documents deposited under section 11301 of Title 49 of the United States Code, the American equivalent of section 105 of the CTA. No requirements exist under either section 104 or 105 of the CTA in respect of notarial acknowledgements, attestations or affidavits of execution and no similar requirements exist in the regulations. As a result, no document will be rejected by the Registrar where an acknowledgement, attestation or affidavit is lacking.

Filing Fees

[3.14] The filing fee for a deposit is \$100 for each primary document and \$35 for each secondary document filed at the same time.¹ Secondary documents which are filed at a time or date subsequent to the primary document will be subject to a \$100 filing fee. Where multiple secondary documents are filed on a subsequent date, the first secondary document will have a filing fee of \$100 with all subsequent

¹ A primary document is the first of a series of documents involved in a transaction or a relationship. A secondary document is either a document which is related to the primary document because it is part of the same transaction or because it is an amendment, assignment, release or discharge of same.

secondary documents filed that day subject to a \$35 fee. All letters of transmittal should clearly state whether documents are primary or secondary in nature to ensure that proper fees are charged.

[3.15] Where filing fees are to be debited to a particular deposit account currently with Industry Canada, clear mention should be made of this in the letter of transmittal. Where no such deposit account exists or where no mention is made of same, all documents presented for registration pursuant to either section 104 or 105 of the CTA must be accompanied by a cheque, certified or uncertified, or money order in the precise amount of the filing fees in Canadian dollars payable to the order of the Receiver General for Canada. Alternatively, the Registrar will accept VISA or MASTERCARD. If this method of payment is used, please provide the name of the credit card holder, credit card number and its expiry date.

[3.16] Where a party filing documents under either section 104 or 105 of the CTA wishes to have more than one copy of a deposit receipted and stamped, the charge for each additional stamped document, beyond the duplicate, will be \$35.

Publication

[3.17] The Registrar does not arrange for publication of the deposit in the *Canada Gazette*. This is the responsibility of the depositor. For publication purposes, you may contact:

Canada Gazette
Canada Communications Group
350 Albert Street, 5th Floor.
Ottawa, Ontario K1A 0S5
Tel: (613) 991-1215

The Registrar will occasionally conduct random audits of the *Canada Gazette* to ensure that the required publications have been done. If publication has not been done, the Registrar will send a letter reminding the depositor of the requirements of the Act concerning the publication of the deposit. Notwithstanding the foregoing, it is the sole responsibility of the depositor to ensure publication.

Registration Copies

[3.18] The Registrar asks that deposits under either section 104 or 105 of the CTA be made in duplicate. In the case of section 105 of the CTA, the statute allows the deposits to be photocopies. As a courtesy, the Registrar has in the past asked, and will continue to ask, that at least one copy of each document presented for deposit under section 105 of the CTA be an original; the duplicate may, however, be a copy. The original will be scanned by the Registrar. Following scanning into the Registrar's automated system, the original will be kept by National Archives of Canada. The original will not be copied and returned to the client. However, the duplicate will be receipted and returned to the filer. Deposits under section 105 of the CTA of photocopies with no accompanying originals will be accepted but are discouraged. Where only one copy of a document is presented for registration under section 105 of the CTA, an acknowledgement letter (defined in section 3.08 of these Procedures) prepared by the Registrar, including a summary of the document deposited and its date and time of deposit, will be provided free of charge.

[3.19] Section 104 of the CTA deposits should be in duplicate and should include at least one originally executed counterpart of each deposit. The original copy will be scanned by the Registrar. The original will be kept by National Archives of Canada. The duplicate will be receipted and returned to the filer. Where only one copy of a document is presented for registration under section 104 of the CTA, an

acknowledgement letter prepared by the Registrar, including a summary of the document deposited and its date and time of deposit, will be provided free of charge. The original will not be copied and returned to the filer, therefore, it is important that the deposits are provided in duplicate.

[3.20] The Registrar does not prescribe the format of documentation for deposit including the type, quality or size of paper on which a deposit is printed, provided that all documents presented for deposit are legible and suitable for scanning by an optical character reader. Because the scanning equipment used to read documents into the Registrar's database is unable to recognize hand-writing, all documents, with the exception of executions, must be typewritten. Documents presented for deposit with an undue amount of hand-writing will be considered deficient.

File Maintenance

[3.21] Deposits under section 104 and section 105 of the CTA will be permanently maintained in the Registrar's database, even where a letter of transmittal or a deposit itself expressly indicates such deposit has a fixed term and/or where a discharge or release of a deposit is subsequently filed in respect of such deposit. Furthermore, the registrar will not entertain any requests to remove a deposit from the system.

Memoranda or Summary Filings

[3.22] In respect of section 104 filings, the full text of the mortgage, hypothec, assignment or related document must be filed with the Registrar.

[3.23] Subsection 105(2) of the CTA allows a summary(also referred to as a memorandum) of a document to be filed in place of the actual document or a copy thereof. The contents of the summary or memorandum are to be prescribed by regulation though, at the time of writing hereof, no regulations have yet been passed.

[3.24] Until the regulations are passed, for clients who choose this manner of filing, the Registrar suggests that a memorandum or summary filing cover the following points:

- (i) the effective date of the memorandum or summary is clearly visible on the face of the memorandum or summary,
- (ii) the nature of the document in reference to the criteria set out in section 105 of the CTA is explained (the memorandum or summary should therefore indicate whether the original document evidenced a lease, a sale, a conditional sale, a mortgage, a bailment or an amendment, assignment or discharge of one of these interests),
- (iii) the memorandum or summary is referred to using the name of the original document (for example, a memorandum evidencing Lease Assignment Trust-ABC must be entitled, Memorandum of Lease Assignment Trust-ABC"),
- (iv) the memorandum or summary properly identifies all the parties to the document it summarizes,
- (v) the effective date of the document which is summarized by the memorandum or summary is clearly stated in the body of the memorandum or summary,
- (vi) collateral descriptions in the original document are expressly repeated in the memorandum or summary,
- (vii) any other documents on deposit with the Registrar to which the memorandum or summary refers are clearly identified by time and date of deposit,
- (viii) the memorandum or summary clearly refers to the terms of the document and incorporates the terms thereof by reference,

- (ix) the memorandum or summary is properly executed by all parties to such document.

All parties conducting filings should ensure their own compliance with these provisions. The Registrar's review of memorandum or summary filings will not include a review of these items though a memorandum or summary filing lacking these items will be considered deficient.

[3.25] The date of execution of a memorandum or summary filing does not have to be the same as the effective date or the date of execution of the document which it summarizes. Memorandum or summary filings are often executed in advance of the execution of the documents they summarize. This practice is acceptable to the Registrar when the memorandum or summary filing refers specifically to the document it summarizes by date.

Collateral Descriptions

[3.26] All documents presented for deposit must clearly describe the general collateral in respect of a section 104 of the CTA filing or the rolling stock in respect of a section 105 of the CTA filing. Secondary documents filed under either section which do not either enumerate rolling stock or recite the collateral must clearly refer back to the collateral or rolling stock listed in the primary document and identify such document by effective date, date of deposit and names of the parties.

Intentional Deletion of Information

[3.27] Because section 105 of the CTA requires deposit of evidence only, information may be deleted from deposits made thereunder provided the information which is deleted is replaced by the words, Intentionally Deleted or words to a similar effect. Deposits made under section 104 of the CTA must include full texts of the document.

Review and Deficiencies

[3.28] No preliminary review of documents presented for deposit will be conducted prior to release of the preliminary confirmation described in paragraph 3.06. The Registrar will review all documents for certain formal requirements prior to release of the acknowledgement letter described in paragraph 3.08. These formal requirements which the Registrar reviews are as follows:

- (i) execution by all parties;
- (ii) clear evidence of effective date of document on face of document;
- (iii) clear description of collateral or rolling stock; and
- (iv) clear instruction in letter of transmittal to deposit under either section 104 or 105 of the CTA. The Registrar will briefly review the information to ensure it is filed under the appropriate section.

[3.29] Documents which do not comply with the statutory requirements or these procedures will be rejected, notwithstanding the preliminary confirmation. As a courtesy, the Registrar will contact the party who signed the letter of transmittal by telephone to advise them of any deficiency. If the deficiency can be explained or remedied, the Registrar, again as a courtesy, will maintain the documents provided such deficiency is remedied within 5 business days. Upon correction of the deficiency, the documents will be deemed to be deposited on the date and time originally deposited.

[3.30] All decisions of the Registrar are final. Parties who wish to appeal a decision of the Registrar should submit their comments in writing to the Deputy Minister or the Minister of Industry at 235 Queen

Street, Ottawa, Ontario K1A 0C8. Prior to formally appealing a decision of the Registrar, you may wish to have the matter reviewed by the Director General of the Corporations Directorate by writing to:

Industry Canada
9th Floor, Jean Edmonds Towers South
365 Laurier Avenue West
Ottawa, Ontario K1A 0C8

PART IV - PROCEDURES FOR SEARCHING

Searches

[4.01] Because the deposit system under both sections 104 and 105 of the CTA is intended to provide notice to interested parties, searches are often conducted to review deposits. All interested parties must conduct their own searches and no telephone or other verbal confirmations of deposits will be provided by the Registrar. The most common searches are those conducted under section 105 of the CTA involving particular rolling stock and under section 104 of the CTA involving current or former railway lands. The Registrar General does not warrant the legal validity of any deposit made thereunder.

File Maintenance

[4.02] The Registrar no longer keeps hard copy files of deposits for public searching. An automation initiative has recently been completed and is more fully described in section 4.07.

[4.03] While the Registrar's staff is always available to answer questions and assist users of the deposit system, searches under sections 104 and 105 of the CTA must be conducted by third parties. The Registrar's staff will not conduct any searches, subsearches or file enquiries.

[4.04] It is to be noted that since the Registrar does not guarantee title, it would be inappropriate for the Registrar to remove a record of deposit from the system.

Scheduling Searches

[4.05] Searches may be conducted by calling (613) 941-9046 to schedule an appointment.

Reliance on Searches

[4.06] The Registrar does not warrant the accuracy or completeness of the deposit system. As a result, searches are conducted at the risk of the user and no insurance or compensation scheme is maintained in respect of damages occasioned by reliance on such searches. All users of the deposit system are deemed to use the system at their own risk and are further deemed to waive any claims or other rights of action they may have in respect of reliance on such system. Every individual conducting a search is subject to the following express warning:

INDIVIDUALS WHO USE THE DEPOSIT SYSTEM MAINTAINED BY THE REGISTRAR GENERAL PURSUANT TO SECTION 104 AND SECTION 105 OF THE *CANADA TRANSPORTATION ACT* DO SO AT THEIR OWN RISK. THE SAID DEPOSIT SYSTEM IS NOT PROTECTED BY ANY INSURANCE OR COMPENSATION SCHEME AND THE REGISTRAR DISCLAIMS ALL RESPONSIBILITY FOR INCONVENIENCE OR DAMAGES ARISING FROM

RELIANCE ON THE SYSTEM BY ANY MEMBER OF THE PUBLIC WHETHER OR NOT SUCH INCONVENIENCE OR DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE REGISTRAR OR ANY EMPLOYEES THEREOF.

Searching Successor Companies

[4.07] The records maintained by the Registrar have not been merged to reflect various amalgamations of railway companies and other transactions involving successors in title and changes of corporate name. As a result, where a party, whether it be a company or railway company, has amalgamated or another corporate transaction has occurred and a name change results, parties conducting searches may consider searching the files of all predecessor companies and/or former corporate names of any existing companies.

Automation Initiative

[4.08] The deposit systems have recently been transformed from manual file systems organized by railway company name and year of registration into a computer database date organized and accessed by various fields.² The recent automation initiative involved the scanning of existing deposits. All searches are now computer searches of the database. A comprehensive user manual is available to all individuals conducting searches. A log of documents received by Registration staff but not yet scanned into the system is maintained by the Registrar. Once a document is scanned, no access to the paper files will be permitted at any time.

[4.09] Two computer terminals are available to conduct searches of the computer database. As a result, appointments must be made in advance of searching to ensure the availability of these terminals.

Charges

[4.10] No charge currently exists for conducting searches under either section 104 or section 105 of the CTA. A charge of \$1 per page or \$10 per document will be required if photocopies are needed by the individual conducting a search.

PART V - COMMONLY-ASKED QUESTIONS

[5.01] Because of the brevity of the statutory language and the lack of comprehensive regulations pursuant to sections 104 and 105 of the CTA, users of sections 104 and 105 of the CTA deposit systems have historically been faced with much uncertainty. The following is a collection of commonly-asked questions put to the Registrar's staff. It is hoped that the clarification, albeit limited, provided in these Procedures, will offer some assistance to users of the systems. **However, these Procedures do not have the force of law and the Registrar does not express any legal opinions or offer any definitive clarifications in respect of the legislation.**

Does registration of a document under section 104 or section 105 of the CTA ensure the validity of such a document under the relevant section?

² These fields are summarized in a document header/banner and include (i) document key, (ii) comments, (iii) document title, (iv) document date (v) date and time of deposit, (vi) legislative reference, (vii) document parties.

[5.02] By accepting a deposit under section 104 or section 105 of the CTA, the Registrar does not provide any opinion on the substantive validity of such document. As a result, acceptance and registration by the Registrar of a document pursuant to section 104 of the CTA does not ensure that it is a mortgage or hypothec for the purposes of the statute.³ Similarly, acceptance and registration of a deposit under section 105 of the CTA does not ensure that the instrument evidences a lease, sale, conditional sale, mortgage, hypothec, bailment or security agreement relating to rolling stock. The Registrar simply reviews the formal elements of a deposit and, once these formal elements have all been satisfied, accepts the document for registration.

What is the difference between a section 104 filing and a section 105 filing under the CTA?

[5.03] Section 104 of the CTA allows for the registration of mortgages, hypothecs or other related documents. By contrast, section 105 of the CTA refers not to a document but to a type of transaction, namely a lease, sale, conditional sale, mortgage, hypothec, bailment or security agreement relating to rolling stock. It is requested that all letters of transmittal clearly direct the Registrar to deposit the documents under a particular section.

Does registration under section 104 or section 105 of the CTA, as the case may be, alleviate the need for provincial registration?

[5.04] Registration pursuant to section 104 of the CTA and section 105 of the CTA as the case may be appears to make registration at the provincial level unnecessary.⁴ The language of both sections has included similar language apparently obviating the need for provincial filing since their early forms. Filing exclusively at the federal level is entirely at the discretion of the user.

Does registration under sections 104 or 105 of the CTA establish a priorities system?

[5.05] The Registrar is unable to express any legal opinion on this point. Notable, however, is the difference in language between section 104 of the CTA, which is silent in respect of third parties and section 105 of the CTA, which indicates that, on due execution and deposit, documents deposited thereunder are valid against all persons.

Is the nature of the deposit system a title system or a notice system?

[5.06] It appears from the language of section 104 of the CTA that the deposit system maintained thereunder is not intended to be a title system but rather a system providing notice to third parties in respect of mortgages and hypothecs. No scope appears to be provided in the legislation for registering documents of title. In respect of section 105 of the CTA, however, the statutory reference appears to contemplate registrations in respect of title including instruments evidencing sales and conditional sales.

³ Arguments have been made that the publication (in the *Canada Gazette*) without delay under section 104 of the CTA is a prerequisite to the essential validity of a mortgage deed or hypothec.

⁴ Consider the comments in *The Canadian Railway Act, 1919* by Angus MacMurchy and John Spence (Toronto: Canada Law Book Company, Limited, 1922) at p. 160:

AThis [section 138, now embodied in section 104 of the CTA] and the preceding section [now also part of section 104 of the CTA] are no doubt intended to provide a uniform method of registration for all mortgages of the real or personal property of railways which are subject to the jurisdiction of the Federal Government in place of the diverse laws upon that subject which exist in each of the provinces.@

Notably, the language in section 105 of the CTA referring to a sale or mortgage was introduced into the statute in amendments in 1980 presumably to bring the statute more closely in line with the provisions of the *Interstate Commerce Act*, but the Registrar notes that the filing system does not provide an index or other features of a title system.

If a document is registered pursuant to the *Interstate Commerce Act*, does it also have to be filed under section 105 of the CTA?

[5.07] Yes. Section 11301 of Title 49 of the United States Code (formerly section 20c of the *Interstate Commerce Act*) is the American parallel of section 105 of the CTA. The Registrar understands that the American statute gives effect to deposits made under the CTA, but the CTA does not have a reciprocal provision. The Registrar is, however, mindful of the provisions for filing under the American system, and the Registrar's procedures permit deposit of memoranda and summaries consistent with practice under that system.

What does the definition of rolling stock include?

[5.08] Rolling stock is defined in section 6 of the CTA:

rolling stock includes a locomotive, engine, motor car, tender
snow plough, flanger and any car or railway equipment that is
designed for movement on its wheels on the rails of a railway.

For the purposes of a section 105 filing under the CTA, the Registrar points out the language or any accessories or appurtenances related thereto following the reference to rolling stock in section 105 of the CTA.

Does an index system exist in respect of section 105 of the CTA deposits similar to that maintained by the Surface Transportation Board in the United States?

[5.09] The automated database does not provide an index such as exists pursuant to the *Interstate Commerce Act*. Documents are simply scanned into the system and searching is conducted based on fields. Documents, including primary documents and secondary documents, are not cross-referenced even if they are filed as a batch on the same day. Letters of transmittal are not scanned into the database. Where documents are filed and relate to documentation filed on a previous date, the Registrar will, based on instructions in a letter of transmittal, make a notation in the comments fields of each document header/banner cross-referencing the document back to a pre-existing document in the system where the precise document number of that deposit is specified by the client in the letter of transmittal.

Does deposit under the CTA ensure creditors the same kind of protection as under the US Bankruptcy Code?

[5.10] The insolvency provisions relating to railway companies are set out in sections 106 through 110 of the CTA. Sections 106(5) and 106(6) of the CTA address the rights of parties with interests in rolling stock.

Must publication in the *Canada Gazette* be completed before a filing under either section 104 or section 105 of the CTA is valid under the statute?

[5.11] The Registrar expresses no legal opinion on this matter. Publication in the *Canada Gazette* is effected by the party or agent of the party having made the deposit.

Will the Registrar, on request, provide a letter or report to provincial land registry authorities in respect of outstanding registrations under section 104 of the CTA?

[5.12] The Registrar's staff will not conduct any searches, subsearches or file enquiries and, as a result, is unable to provide any information, whether certified or uncertified, to provincial real or personal property registries or any other person.

ATTACHMENT E
ANNEXE E

RAIL EQUIPMENT LIEN REGISTRY SYSTEM
AT THE SURFACE TRANSPORTATION BOARD

Rail Registry Task Force Meeting – Rome, March 2002

The Rail Equipment Lien (“recordation”) Registry database system was developed in 1999 by the Surface Transportation Board (STB), an operating administration of the U.S. Department of Transportation. The database contains all liens submitted to the STB for recording since November 1999. It now holds more than 3,000 records, consisting of indexing information and the corresponding imaged lien documents. In addition to processing new records, the STB currently is scanning and indexing recordations filed with the Board and its predecessor agency, the Interstate Commerce Commission, prior to November 1999.

The system was developed to address problems inherent with storing paper records, including space constraints and the risks of damage or loss. An electronic, on-line system was sought to save space, maintain the integrity of the records and, as an additional benefit, provide on-line search capability to the public.

The STB system was created in-house, using the Lotus Notes/Domino platform. Lotus Notes was chosen as a developmental tool because of its ease in placing data on the Internet. The information that appears on the STB Internet web site changes constantly as new records are added throughout the day.

Recordation records are displayed at the STB website, WWW.STB.DOT.GOV. Users first choose between one of three ways to view (sort) the records: by filing date, by recordation number, or by party name. For example, the view displayed below shows recordation records by filing date, with additional indexing information displayed to the right of the recordation number. Within each view, users may select search criteria to assist in finding individual records. Records may be viewed by clicking on the highlighted link. Users cannot search the text contained within any lien document itself because there is no text file; users can search only on the index information entered by STB staff which includes the recordation numbers and party names, as required by statute.

SURFACE TRANSPORTATION BOARD Rail Recordations by Filing Date					
Rail Recordations		Search for the following word(s):			
<ul style="list-style-type: none"> o By Party Name o By Filing Date o By Recordation Number 		<input type="text"/> <input type="button" value="Search"/> <ul style="list-style-type: none"> o Advanced Search o Click here for Help Searching 			
Home Page / Previous Page / Next Page / Expand List / Collapse List					
◆	No.	Party	Description	HAC Type	Filing Date/Time
▼	2002				
▼	March				
▼	03/15/2002				
	23903	Allfirst Bank (f/k/a The First National Bank of Maryland) / Bombardier Capital Rail Inc	50 covered hopper railcars within the series NRLX 055001 - NRLX 055097 not inclusive. For specific car numbers see document.	Memorandum of Schedule No. 10 to the Master Railcar Lease Agreement	03/15/2002 12:08 PM
	23903 A	Allfirst Bank (f/k/a The First National Bank of Maryland) / Bombardier Capital Rail Inc	50 covered hopper railcars within the series NRLX 055001 - NRLX 055097 not inclusive. For specific car numbers see document.	Bill of Sale	03/15/2002 12:16 PM
	23902	GATX Financial Corporation / GATX Rail Corporation	There is no equipment associated with this filing.	Notice of Merger	03/15/2002 12:04 PM
	23842 B	Flex Leasing I LLC / RailTex, Inc.	Seventy-nine (79) flatcars, LW62121-62199.	Supplement	03/15/2002 11:17 AM
	23204 HHH	Allfirst Bank / Norfolk Southern Railway Company	3 locomotives NS 5530, 5531, and 5532.	Memorandum of Lease	03/15/2002 12:02 PM
	23204 GGG	Norfolk Southern Railway Company / Allfirst Bank	3 locomotives NS 5530, 5531, and 5532.	Bill of Sale	03/15/2002 11:59 AM
	23204 FFF	First Union Rail Corporation / Allfirst Bank	3 locomotives NS 5530, 5531, and 5532.	Memorandum of Partial Assignment	03/15/2002 11:56 AM
Home Page / Previous Page / Next Page / Expand List / Collapse List					

Figure 1 - Recordations sorted by most recent date

Electronic records of rail equipment liens are created each time a recordation is filed. The accompanying figure shows the major fields required to index a new recordation. The filing date and time are automatically entered onto the new record. A new sequential number is assigned if a new primary recordation is filed. Supplemental records pertaining to previously filed documents bear the same recordation number as the primary document plus, as a suffix, the next available letter in the alphabet. All other data are entered manually. The STB does not currently accept electronic filings.


Surface Transportation Board			
Recordation	23894	Document Date	01/11/2002
Filing Date/Time	03/11/2002 04:31 PM	Type	Chattel Mortgage and Commercial Security Agreement
Have Parties Identified Hereafter Acquired Clause (No/Yes):	No		
Equipment Description	1974 EMD GP38-2 locomotive, road number VTR 202 AKA Champlain Flyer 202		
Document Image			
 - 23894.pdf		Size: 1.1 MB. Estimated download time at 28.8 Kb is 6 minutes.	
Borrower		Grantor	Submitter
Name of Individual Company	Railway Services Inc	Vermont Railway Inc	Larry Mackinnon
Address City, State, Zip	One Railway Lane, Burlington, VT 05401	1 Railway Lane, Burlington VT 05401	Two Burlington Square, Burlington, VT 05401
Lender			
Company	Chittenden Trust Company		
Address City, State, Zip	dba Chittenden Bank, Two Burlington Square, Burlington VT 05401		

Figure 2 - Typical completed recordation record

For entering names into the index, the system maintains a list of previously entered party names (borrowers and lenders) and submitter names (persons who submit the required transmittal letter). Data entry clerks first check the list of available party names and addresses for a match to an already saved name and address. If found, the clerk checks the name to autofill the name and address fields. If there is no existing match for the party name and address, the name and address are added to the database and saved for future use. The remainder of the record fields are filled based on information contained within the transmittal letter, which is based on information in the lien document. Error checking within the record ensures the record cannot be processed with blank fields. As a security feature, the date, the name of data entry clerk and the processing status of the record are embedded at the bottom of each record.

New recordation index records are viewable on-line within minutes of their creation. Images of the lien document itself are available on-line a short time later, usually on the same work day. All documents are scanned using an imaging system called TurboScan. An Adobe Acrobat readable PDF file is created for each recordation document.

The STB registry does have the technological capability of accepting electronic filings, but the Board has not yet adopted the practice.

RAIL EQUIPMENT LIEN FILING AND PROCESSING AT THE SURFACE TRANSPORTATION BOARD

Rail Registry Task Force Meeting – Rome, March 2002

Federal law, 49 U.S.C. 11301, provides for central filing, at the Surface Transportation Board offices in Washington, D.C., of rail equipment liens, commonly referred to as “recordations”. (See the statute for a description of the types of documents and equipment covered, and the indexing information required to maintain a system for recording the documents filed.) Regulations of the Surface Transportation Board (STB), codified at 49 CFR Part 1177, implement the law and provide detailed information about how recordations should be filed. The following is a very brief description of how recordations are filed and how they are processed and made available to the public.

1. An original plus one copy of the rail equipment lien document, and a transmittal letter, may be mailed or hand-delivered to the STB’s offices in Washington, DC.
2. Upon receipt of a filing, STB staff review the transmittal letter and lien documents for conformance with the regulations; staff do NOT review the lien documents for content.
3. Rejected documents are returned to the person who signed the transmittal letter; the signer may be, but usually is not, a party to the lien document.
4. Documents (“recordations”) accepted for filing are processed as follows:
 - a. Every document that is part of a unique recordation filing (consisting of a transmittal letter, the original lien document and all copies) is stamped with a stamp showing the date and time (to the minute) the document is accepted for filing, and with a blank line for STB staff to fill in the unique number (for a primary document) or number and letter suffix (for a secondary document) assigned to the filing;
 - b. For each filing, STB staff enter into the system database the following indexing information which, except for the document number and the date and time of filing, are to be set forth in the transmittal letter:
 - Document number (“recordation” number)
 - Date and time of filing (to the minute)
 - Document type
 - Document date
 - Name and address of each party to the document/agreement
 - Name and address of the person signing the transmittal letter
 - Brief description of the equipment involved in the agreement

- Whether the transmittal letter indicates the agreement includes a “Hereafter acquired” clause.

c. The indexing information is saved to a database to which the public has access, via the Internet.

d. Copies of the index information are printed onto paper so that index information also can be placed in the Number Index and the Name Index books. **These index books are the tools used by searchers to locate information about whether equipment is subject to a lien.** These “books” are collections of 3-ring binders which allow for the insertion or addition of new index pages that correspond to new lien filings. One copy of the index sheet is placed into the Number Index, which is a numerical listing, with alphabetical suffixes as needed, of all the lien records filed at the STB. Other copies of the index sheets are placed into the Name Index books, which are an alphabetical listing of all the parties to all liens filed at the STB. One copy of the index sheet is inserted into the Name Index book for every party name that appears on the index sheet.

e. The transmittal letter and one copy of the lien document are scanned and the image, in PDF format, is “attached” to the page containing the index information for that document. The “page” containing the index information and the attached PDF image are accessible from the STB Internet site, WWW.STB.DOT.GOV under the “Recordations” button.

f. The original and any extra copies of the lien document, bearing the date and time of filing stamp and the recordation number, are returned to the filer, along with a cover letter that also sets forth the date and time of filing and the recordation number assigned to the filing

NOTE: Information about liens that appears on the Internet is NOT an “official record”. The official record of documents filed between August 1, 1952 (the date of the first recorded lien), to March 31, 2001, is the **paper** filing. The official record of documents filed on and after April 1, 2001, is the **microfilm** copy. About half of the STB’s paper records and all of the microfilm records pertaining to rail equipment liens are available for viewing and copying at the STB offices. The other half of the STB’s paper records are stored off-site, but can be made available for viewing and copying.

UNIDROIT/OTIF RAIL REGISTRY TASK FORCE

Questionnaire on Railway Registries

Financing of railway equipment

1. Describe your country's railway sector briefly. What are the total assets of the sector? Is it publicly or privately owned? What proportion of traffic is freight vs passenger?
2. Describe how the railways finance or re-finance their equipment. Does the government provide funds to finance rail equipment? Is the equipment financed through floating charges, e.g., mortgages, bonds, or is it pledged as security? Do the railways lease equipment? Is the rail equipment financed by the seller or by a financial intermediary?

Registering financial interests on railway equipment

3. Describe how financial interests on railway equipment are registered. Is there one system for the whole country? Are the financial interests registered in multiple jurisdictions? How is the registry financed? Who registers the financial interests, the borrower, the lender or an intermediary? What financial interests are registered, e.g., mortgages, bonds, loans, leases?
4. Describe the registry. Is it searchable by asset? Are the assets uniquely defined? If so, what is the basis for the unique identifier, e.g., manufacturer's serial number? Is the information available electronically? Is the registry accessible to the public? What information is available to the public?
5. What is consequence of registering the financial interests? Does the registry establish priority of financial interests or does it provide notice?
6. Is the registry system comparable to that used in other countries?

Interests in international protocol

7. Describe your interests in an international rail registry. Are you considering implementing a new system? Or updating an existing system?

ATTACHMENT G

PRESENTATION OF THE ETHIO-DJIBOUTI RAILWAY ORGANIZATION AND ANSWERS TO THE QUESTIONNAIRE ON RAILWAY REGISTRIES

(presented by Mr Girma Mekonnen, Legal Adviser,
Ethio-Djibouti Railway Organization)

(UNIDROIT/OTIF CGERail2/Int.Int./WP6)

- 1) Ethio-Djibouti Railway Organization was established 105 years ago by a French company called Ethio-French Railway Company. The Railway stretched from 0° sea level of Djibouti port to 2540° sea level of Addis Ababa mountainous area. The total amount of the length of the Railway is 710 km out of which 610 km is found in Ethiopian territory while 100 km is in Djiboutian territory. It has almost 3000 permanent employees and not less than 750 temporary employees. Its initial capital is 3,400,000 Birr or 425,000 USD. The Ethiopian and Djibouti Governments have equal share over the Organization. After the Ethio-Eritrea war, the Organization is playing a vital role in transporting import-export goods and out of the total import-export goods the Organization is transporting almost 30% of the total goods. The Organization gives service within a year almost to a million passengers in Ethiopia and Djibouti cities. It owns 17 freight locomotives and 8 passengers locomotives.
- 2) Ethio-Djibouti Railway Organization finances or re-finances its equipment by its own income and highly by the aid obtained from the French Government and EU. The two Governments do not provide funds or subsidize to finance rail equipment. The equipment is not financed through floating charges; and the Organization does not lease the equipment.
- 3) Registering financial interest in Railway equipment. In Ethio-Djibouti Railway Organization financial interests on railway equipment are registered by its own section known as financial-administrative Direction (Director). In Ethiopia and Djibouti there is only one Railway Organization and by doing so there is only one system in these two countries. Financial interests are not registered in these two countries (jurisdictions) separately. The registry financed by the Organization - the financial interests registered by the Organization itself. In Ethio-Djibouti Railway Organization financial interest which is registered is only loan.
- 4) The assets of the Organization are not yet uniquely defined. The Committee which is established for counting and registering the assets of the Organization is in the way of counting and registering the assets. The registry is not accessible to the public. Except the initial capital of the Organization information is not available to the public.
- 5) In case of Ethio-Djibouti Railway Organization the consequence of registering the financial interests is to be seen in future.
- 6) I do not think so.
- 7) This is to be decided by the management Committee of the Organization. However, when I come back to my country, I will discuss the matter thoroughly.

Thank you.

Girma Mekonnen
Legal Adviser

**REVISED PROPOSAL FOR A NEW ARTICLE VII(1) OF THE PRELIMINARY
DRAFT PROTOCOL ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK**

(submitted by the delegation of Canada)

(UNIDROIT/OTIF CGERail2/Int.Int./WP 5)

This document is a “clean version” of WP/3 Corr. where the text appeared marked up

*Article VII
Modification of default remedies provisions*

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may apply to the court in the jurisdiction in which the railway rolling stock is located for an order directing the defaulting debtor to take all reasonable measures to deliver or procure the delivery of the railway rolling stock without undue delay to a location, within or outside such jurisdiction where the creditor can move it without the need of traction to be provided by the defaulting debtor or any person on its behalf.
2. Unchanged.
3. Unchanged.
4. Unchanged.

ATTACHMENT I

PROPOSAL FOR ARTICLE VII *bis*

(submitted by the German delegation)

(UNIDROIT/OTIF CGERail2/Int.Int./WP 1)

Article VIIbis Public service rolling stock

“Every State may declare at the time of ratification ..., that it will not apply this Protocol to railway rolling stock, which is necessary to maintain public passenger transport service. The declaration may be extended to the whole public passenger transport service or be limited to short distance or to long distance services. In such case the State has to define short or long distance services in that declaration”.

ATTACHMENT J

**PROPOSALS REGARDING ARTICLES I (2)(e) AND (f) AND VII *BIS*
AND FOR A NEW ARTICLE XXII *BIS*
OF THE PRELIMINARY DRAFT PROTOCOL ON MATTERS
SPECIFIC TO RAILWAY ROLLING STOCK**

(submitted by the Informal Working Group on Article VII *bis*)

(UNIDROIT/OTIF CGERail2/Int.Int./WP 4)

It is proposed that Article I (2)(e) should be deleted, that Article I (2)(f) should be retained and that Article VII *bis* should be deleted, to be replaced by a new Article XXII *bis*, to be worded as follows:

“Article XXII *bis*
Public service rolling stock”

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that the remedies provided in [Chapter III of the Convention and Article IX of this Protocol] * shall not be exercisable within its territory in relation to the public service rolling stock specified in its declaration or determined by a competent authority of that State notified to the Depositary.”

* It is anticipated that the scope of the words appearing within square brackets will be fine-tuned at the third session of the Committee of governmental experts in order to limit it to repossession or other remedies which may disrupt public services.

**PROPOSED CHANGES TO THE DRAFT PROTOCOL ON MATTERS SPECIFIC
TO RAILWAY ROLLING STOCK**
(Articles IX, *Xter* and XI)

(Presented by the Rail Working Group (RWG))

(UNIDROIT/OTIF CGERail2/Int.Int./WP 2)

INTRODUCTORY REMARKS

1. – The RWG has been invited by the Drafting Group of the Joint UNIDROIT / OTIF Committee of Governmental Experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (the *draft Rail Protocol*) to submit proposals for certain clauses for the Draft Rail Protocol for consideration by the Joint UNIDROIT / OTIF Committee of Governmental Experts Study Group (the *Study Group*) at its second session, to be held in Rome from 17 to 19 June 2002. The RWG further wishes to take the opportunity of proposing further amendments and ideas which hopefully may assist the Study Group in its deliberations.

2. – Before setting out proposals in detail below, the RWG is most grateful for the considerable progress made by the Study Group in reviewing the Draft Rail Protocol in March 2001 in Berne and, in particular very much appreciates the active assistance from Professor Sir Roy Goode, Professor Karl Kreuzer and Professor Herbert Kronke, Secretary General of UNIDROIT.

3. - The proposed changes are submitted by reference to the draft Rail Protocol set out in a marked up version (as against document OTIF/JGR/2 – Doc. 6, March 2002).

1. Article IX: Remedies on insolvency

The RWG considers that if at all possible a text should be agreed that can be applicable to Contracting States compatible with international norms on insolvency, without any need to provide an opt-out or even opt in mechanism. We realise that this is not an easy objective but consider that it is worth working towards. Accordingly although the draft provision in Article XVIII of the draft Protocol seeking to override EU Regulation 1346/2000 is probably necessary, this should not be seen as evidencing an intention to override the Regulation

arbitrarily and indeed we would hope that many of its provisions can be worked into the concepts in Article IX.

This approach – to establish an inclusive system with only limited opt out possibilities also requires in our view providing an insolvency administrator with the possibility of restraining any repossession of the railway rolling stock but, subject to this, not adversely affecting the economic interest of the creditor. Proposals from the RWG are showed marked below and, for completeness, we have also highlighted the proposed wording in paragraph 1 already shown in Doc 6.

Article IX
Remedies on insolvency

~~[1. This Article applies only in a Contracting State which is the State of the primary insolvency jurisdiction.]⁴~~

1.

Alternatives A & B as in the Aviation Protocol (modified to take into account railway rolling stock)

Alternative C

2. Upon the occurrence of an insolvency-related event, the debtor or the insolvency administrator, as the case may be, shall ~~W~~within [the cure period (as defined below)] a period not exceeding sixty days² from the date of the insolvency-related event [occurring in the primary insolvency jurisdiction]³(the “cure period”)], ~~the debtor or the insolvency administrator, shall:~~

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law.⁴

3. The insolvency administrator or the debtor shall have the right to apply to the court for an order suspending its obligation under paragraph 2 (b) above for a period commencing from the end of the cure period for such period and on such terms as the court considers just (the “suspension period”), provided that the insolvency administrator has undertaken to the court to pay all sums and perform all other obligations accruing to the creditor during the suspension period.

¹ The adoption of this paragraph should be considered.

² The official commentary should stress that this period of sixty days cannot be modified by the applicable law.

³ The wording in brackets has been proposed after the meeting by the Rail Working Group.

⁴ Changes to Article IX(1)(a) and (b) have been done to align the provisions with Article XI(2)(a) and (b) of Alternative B in the Aircraft Protocol.

4. If an application is made to the court under the preceding paragraph, the railway rolling stock shall not be sold pending a decision by the court.

5. Notwithstanding the foregoing, the court shall not be entitled to grant any relief in respect of a period after the expiration of the agreement or of any renewal thereof, any application not granted within [30] days will be deemed withdrawn unless the insolvency administrator or debtor and the creditor agree otherwise.

64. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(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.

75. 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.

86. 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 other than a default constituted by the opening of insolvency proceedings 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.

97. Subject to the provisions of paragraph 3 above, nNo exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

108. Subject to the provisions of paragraph 3 above, nNo obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

119. 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.

120. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in the insolvency proceedings over registered interests.⁵

134. Nothing in this Article shall operate to modify Article 30(3) of the Convention to which this Article shall be subject.

142. Article s VII and VII bis of this Protocol and Article 8 of the Convention as modified by Article VII of this Protocol shall apply to the exercise of any remedies under this Article.

⁵ Wording taken from Alternative A of Article XI(12) of the Aircraft Protocol.

* The RWG has concerns that the debtor will not be able to commit its assets without the consent of the insolvency administrator once an insolvency related event has occurred.

[13. For the purposes of this Article, the “cure period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.⁶]

[14. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.]⁷

2. Article X ter Debtor provisions

The RWG fully supported the position taken by various delegates at the Convention in Cape Town last November supporting a debtor’s right of quiet possession in the context of its being a lessee pursuant to a lease in respect of which an international interest is registered. However the clarification of the definition “leasing agreement” at the Convention has had one consequence which we consider could cause practical difficulties. The Convention defines a leasing agreement as follows:

“leasing agreement” means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment

It is not unusual for rolling stock to be made available to another party on a short term basis. For example, in Europe rolling stock crossing borders may no longer be controlled by the debtor and may be required legally to be made available to the operator having the right to operate the rolling stock in the jurisdiction into which it travels. The operator will pay for the right to use this asset. Technically this will qualify as a leasing agreement but the usage under these circumstances may only be for a few days (until the rolling stock returns to the debtor’s jurisdiction). The short term user will expect quiet possession but we consider that it is impractical to require registration of an international interest in these cases, which would otherwise be required to preserve the user’s rights against any creditors registering an international interest after the date of the registration of the interest pursuant to which the debtor is granted the right to use the assets concerned. Accordingly we propose a modification of the priority provision of the Convention preserving the quiet possession rights of any derivative user of the rolling stock pursuant to a short term lease subject to the usual precondition of compliance with the terms of the existing agreement (as defined in the Convention) and of the short term leasing agreement.

We would therefore suggest an insertion of a new definition of short term lease agreement into the definition Article (I) of the Protocol and additional wording as paragraph 2 of Article X ter in each case as follows:

Article I *Defined Terms*

() “short term leasing agreement” means a leasing agreement in respect of railway rolling stock which has a fixed an non renewable term not exceeding [60] days.

⁶ Required if the first alternative on paragraph 2 is chosen.

⁷ Following paragraph 4 of Alternative A of Article XI of the Aviation Protocol

[Article X *ter* ⁸
Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:

(a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; ~~and~~

(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed; ~~and~~

(c) in the case of a short-term leasing agreement, and subject to the provisions of paragraph 3, the holder of any interest registered after the registration of an interest from which the lessor's interest is derived

2. Sub-paragraph (c) of the preceding paragraph shall apply only if the entry into the short term leasing agreement is not in breach of an agreement pursuant to which the debtor is granted or retains the right to use the railway rolling stock and no default has occurred within the meaning of Article 11 of the Convention under the short term leasing agreement.⁹

3. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.

3. Article XI: The Supervisory Authority and the Registrar

The Intergovernmental Organisation for International Carriage by Rail (OTIF) has been provisionally named in paragraph 1 as the Supervisory Authority. Our understanding is that there has been a consensus from the outset that the Supervisory Authority should be an intergovernmental body and in fact OTIF is the only such body available which is specialised in rail matters. We are confident that it will do an excellent job. Nonetheless, unlike the anticipated Supervisory Authority for the Aircraft Protocol, the International Civil Aviation Organisation (ICAO), which represents 187 states, OTIF's constituency at present comprises 41 states located in Europe and the Maghreb. This leads to a legitimate concern for states which are not COTIF signatories that the body controlling the operation of the registration process has no accountability to them or their representatives. On the other hand, a committee of Contracting States without a secretariat will not be able to discharge the duties of the Supervisory Authority as contemplated in the Rail Protocol. Accordingly, we propose a material change to paragraph 3 (which just replicates the Aircraft Protocol) in order to introduce a system of accountability. We would expect that the first council would be nominated pursuant to a resolution of the diplomatic conference adopting the rail protocol.

⁸ Wording of paragraphs (1) and (3) taken from Article XVI of the Aircraft Protocol.

⁹ The Rail Working Group will propose a provision protecting the quiet possession of a short-term lessee and the priority of a short-term lessor. In case of adoption of such a provision, the Joint Committee of governmental experts will determine where it should go in the Protocol.

Article XI
The Supervisory Authority and the Registrar

1. The initial Supervisory Authority shall be [the Intergovernmental Organisation for International 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 Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise, but in any event shall enjoy functional immunity from legal or administrative process.]¹⁰

[3. The Supervisory Authority ~~may shall~~ establish a council and a commission of experts, from among persons nominated by Signatory and Contracting States and, in relation to the commission having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions. The council shall be representative of the Signatory and Contracting States and where practicable shall include at least one representative of a Contracting State per transnational rail network. Except in relation to the powers given to the Supervisory Authority under paragraphs 4 and 6 herein and under Article XII, the council shall, by simple majority, approve any appointment of a Registrar or the adoption of regulations and the Supervisory Authority shall deliver to it regular reports of concerning the functioning of the international registration system.]

– END

¹⁰ This paragraph is necessitated by a change in the draft Convention and the current wording is drawn on the Aircraft Protocol (Article XVII(3)) up to “otherwise”.

ATTACHMENT L

UNIDROIT/OTIF RAIL REGISTRY TASK FORCE:

PROPOSED TERMS OF REFERENCE

(submitted by the Informal Working Group constituted for this purpose)

(UNIDROIT/OTIF CGERail2/Int.Int./WP 7)

1. To ascertain the operation of existing systems of railway registries, including the various matters listed in the UNIDROIT/OTIF Rail Registry Task Force questionnaire on railway registries.
2. To explore alternative methods (for example, the designation of a regional system as an entry point or a self-contained regional registry system and the relationship between the regional system and the International Registry) and their relative advantages and disadvantages.
3. To identify criteria to ensure uniqueness and the maintenance of such uniqueness.
4. To consider the implications of movements of railway rolling stock into and from regional systems.
5. To have regard to the following attributes of the international registration system envisaged by the Cape Town Convention:
 - (i) its asset-based nature;
 - (ii) its electronic nature;
 - (iii) the need to ensure that the international registration system for railway rolling stock covers all the forms of registration provided for in the Convention;
 - (iv) the responsibility of the Registrar for errors and omissions and system malfunction;
 - (v) general adherence to the registration provisions of the Convention, in particular Articles 19, 22 and 26;
 - (vi) the need to ensure consistency with the priority rules as established in the Convention as implemented by the preliminary draft Rail Protocol.
6. To examine the role of the Supervisory Authority and its relations with regional systems.
7. To prepare recommendations and a draft text for consideration by the Drafting Committee.

Convention on International Interests in Mobile Equipment
Protocol to the Convention on International Interests in Mobile Equipment
on Matters specific to Railway Rolling Stock

Draft Regulations for the International Registry

(art. 17 (2) d of the Convention and art. XI of the Protocol)

(submitted by OTIF after the UNIDROIT/OTIF Rail Registry Task Force meeting
in Rome, March 2002)

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[CHAPTER 15	RELATIONS WITH THE AUTONOMOUS TRANSNATIONAL REGISTRIES]
CHAPTER16	FEES
CHAPTER 17	FINAL PROVISIONS

CHAPTER 1 GENERAL PROVISIONS

- 1.1 The International Registry (hereinafter: the Registry) is a notice-based electronic registration system. It has a scalable (Internet or Intranet) architecture. It is established for the registrations provided for in the Convention on international interests in mobile equipment (hereinafter: the Convention) and in the Protocol to the Convention on international interests in mobile equipment on matters specific to railway rolling stock (hereinafter: the Protocol).
- 1.2 The Registry can be accessed 24 hours a day, 7 days a week, except for maintenance (performed outside peak periods) or technical problems.
- 1.3 Technical support is provided to users by a help desk of the Registry, which is available 24 hours a day, 7 days a week via telephone and/or electronic mail.
- 1.4 The Registry drafts and provides the electronic forms required for its operation.
- 1.5 The technological structure used for the electronic transmission of data to the Registry must be established in compliance with international practice and standards, in order to provide an efficient, reliable and secured access to the data base by means of electronic transmission.

CHAPTER 2 STRUCTURE OF THE REGISTRY

- 2.1 The Registry is composed of personal data records and of railway rolling stock object files.
- 2.2 A personal data record is kept for each (natural or legal) person, and for any other entity, identified in an application to the Registry.
- 2.3 An railway rolling stock object file is kept for the identification and registration of each railway rolling stock object; it is numbered and shows the relevant data from the personal data records. All registrations concerning an railway rolling stock object are effected on its allocated file.

CHAPTER 3 *PERSONAL DATA RECORDS*

3.1 Natural persons

3.1.1 Personal data records concerning natural persons may include their complete name, birth date, permanent address and their electronic address.

3.2 Legal persons

3.2.1 Personal data records concerning a legal person may include their legal name, the address of the relevant office, their juridical form and their electronic address.

3. Other entities

3.3.1 Personal data concerning other entities may include their name, permanent address and electronic address.

3.4 Each personal data record receives an identification number when it is established.

3.5 The Registry's electronic system must ensure the recognition of electronic signatures (as defined by the relevant international provisions) with a high degree of security. The Registrar specifies the conditions of use and of recognition of electronic signatures.

CHAPTER 4 *RAILWAY ROLLING STOCK OBJECT FILE*

4.1 A separate railway rolling stock object file is kept for each railway rolling stock object, allowing their identification.

4.2 The railway rolling stock object file concerning a railway rolling stock object must contain the following ~ information:

- type of railway rolling stock and name of the manufacturer;

[- registration mark and State of registry;]

- manufacturer's serial number.

4.5 Each railway rolling stock object file receives an identification number when it is established.

CHAPTER 5 APPLICATION FOR REGISTRATION ON THE REGISTRY

5.1 Each application for registration on the Registry must be submitted using the relevant electronic official form provided by the Registry.

5.2 The application form must contain:

- the date of the application;
- the applicant's name, with all the information enabling the keeping of a personal data record or, if such record already exists, with the number of the personal data record;
- the designation of the railway rolling stock object affected by the registration, with all the information enabling the keeping of an railway rolling stock object file or, if such file already exists, with the number of the railway rolling stock object file;
- the type of transaction to be registered; - the designation of the parties;
- the duration of the registration, if applicable.

CHAPTER 6 REGISTRATION ON THE REGISTRY

6.1 The railway rolling stock object file records the date and time of reception of the application for registration, in chronological order with a sequentially ordered file number.

6.2 As soon as the registration is effected, all interested parties, including any Autonomous Transnational Registry, receive a notice of the registration setting out all the data concerning the- railway rolling stock object.

CHAPTER 7 OTHER REGISTRATIONS

7.1 For the purposes of the se regulations, the terms "other registrations" include notably applications for the amendment, the extension or the discharge of a registration.

7.2 The applications mentioned in paragraph 7.1 must be submitted using the relevant official electronic form provided by the Registry.

7.3 The application form must contain:

- the date of the application;
- the file number of the railway rolling stock object;
- the names of the parties with all information enabling the keeping of a personal data record or, if such record already exists, with the number of the personal data record;
- the kind of registration which is requested.

7.4 The registration is effected on the file of the relevant railway rolling stock object, and mentions the date and time of reception of the application for registration. It is assigned a sequentially ordered number.

7.5 As soon as the registration is effective, all interested parties to the registration, including any entry point, receive a notice of the registration setting out all the data concerning the railway rolling stock object.

CHAPTER 8 DURATION OF REGISTRATION

8. Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

CHAPTER 9 SEARCHES ON THE REGISTRY

- 9.1 Access to the Registry for searches [is open to any person and does not] require[s] the establishment of a specific interest.
- 9.2 [Any data contained on the file of railway rolling stock objects may be searched.]
- 9.3 Searches and requests for searches certificates are made by electronic means.
- 9.4 For purposes of Article 19 (6) of the Convention and Article XV (2) of the Protocol, a registration shall be "searchable" only against the "legal search criterion". The legal search criterion shall be the name of the manufacturer, the model of the railway rolling stock object and the manufacturer's serial number of the railway rolling stock object.
- 9.5 Upon receipt of a request for a search certificate (against a legal search criterion; art. 9.4), the Registrar issues either a registry search certificate stating the data contained in the file of the relevant railway rolling stock object or a certificate indicating that there is no information in the Registry relating to that object.
- 9.6 Upon request, the certificates mentioned in paragraph 9.5 are issued on an official paper document.

CHAPTER 10 OPERATIONAL COMPLAINTS

- 10.1 Any person may file a complaint with the Supervisory Authority concerning the operation of the Registry.
- 10.2 A matter concerns the operation of the Registry when it relates to general procedures and policies of the Registry and does not involve specific adjudication by the Supervisory Authority.

10.3 A person making a complaint shall substantiate its assertions.

10.4 The Supervisory Authority shall promptly consider complaints and where, on the basis of that consideration, it determines changes in the procedures or policies are appropriate, it shall so instruct the Registrar.

10.5 The Registrar may correct manifest errors in the Registry where such corrections are not prejudicial.

CHAPTER 11 CONFIDENTIALITY

11.1 The Registrar must ensure the confidentiality of all data in the Registry which are not stated on railway rolling stock object files.

11.2 The Registrar must also ensure the confidentiality and integrity of the messages transmitted by way of cryptographic and encoding.

CHAPTER 12 STORAGE OF DATA

12.1 Storage of the registry's data must ensure their historical record as well as point-in-time reporting of all operations performed.

12.2 All data registered in the Registry must be stored on electronic media.

12.3 Discharged registrations must be indicated as such on the railway rolling stock object files

12.4 All data stored in the registry must be frequently backed-up on electronic media and stored in a secure area at a separate location from the Registry's hardware.

12.5 In the case of a system failure, the Registrar must ensure a restoration of the records to the point-in-time the system failed. The Registrar must also ensure the restoration of registrations in the case of improper manipulation.

CHAPTER 13 STATISTICS

13.1 The Registrar keeps updated registration statistics which will be published in an annual report. This report is electronically accessible to [any person].

CHAPTER 14 RELATIONS W/TH THE SUPERVISORY AUTHORITY

14.1 The Registrar draws up a report at the end of each calendar year, to be submitted with statistical data to the Supervisory Authority. If necessary, this report includes proposals of the Registrar to improve the Registry's functioning. The Supervisory Authority may approve these proposals if it deems them appropriate.

14.3 Any request for modification of these regulations or of the structure of fees must be submitted by the Registrar to the Supervisory Authority, which has sole authority to approve such requests.

14.4 The Registrar is not bound by the confidentiality rule (paragraph 11.1) in its relations with the Supervisory Authority.

14.5 The Registrar must comply with the directives which are periodically issued by the Supervisory Authority.

[CHAPTER 15 RELATIONS WITH THE AUTONOMOUS TRANSNATIONAL REGISTRIES

15.1 The Registrar keeps an updated list of contracting States which have designated an entity in their territory as the entity through which the information required for registration shall or may be transmitted to the Registry.

15.2 The Registrar consults with the Autonomous Transnational Registry before fixing and individualizing the registration procedure and the coordination of operations concerning that Autonomous Transnational Registry. Any application for registration which does not comply with these procedure and coordination rules shall be electronically rejected.]

CHAPTER 16 FEES

16.1 The Registrar collects a fee for each of the following operations:

- initial registration of an international interest;
- other registrations (amendment, extension, discharge);
- searches;
- search certificates;
- such other matters as may be determined.

16.2 Fees, including fees arising from operations channelled through Autonomous Transnational Registries, must be paid to the Registrar, prior to the requested operation.

16.3 Fees are collected according to a schedule issued by the Supervisory Authority.

CHAPTER 17 FINAL PROVISIONS

17.1 The present regulations take effect on ...

17.2 Publication (to be determined, see art. 17 paragraph 2 (d) of the Convention).