

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**

**PRELIMINARY DRAFT PROTOCOL ON MATTERS SPECIFIC
TO RAILWAY ROLLING STOCK**

(as reviewed by the Drafting Committee at its second session,
held in Rome, 23 to 25 October 2002)

INTRODUCTORY REMARKS

by the UNIDROIT Secretariat

1. – The Drafting Committee 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 held its second session at the Headquarters of UNIDROIT in Rome from 23 to 25 October 2002. The session was opened by Prof. Herbert Kronke, Secretary General of UNIDROIT, at 10 a.m. on the 23rd. Prof. Karl Kreuzer chaired the Drafting Committee.

2. – The session was also attended by the following representatives:

Mr G. Mutz	First Legal Adviser and Deputy Director-General of OTIF
Mr H. Rosen	Co-ordinator of the Rail Working Group
Sir Roy Goode	Rapporteur
Mr W. Goyarts	United Kingdom
Mr H. Kjellin	Sweden

3. – The business of the Drafting Committee at the session was to review the draft articles of the preliminary draft Protocol on Matters specific to Railway Rolling Stock for submission to the Joint UNIDROIT / OTIF Committee of Governmental Experts Study Group at its third session, to be held in Berne from 5 to 13 May 2003. This revision was designed to implement the decisions taken by the Joint Committee which met for its second session in Rome from 17 to 19 June 2002.

4. – The Joint Committee of governmental experts adopted at its last session proposed terms of reference for the UNIDROIT/OTIF Rail Registry Task Force (OTIF/JGR/5 UNIDROIT 2002 – Study LXXIIIH – Doc. 7, August 2002, Attachment L), of which the last point was “To prepare recommendations and a draft text for consideration by the Drafting Committee”. The Task Force was unable to meet in September 2002 as planned and no text was submitted to the Drafting Committee which could only implement the few decisions taken by the Joint Committee on those provisions. To help the Task Force in its work, a Questionnaire on Railway Registries has been distributed (OTIF/JGR/5 UNIDROIT 2002 – Study LXXIIIH – Doc. 7, August 2002, Attachment F) and the Secretariat urges those Governments who have not yet answered to do so at the earliest possible opportunity. The Rail Registry Task Force should meet early in 2003.

5. – The basic working documents of the session were:

(1) Joint UNIDROIT / OTIF Committee of Governmental Experts for the preparation of a draft Protocol to the draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock: preliminary draft Protocol on Matters specific to Railway Rolling Stock, as reviewed by the Drafting Group at its first session held in Rome, 4 - 6 February 2002 (OTIF/JGR/4 UNIDROIT 2002 – Study LXXIIIH – Doc. 6, March 2002);

(2) Joint UNIDROIT / OTIF Committee of Governmental Experts for the preparation of a draft Protocol to the draft UNIDROIT Convention on International Interests in Mobile

Equipment on Matters specific to Railway Rolling Stock: Report of the second Joint Session held in Rome on 17 - 19 June 2002 (OTIF/JGR/5 UNIDROIT 2002 – Study LXXIIIH – Doc. 7, August 2002);

(3) Convention on International Interests in Mobile Equipment, adopted in Cape Town on 16th November 2001;

(4) Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, adopted in Cape Town on 16th November 2001.

6. – As the Joint Committee of Governmental Experts did in June 2002, the Drafting Committee only had time to review Articles I to XVII of the preliminary draft Rail Protocol. The Chairman closed the session at 1 p.m. on 25th October.

7. – The text of the revised draft articles is set out in a marked up version (as against document OTIF/JGR/4 UNIDROIT 2002 – Study LXXIIIH – Doc. 6, March 2002) in APPENDIX I (pp. 1 – 29) *infra* and in a clean version in APPENDIX II (pp. 31 – 55) *infra*.

8. – In order for the Joint Committee of governmental experts to make progress at its third session, the Drafting Committee wishes to draw the attention of Governments to some specific main points which need to be considered with particular care before the meeting, namely:

(a) Definition of “railway rolling stock”, and do modular components (i.e. engines for locomotives) (Art. I(2)(i)) need to be provided for?

(b) Which provisions should be mandatory (Art. III)?

(c) Remedies on insolvency: Is the solution of the Aircraft Protocol (voluntary opt-in with two alternatives A and B) or a single compromise solution (e.g. Alternative C) to be preferred (Art. IX)?

(d) Is the problem of “short term leases” satisfactorily solved by Art. *Xter* (2) and (3) as drafted by the Drafting Committee?

(e) Registry: structure and entities, including the issues of autonomous regional authorities and review mechanism for a local registry to become a portal to the International Registry (Art. XI *et seq.*)

(f) Definition of “public service rolling stock” and of the remedies which may be excluded by a declaration (Art. XXII*bis*)

(g) Which provisions should be subject to opting-in or opting-out declarations (see especially Articles VI (1), VIII, IX (1), XXII*bis*)? The relevant article of the Final provisions has not yet been drafted.

(h) How should the transitional provisions apply (Art. XXIII)?

(i) Should “internal transactions” be the subject of the Protocol and if so, what are the criteria (Art. XXV (3))?

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

(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome from 23 to 25 October 2002, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its second session held in Rome from 17 to 19 June 2002)

PREAMBLE

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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~~ of this Protocol];²

¹ ~~It is to be expected that t~~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. The Drafting Committee considers therefore that neither ~~It is open whether~~ a definition n or a 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) This and related definitions will be dependent upon the final decisions on the structure and entities relating to the registry system (Article XIV), especially~~ as to what special provisions, if any, should be taken for ~~regional~~ registration systems within a geographically isolated area ~~continent~~.

(~~b~~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;~~
- (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;]³or~~
- (iii) ~~such other unique~~ identification criteria as are prescribed or approved by the Supervisory Authority pursuant to Article V(1) of this Protocol ~~may prescribe or approve from time to time in regulations.~~⁴

(c) [“~~transnational designated entity registry authority~~”⁵ means an entity the authority, or entities 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]~~ of this Protocol herein;]⁶

~~(d)~~ “insolvency-related event” ~~in relation to a debtor~~ means:

- (i) the commencement of the insolvency proceedings; or
- (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;]⁷

(~~e~~e) [“local personal property register” means a registry in a Contracting State, whether national or local in a jurisdiction forming part of a ~~s~~State, in which an interest in railway rolling stock ~~governed by the Convention~~ may be registered;]⁸

(~~f~~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;]⁹

(e) [“~~public service authority~~” means ~~a department of a Contracting State or an authority or agency or other body designated by it,~~¹⁰ ~~appointed under statute or acting under public law to oversee the public interest in respect of public service rolling stock;~~

³ See footnote 2.

⁴ The Official Commentary concerning the Rail Protocol will give examples which were in former Article I(2)(k)(i) and (ii).

⁵ Alternative suggestion: “continental registry authority”.

⁶ See footnote 2.

⁷ Wording of sub-paragraph (b) taken from Article I(2)(m) of the Aircraft Protocol.

⁸ See footnote 2.

⁹ Added wording taken from Article I(2)(n) of the Aircraft Protocol. See also Article IX(1) of the Rail Protocol.

¹⁰ It would seem inappropriate to grant this intervention right to agencies of States which are not Contracting States.

(g) “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;]⁴⁴¹²

(h) [“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;]¹³

(i) “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;]

(j) [“~~transnational~~ self-contained rail network area”⁴⁴ means a geographical area out of which it is not possible for any railway rolling stock to move on, or directly above a fixed railway track or guideway, rails;]¹⁵

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~~ [xyz]]¹⁶].

⁴⁴ ~~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.~~

¹² ~~The Drafting Committee considers useful to keep this definition despite Article XXIIbis, but the Joint Committee of governmental experts should review the content of this definition (g).~~

¹³ Consider a de minimis weight or value criterion. ~~The Rail Working Group will prepare a paper on the extent to which limitations to the definition are required.~~

⁴⁴ ~~Alternative suggestion: “continental rail network”.~~

¹⁵ See footnote 2.

¹⁶ This Article needs further consideration in order to decide which provisions should be mandatory and where derogations should be allowed.

Article IV
Representative capacities

[A person ~~may enter into~~ and effect a registration, as defined by Article 16(3) of the Convention, in relation to an item of railway rolling stock, in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention ~~may effect a registration in its own name.~~ ¹⁷]

[Article V
Identification and ~~D~~description of railway rolling stock

1. The Supervisory Authority shall prescribe in regulations such identification criteria as will enable an item of railway rolling stock to be uniquely identified. It may prescribe different criteria for different classes of railway rolling stock. ¹⁸

~~2.~~ A description of railway rolling stock that includes the ~~unique~~ identification criteria is necessary and sufficient to identify the ~~item object~~ for ~~the~~ purposes of Article 7(c) of the Convention.

~~3.~~ Any change ~~in~~ ~~to~~ the description of an item of railway rolling stock as registered referred to in the preceding paragraph shall be notified by ~~the~~ debtor [or ~~the~~ 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 self-contained~~ rail network area ¹⁹, such relocation shall be notified by ~~the~~ debtor [or ~~the~~ creditor] to the Registrar immediately after such change takes place, specifying the ~~unique~~ identification criteria appropriate to the new location. ²⁰

~~3.~~ Any refurbishment or alteration of railway rolling stock shall not affect the rights of creditors. ²¹]

Article VI
Choice of law

[1. This Article applies only where a Contracting State has made a declaration pursuant to Article [xyz] ²².]

¹⁷ ~~The Committee of governmental experts wished to reconsider the issue.~~ The Drafting Committee considered that this Article should be moved to Chapter III.

¹⁸ See also footnote 3.

¹⁹ See footnote 2.

²⁰ 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.

²¹ If this paragraph is necessary, it should be placed in a specific Article.

²² This paragraph has been taken from Article VIII(1) of the Aircraft Protocol. Article xyz has not yet been drafted.

~~12.~~ 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.

~~23.~~ 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 ~~apply to obtain an order from~~ the court in the jurisdiction in which the railway rolling stock is ~~physically~~ located ~~for an order,~~ directing ~~the defaulting debtor to take all reasonable measures to immediate deliver or procure the~~ delivery of the railway rolling stock ~~without undue delay~~ to a location, within or outside of such jurisdiction where ~~thereafter~~ the creditor can move ~~it the railway rolling stock~~ without the need of traction ~~[or other services or facilities]~~ to be provided by the defaulting debtor or any ~~person on its behalf 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. ~~{~~²³

4. ~~{~~ A chargee giving 14 or more calendar days' prior written notice of a proposed sale or lease to interested persons ~~as provided by Article 8(4) of the Convention~~ shall be deemed to satisfy the requirement of ~~giving the providing~~ "reasonable prior notice" specified ~~therein Article 8(4) of the Convention~~. The foregoing shall not prevent a chargee and a chargor ~~[or a guarantor]~~ from agreeing to a longer period of prior notice. ~~{~~²⁴

²³ ~~Wording taken from Article IX(3) of the Aircraft Protocol.~~

²⁴ Wording taken from Article IX(4) of the Aircraft Protocol with adjustments ~~by the Drafting Committee.~~

~~[Article VIII²⁵
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.]²⁶~~

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. [Subject to paragraph 7, r][R]elief 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.

²⁵ This Article has been replaced by a new Article XXIIbis.

²⁶ 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.~~²⁷

~~Alternative B~~

3. ~~[Subject to paragraph 7, f][F]~~or the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within 60 ~~[working] [calendar]~~ days from the date of filing of the application for relief.]²⁸

4. ~~[~~ Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (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)”.]²⁹

~~5. [Subject to paragraph 7, [o][O]wnership 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.~~³⁰

~~6]. [Subject to Article 30(3)(b) of the Convention,] ~~[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 or an instrument made by a regional economic integration organisation to which Article XX(1) of this Protocol applies, being an instrument which in either case is binding on the ~~first mentioned~~ Contracting State.~~

7. Paragraphs 2, 3 and 5 of this Article apply except as otherwise provided by a declaration pursuant to Article [xyz]^{32 33}.

²⁷ Wording taken from Article X(2) of the Aircraft Protocol.

²⁸ Alternative solution proposed by the Rail Working Group.

²⁹ Wording taken from Article X(3) of the Aircraft Protocol with adjustments.

³⁰ Wording taken from Article X(4) of the Aircraft Protocol.

³¹ This policy issue should be considered by the Joint Committee of governmental experts.

³² Article xyz has not yet been drafted and it may empower a Contracting State to specify different time periods where appropriate.

³³ The Joint Committee of governmental experts agreed that it could be necessary to review the issue of opting-out. The Drafting Committee endorses this view, in particular it considers that it should be reviewed with regard to paragraphs 2 and 5.

*Article IX*³⁴
Remedies on insolvency

~~1. This Article applies only in a Contracting State which is the State of the primary insolvency jurisdiction.~~³⁵

~~2. Within a period not exceeding sixty days~~³⁶ ~~from the date of the insolvency related event [occurring in the primary insolvency jurisdiction]~~³⁷ ~~(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.~~³⁸

~~3.~~³⁹

~~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.~~⁴⁰

³⁴ Alternatives A and B are taken from Article XI of the Aircraft Protocol adapted to railway rolling stock, and Alternative C is a proposal from the Rail Working Group as amended by the Drafting Committee.

³⁵ The adoption of this paragraph should be considered.

³⁶ The Official Commentary should stress that this period of 60 days cannot be modified by the applicable law.

³⁷ The wording in brackets has been proposed after the meeting by the Rail Working Group.

³⁸ 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.

³⁹ 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.

⁴⁰ Has to be conformed to paragraph 3 of this Article.

~~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.⁴⁴~~

~~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.⁴²~~

~~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.~~

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article [xyz]⁴³.

Alternative A⁴⁴

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the railway rolling stock to the creditor no later than the earlier of:

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the railway rolling stock if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

[4. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.]⁴⁵

5. 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.

⁴⁴ ~~Has to be conformed to paragraph 3 of this Article.~~

⁴² ~~Wording taken from Alternative A of Article XI(12) of the Aircraft Protocol.~~

⁴³ ~~Article xyz has not yet been drafted.~~

⁴⁴ ~~This Alternative is taken from Article XI of the Aircraft Protocol (Alternative A) with the omission of its paragraph 8 which relates to de-registration and export of aircraft which is not relevant for the Rail Protocol.~~

⁴⁵ ~~The Drafting Committee considers that this paragraph is not necessary.~~

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

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 2, 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 waiting period shall not apply in respect of a default in the performance of such future obligations.

8. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

9. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

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

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

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

Alternative B⁴⁶

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article [xyz]⁴⁷ whether it will:

(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.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

⁴⁶ This Alternative is taken from Article XI of the Aircraft Protocol (Alternative B).

⁴⁷ Article xyz has not yet been drafted.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the railway rolling stock but fails to do so, the court may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The railway rolling stock shall not be sold pending a decision by a court regarding the claim and the international interest.

Alternative C⁴⁸

2. Upon the occurrence of an insolvency-related event, the debtor or the insolvency administrator, as the case may be, shall within the cure period:

(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.

3. Before the end of the cure period, the insolvency administrator or the debtor may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period for such period ending not later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the “suspension period”). No such order shall be made unless 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.

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. If an application is not granted within [30] days it will be deemed withdrawn unless the insolvency administrator or debtor and the creditor agree otherwise.

5. 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.

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

⁴⁸ This Alternative is taken from a proposal of the Rail Working Group put to the Joint Committee of governmental experts at its second session (UNIDROIT/OTIF CGE2Rail/Int.Int./WP2, Article IX in Attachment K).

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period or any suspension period, it cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraph 3, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

9. Subject to paragraph 3, no obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

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

11. No rights or interests, except for 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.

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

13. For the purposes of this Article, the cure period shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction. In the absence of such specification, the cure period shall be [60] days ⁴⁹ commencing with the date of the insolvency-related event.

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 ⁵⁰ Modification of assignment provisions

✚ {Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

“and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person” } ⁵⁴.

⁴⁹ The Official Commentary should stress that the fixed period cannot be modified by the applicable law.

⁵⁰ This Article has been moved from Chapter III.

⁵⁴ Note this is at variance with the course taken by the Aircraft Protocol in Article XV thereof.

*‡ Article X ter⁵²
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. Notwithstanding the preceding paragraph and Article 29(4)(a) of the Convention, the lessee shall be entitled to quiet possession and use of the railway rolling stock as against any creditor for a period not exceeding [60] days from the date of delivery to the lessee or, where the leasing agreement is one of a chain of leasing agreements, for a period not exceeding [60] days from the date of delivery to the first lessee under the first such leasing agreement.

3. The preceding paragraph applies only if:

(a) the entry into the leasing agreement was not in breach of any obligation of the lessor to that creditor; and

(b) the lessee is not in default within the meaning of Article 11 of the Convention.]⁵³

43. 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~~].

⁵² The wording of paragraphs (1) and (3) is taken from Article XVI of the Aircraft Protocol.

⁵³ Paragraphs 2 and 3 are a proposal of the Rail Working Group, supported in the Joint Committee of governmental experts, as amended by the Drafting Committee. In the light of this provision, the Drafting Committee considers that a definition of "short term leasing agreement" is not necessary.

[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.]⁵⁴

[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.]⁵⁵

~~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.]⁵⁶~~

Alternative A⁵⁷

4. The first Registrar shall operate the International Registry for a period of [five] years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular [five-]yearly intervals by the Supervisory Authority.

Alternative B

45. The first Registrar shall be appointed for a period not exceeding [10]⁵⁸ years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding [10]⁵⁹ years.

⁵⁴ ~~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”. To be decided by the Diplomatic Conference.~~

⁵⁵ ~~Wording taken from the Aircraft Protocol (Article XVII(4)). The issue of immunity is to be decided by the Diplomatic Conference. The Rail Working Group proposed an alternative to this paragraph which reads as follows:~~

~~“3. The Supervisory Authority 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 self-contained rail network area. Except in relation to the powers given to the Supervisory Authority under paragraph 4 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.”~~

~~Should this proposal be accepted, the Drafting Committee wonders whether it should appear in the text of the Rail Protocol or as a Resolution of the Diplomatic Conference.~~

⁵⁶ ~~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.~~

⁵⁷ ~~The wording has been taken from Article XVII(5) of the Aircraft Protocol but the Drafting Committee considers that the Joint Committee of governmental experts should not follow this provision of the Aircraft Protocol. Therefore, Alternative B should be preferred.~~

⁵⁸ ~~The Drafting Committee considers that the length of the period should be reconsidered by the Joint Committee of governmental experts at its next session.~~

⁵⁹ ~~See the preceding footnote.~~

~~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] ⁶⁰ under regulations set out by the Supervisory Authority. ⁶⁴~~

~~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. ⁶²~~

Article XII ⁶³
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. ⁶⁴ 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.

⁶⁰ See footnote 42.

⁶¹ Compare with Art 17 (2) (b) of the Convention.

⁶² 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.

⁶³ To be considered by the Joint Committee of governmental experts at its next session.

⁶⁴ The new text has been added to be consistent with the Aircraft Protocol.

Article XIII ⁶⁵
Access to Registry

1. The centralised functions of the International Registry shall be operated and administered by the Registrar on a 24-hour basis. ⁶⁶
2. All States in the area covered by a transnational rail network ⁶⁷, 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 of this Protocol,~~] any transnational registry authority designated pursuant to the preceding 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 of this Article 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. ⁶⁸
4. For the purposes of Article V (3 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. ⁶⁹
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

⁶⁵ Not yet considered by the Joint Committee of governmental experts because referred to the Rail Registry Task Force. For the entities referred to in this article, see footnote 2 and revised definitions (Article I(2) (c) and (j)).

⁶⁶ If the decision is taken to provide for national entry points, the Drafting Committee considers that it will be necessary to add a provision along the lines of Article XX(4) of the Aircraft Protocol ("The various entry points shall be operated at least during working hours in their respective territories.")

⁶⁷ See footnote 2

⁶⁸ See footnote 2 and revised definitions (Article I(2) (c) and (j)). Some revision of paragraphs 2 and 3 will be needed to produce consistency between the two provisions.

⁶⁹ See footnote 2 and revised definitions (Article I(2) (c) and (j)).

rail network, apply exclusively within such network and are sufficient to comply with the basic informational requirements of the Registrar in operating the International Registry].⁷⁰

[Article XIV⁷¹
*Autonomous Transnational Registries*⁷²

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 [the preceding paragraph 1 above](#), the undertaking to the Supervisory Authority set out in Article XIII(2) [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.]]

⁷⁰ 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.

⁷¹ Not yet considered [by the Joint Committee of governmental experts because referred to the Rail Registry Task Force.](#)

⁷² [See revised definition in Article I\(2\)\(a\).](#) 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~~ the self-contained rail network area in which it is located ~~in~~, the Registrar [shall] [may], at its expense, maintain a lexicon showing the equivalent descriptions, which shall be open to inspection by any person on payment of any prescribed fee.

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 10 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.~~⁷³

~~45.~~ 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 10 calendar days ⁷⁴ after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.

~~56.~~ Notwithstanding Article 28(1) of the Convention, [there shall be no liability of the Registrar for consequential loss] ⁷⁵ and in respect of any loss arising from an error or omission by a designated entity transnational rail registry, that entity the transnational registry authority shall assume the liability of the Registrar thereunder. ⁷⁶

~~67.~~ † 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. † ⁷⁷

~~78.~~ † 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. † ⁷⁸

⁷³ ~~Could be deleted and left to the Convention (Article 21).~~

⁷⁴ ~~The Drafting Committee kept "10 calendar days" instead of "without undue delay" in order to be consistent with paragraph 3 of this Article.~~

⁷⁵ 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. If this is retained, the Drafting Committee considers that it would be necessary to split this paragraph into two provisions.

⁷⁶ See footnote 2 and revised definition in Article I(2)(c).

⁷⁷ ~~Wording taken from Article XX(5) of the Aircraft Protocol.~~

⁷⁸ ~~Wording taken from Article XX(6) of the Aircraft Protocol.~~

*Article XVI*⁷⁹
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 authority⁸⁰];

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

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

2. The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to recover the costs of establishing and implementing (amortised over 10 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.⁸¹ [Except where it is an autonomous transnational registry authority⁸²] if filings are made through a transnational registry authority⁸³, such authority shall collect such fees and shall account to the Registrar therefor.⁸⁴

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 [10] 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.

⁷⁹ To be considered by the Joint Committee of governmental experts at a future session.

⁸⁰ See revised definition in Article I(2)(c).

⁸¹ 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 ~~for at a~~ profit.

⁸² See revised definition in Article I(2)(a).

⁸³ See revised definition in Article I(2)(c).

⁸⁴ 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].

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 writing and~~ contains a description of the railway rolling stock ~~in the terms~~ as specified in Article V of this Protocol. ⁸⁵

CHAPTER V RELATIONSHIP WITH OTHER CONVENTIONS

Article XVIII *Relationship with other Conventions*

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

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

⁸⁵ ~~The wording of paragraph 2 departs from that of the Aircraft Protocol.~~

[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.⁸⁶

CHAPTER VI

[OTHER] FINAL PROVISIONS

*Article XIX*⁸⁷

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.
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*⁸⁸

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.

⁸⁶ 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.

⁸⁷ Wording taken from Article XXVI of the Aircraft Protocol.

⁸⁸ Wording taken from Article 48 of the Convention and Article XXVII of the Aircraft Protocol.

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*⁸⁹
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.

*Article XXII*⁹⁰
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.

⁸⁹ Wording taken from Article XXVIII of the Aircraft Protocol.

⁹⁰ Wording taken from Article XXIX of the Aircraft Protocol.

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 XXIIbis
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] ⁹¹ 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.

Article XXIII
Transitional Provisions

Notwithstanding Article 60 of the Convention, [10] 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) of the Convention.

*Article XXIV*⁹²
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.

⁹¹ It is anticipated by the Drafting Committee that the scope of the words appearing within square brackets will be fine-tuned at the third session of the Joint Committee of governmental experts in order to limit it to repossession or other remedies which may disrupt public services.

⁹² Wording taken from Article XXXII of the Aircraft Protocol.

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 of the Convention. 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.⁹³
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.⁹⁴

*Article XXVI*⁹⁵

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.
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.

⁹³ 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.

⁹⁴ 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.

⁹⁵ Wording, except paragraph 4, taken from Article XXXIII of the Aircraft Protocol.

[4. Declarations made pursuant to Articles 39 and 40 of the Convention shall be subject to this Article.]⁹⁶

*Article XXVII*⁹⁷
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*⁹⁸
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 12 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*⁹⁹
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.

⁹⁶ Needed?

⁹⁷ Wording taken from Article XXXIV of the Aircraft Protocol.

⁹⁸ Wording taken from Article XXXV of the Aircraft Protocol.

⁹⁹ Wording taken from Article XXXVI of the Aircraft Protocol.

2. At the request of not less than 25 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 XXX*¹⁰⁰

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;

¹⁰⁰ Wording taken from Article XXXVII of the Aircraft Protocol.

(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

(d) perform such other functions customary for depositaries.

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

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

(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome from 23 to 25 October 2002, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its second session held in Rome from 17 to 19 June 2002)

PREAMBLE

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Article XXX Depositary and its functions

**PRELIMINARY DRAFT PROTOCOL TO THE CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS
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(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome from 23 to 25 October 2002, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its second session held in Rome from 17 to 19 June 2002)

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 registry authority” means a registry authority which has been designated as an autonomous registry authority pursuant to Article XIV of this Protocol];²
 - (b) “identification criteria” means such identification criteria as are prescribed or approved by the Supervisory Authority pursuant to Article V(1) of this Protocol.³

¹ The Official Commentary to Article 7(b) of the Convention makes clear that the “power to dispose” includes the power to permit the use of any object. The Drafting Committee considers therefore that neither a definition nor a similar provision should be added in this Protocol to confirm this position.

² This and related definitions will be dependent upon the final decisions on the structure and entities relating to the registry system (Article XIV), especially as to what special provisions, if any, should be taken for registration systems within a geographically isolated area .

³ The Official Commentary concerning the Rail Protocol will give examples which were in former Article I(2)(k)(i) and (ii).

(c) [“designated entity” means an entity, or entities 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 XIII (2) of this Protocol ;] ⁴

(d) “insolvency-related event” means:

- (i) the commencement of the insolvency proceedings; or
- (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;

(e) [“local personal property register” means a register in a Contracting State, whether national or local in a jurisdiction forming part of a State, in which an interest in railway rolling stock may be registered;] ⁵

(f) “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;

(g) “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;] ⁶

(h) “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; ⁷

(i) “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;

(j) [“self-contained rail network area” means a geographical area out of which it is not possible for any railway rolling stock to move on or directly above a fixed railway track or guideway.] ⁸

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.

⁴ See footnote 2.

⁵ See footnote 2.

⁶ The Drafting Committee considers useful to keep this definition despite Article XXII*bis*, but the Joint Committee of governmental experts should review the content of this definition (g).

⁷ Consider a de minimis weight or value criterion. The Rail Working Group will prepare a paper on the extent to which limitations to the definition are required.

⁸ See footnote 2.

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 [[xyz]⁹].

*Article IV
Representative capacities*

[A person may enter into an agreement and effect a registration, as defined by Article 16(3) of the Convention, in relation to an item of railway rolling stock, in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention. ¹⁰]

*[Article V
Identification and description of railway rolling stock*

1. The Supervisory Authority shall prescribe in regulations such identification criteria as will enable an item of railway rolling stock to be uniquely identified. It may prescribe different criteria for different classes of railway rolling stock. ¹¹

2. A description of railway rolling stock that includes the identification criteria is necessary and sufficient to identify the item for the purposes of Article 7(c) of the Convention.

3. Any change in the description of an item of railway rolling stock as registered shall be notified by the debtor [or the 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 self-contained rail network area ¹², such relocation shall be notified by the debtor [or the creditor] to the Registrar immediately after such change takes place, specifying the identification criteria appropriate to the new location. ¹³

⁹ This Article needs further consideration in order to decide which provisions should be mandatory and where derogations should be allowed.

¹⁰ The Drafting Committee considered that this Article should be moved to Chapter III.

¹¹ See also footnote 3.

¹² See footnote 2.

¹³ 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.

4. Any refurbishment or alteration of railway rolling stock shall not affect the rights of creditors. ¹⁴]

Article VI
Choice of law

[1. This Article applies only where a Contracting State has made a declaration pursuant to Article [xyz] ¹⁵.]

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

3. 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 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 of such jurisdiction where the creditor can move it without the need of traction [or other services or facilities] to be provided by the defaulting debtor or any person on its behalf.]

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.

¹⁴ If this paragraph is necessary, it should be placed in a specific Article.

¹⁵ This paragraph has been taken from Article VIII(1) of the Aircraft Protocol. Article xyz has not yet been drafted.

4. A chargee giving 14 or more calendar days' prior written notice of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the "reasonable prior notice" specified therein. The foregoing shall not prevent a chargee and a chargor [or a guarantor] from agreeing to a longer period of prior notice.¹⁶

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. [Subject to paragraph 7, r][R]elief 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.

3. [Subject to paragraph 7, f][F]or the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within 60 calendar days from the date of filing of the application for relief.]

4. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (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)”.

5. [Subject to paragraph 7, [o][O]wnership 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.

6. Judicial relief under Article 13(1) of the Convention may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another State unless its application would contravene an international instrument or an instrument made by a regional economic integration organisation to which Article XX(1) of this Protocol applies, being an instrument which in either case is binding on the Contracting State.

7. Paragraphs 2, 3 and 5 of this Article apply except as otherwise provided by a declaration pursuant to Article [xyz]¹⁷ .¹⁸

¹⁶ Wording taken from Article IX(4) of the Aircraft Protocol with adjustments by the Drafting Committee.

¹⁷ Article xyz has not yet been drafted and it may empower a Contracting State to specify different time periods where appropriate.

¹⁸ The Joint Committee of governmental experts agreed that it could be necessary to review the issue of opting-out. The Drafting Committee endorses this view, in particular it considers that it should be reviewed with regard to paragraphs 2 and 5.

*Article IX*¹⁹
Remedies on insolvency

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article [xyz]²⁰.

*Alternative A*²¹

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the railway rolling stock to the creditor no later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the railway rolling stock if this Article did not apply.

3. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

[4. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.]²²

5. 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.

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

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 2, 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 waiting period shall not apply in respect of a default in the performance of such future obligations.

¹⁹ Alternatives A and B are taken from Article XI of the Aircraft Protocol adapted to railway rolling stock, and Alternative C is a proposal from the Rail Working Group as amended by the Drafting Committee.

²⁰ Article xyz has not yet been drafted.

²¹ This Alternative is taken from Article XI of the Aircraft Protocol (Alternative A) with the omission of its paragraph 8 which relates to de-registration and export of aircraft which is not relevant for the Rail Protocol.

²² The Drafting Committee considers that this paragraph is not necessary.

8. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.
9. No obligations of the debtor under the agreement may be modified without the consent of the creditor.
10. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
11. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.
12. The Convention as modified by Article VII of this Protocol shall apply to the exercise of any remedies under this Article.

*Alternative B*²³

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article [xyz]²⁴ whether it will:
 - (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.
3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.
4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.
5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the railway rolling stock but fails to do so, the court may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.
6. The railway rolling stock shall not be sold pending a decision by a court regarding the claim and the international interest.

²³ This Alternative is taken from Article XI of the Aircraft Protocol (Alternative B).

²⁴ Article xyz has not yet been drafted.

*Alternative C*²⁵

2. Upon the occurrence of an insolvency-related event, the debtor or the insolvency administrator, as the case may be, shall within the cure period:

(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.

3. Before the end of the cure period, the insolvency administrator or the debtor may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period for such period ending not later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the “suspension period”). No such order shall be made unless 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.

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. If an application is not granted within [30] days it will be deemed withdrawn unless the insolvency administrator or debtor and the creditor agree otherwise.

5. 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.

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

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period or any suspension period, it cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraph 3, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

²⁵ This Alternative is taken from a proposal of the Rail Working Group put to the Joint Committee of governmental experts at its second session (UNIDROIT/OTIF CGE2Rail/Int.Int./WP2, Article IX in Attachment K).

9. Subject to paragraph 3, no obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.

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

11. No rights or interests, except for 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.

12. The Convention as modified by Articles VII and XXII*bis* of this Protocol shall apply to the exercise of any remedies under this Article.

13. For the purposes of this Article, the cure period shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction. In the absence of such specification, the cure period shall be [60] days²⁶ commencing with the date of the insolvency-related event.

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
Modification of assignment provisions

Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

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

²⁶ The Official Commentary should stress that the fixed period cannot be modified by the applicable law.

Article X ter
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. Notwithstanding the preceding paragraph and Article 29(4)(a) of the Convention, the lessee shall be entitled to quiet possession and use of the railway rolling stock as against any creditor for a period not exceeding [60] days from the date of delivery to the lessee or, where the leasing agreement is one of a chain of leasing agreements, for a period not exceeding [60] days from the date of delivery to the first lessee under the first such leasing agreement.

3. The preceding paragraph applies only if:

(a) the entry into the leasing agreement was not in breach of any obligation of the lessor to that creditor; and

(b) the lessee is not in default within the meaning of Article 11 of the Convention.]²⁷

4. 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].

[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.]²⁸

²⁷ Paragraphs 2 and 3 are a proposal of the Rail Working Group, supported in the Joint Committee of governmental experts, as amended by the Drafting Committee. In the light of this provision, the Drafting Committee considers that a definition of "short term leasing agreement" is not necessary.

²⁸ To be decided by the Diplomatic Conference.

[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.] ²⁹

Alternative A ³⁰

4. The first Registrar shall operate the International Registry for a period of [five] years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular [five-]yearly intervals by the Supervisory Authority.

Alternative B

4. The first Registrar shall be appointed for a period not exceeding [10] ³¹ years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding [10] ³² years.

Article XII ³³
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. 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.

²⁹ The issue of immunity is to be decided by the Diplomatic Conference. The Rail Working Group proposed an alternative to this paragraph which reads as follows:

“3. The Supervisory Authority 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 self-contained rail network area. Except in relation to the powers given to the Supervisory Authority under paragraph 4 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.”

Should this proposal be accepted, the Drafting Committee wonders whether it should appear in the text of the Rail Protocol or as a Resolution of the Diplomatic Conference.

³⁰ The wording has been taken from Article XVII(5) of the Aircraft Protocol but the Drafting Committee considers that the Joint Committee of governmental experts should not follow this provision of the Aircraft Protocol. Therefore, Alternative B should be preferred.

³¹ The Drafting Committee considers that the length of the period should be reconsidered by the Joint Committee of governmental experts at its next session.

³² See the preceding footnote.

³³ To be considered by the Joint Committee of governmental experts at its next session.

Article XIII ³⁴
Access to Registry

1. The centralised functions of the International Registry shall be operated and administered by the Registrar on a 24-hour basis. ³⁵
2. All States in the area covered by a transnational rail network, provided that they act jointly and are all Contracting States, may designate one or more (acting jointly) local personal property registers as a 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 of this Protocol,] any transnational registry authority designated pursuant to the preceding paragraph 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 of this Article, 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. ³⁶
4. For the purposes of Article V (3), 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. ³⁷
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, apply exclusively within such network and are sufficient to comply with the basic informational requirements of the Registrar in operating the International Registry]. ³⁸

³⁴ Not yet considered by the Joint Committee of governmental experts because referred to the Rail Registry Task Force. For the entities referred to in this article, see footnote 2 and revised definitions (Article I(2) (c) and (j)).

³⁵ If the decision is taken to provide for national entry points, the Drafting Committee considers that it will be necessary to add a provision along the lines of Article XX(4) of the Aircraft Protocol (“The various entry points shall be operated at least during working hours in their respective territories.”).

³⁶ See footnote 2 and revised definitions (Article I(2) (c) and (j)). Some revision of paragraphs 2 and 3 will be needed to produce consistency between the two provisions.

³⁷ See footnote 2 and revised definitions (Article I(2) (c) and (j)).

³⁸ 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

[Article XIV³⁹
*Autonomous Transnational Registries*⁴⁰

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 the preceding paragraph, the undertaking to the Supervisory Authority set out in Article XIII(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.]]

autonomy to a transnational registry in operational issues but also remove the oversight obligation of the Supervisory Authority. See also footnote 2.

³⁹ Not yet considered by the Joint Committee of governmental experts because referred to the Rail Registry Task Force.

⁴⁰ See revised definition in Article I(2)(a). 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 identification criteria depending on the self-contained rail network area in which it is located, the Registrar [shall] [may], at its expense, maintain a lexicon showing the equivalent descriptions, which shall be open to inspection by any person on payment of any prescribed fee.
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 10 calendar days after the receipt of the demand described in such paragraph.
4. 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 10 calendar days ⁴¹ after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
5. Notwithstanding Article 28(1) of the Convention, [there shall be no liability of the Registrar for consequential loss] ⁴² and in respect of any loss arising from an error or omission by a designated entity, that entity shall assume the liability of the Registrar thereunder. ⁴³
6. 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.
7. 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.

⁴¹ The Drafting Committee kept "10 calendar days" instead of "without undue delay" in order to be consistent with paragraph 3 of this Article.

⁴² 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. If this is retained, the Drafting Committee considers that it would be necessary to split this paragraph into two provisions.

⁴³ See footnote 2 and revised definition in Article I(2)(c).

*Article XVI*⁴⁴
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 authority⁴⁵];

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

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

2. The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to recover the costs of establishing and implementing (amortised over 10 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.⁴⁶ [Except where it is an autonomous transnational registry authority⁴⁷] if filings are made through a transnational registry authority⁴⁸, such authority shall collect such fees and shall account to the Registrar therefor.⁴⁹

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 [10] 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.

⁴⁴ To be considered by the Joint Committee of governmental experts at a future session.

⁴⁵ See revised definition in Article I(2)(c).

⁴⁶ 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 for profit.

⁴⁷ See revised definition in Article I(2)(a).

⁴⁸ See revised definition in Article I(2)(c).

⁴⁹ 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].

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 writing and contain a description of the railway rolling stock as specified in Article V of this Protocol.

CHAPTER V RELATIONSHIP WITH OTHER CONVENTIONS

Article XVIII Relationship with other Conventions

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

- (a) the Rome Convention on the Law Applicable to Contractual Obligations 1980;
- (b) the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 (as amended from time to time);
- (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.⁵⁰

CHAPTER VI

[OTHER] FINAL PROVISIONS

*Article XIX*⁵¹

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.
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*⁵²

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.

⁵⁰ 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.

⁵¹ Wording taken from Article XXVI of the Aircraft Protocol.

⁵² Wording taken from Article 48 of the Convention and Article XXVII of the Aircraft Protocol.

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*⁵³
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.

*Article XXII*⁵⁴
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:

⁵³ Wording taken from Article XXVIII of the Aircraft Protocol.

⁵⁴ Wording taken from Article XXIX of the Aircraft Protocol.

(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 XXIIbis
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] ⁵⁵ 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.

Article XXIII
Transitional Provisions

Notwithstanding Article 60 of the Convention, [10] 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) of the Convention.

*Article XXIV*⁵⁶
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.

⁵⁵ It is anticipated by the Drafting Committee that the scope of the words appearing within square brackets will be fine-tuned at the third session of the Joint Committee of governmental experts in order to limit it to repossession or other remedies which may disrupt public services.

⁵⁶ Wording taken from Article XXXII of the Aircraft Protocol.

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 of the Convention. 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.⁵⁷
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.⁵⁸

*Article XXVI*⁵⁹

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.
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.

⁵⁷ 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.

⁵⁸ 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.

⁵⁹ Wording, except paragraph 4, taken from Article XXXIII of the Aircraft Protocol.

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.]⁶⁰

*Article XXVII*⁶¹
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*⁶²
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 12 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*⁶³
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.

⁶⁰ Needed?

⁶¹ Wording taken from Article XXXIV of the Aircraft Protocol.

⁶² Wording taken from Article XXXV of the Aircraft Protocol.

⁶³ Wording taken from Article XXXVI of the Aircraft Protocol.

2. At the request of not less than 25 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 XXX*⁶⁴

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;

⁶⁴ Wording taken from Article XXXVII of the Aircraft Protocol.

(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

(d) perform such other functions customary for depositaries.

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

