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**INTERGOVERNMENTAL ORGANISATION FOR
INTERNATIONAL CARRIAGE BY RAIL**



**INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF
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**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**

RAIL REGISTRY TASK FORCE

(Second meeting, Washington 19-20 March 2003)

REPORT

(prepared by Mr Peter Bloch, Co-Chairman)

REPORT OF THE RAIL REGISTRY TASK FORCE
TO THE COMMITTEE OF GOVERNMENT EXPERTS
FOR THE PREPARATION OF A DRAFT PROTOCOL
TO THE CONVENTION ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT ON MATTERS SPECIFIC
TO RAILWAY ROLLING STOCK

Introduction

The Rail Registry Task Force (RRTF) met in Washington, D.C., March 19-20 at the headquarters of the American Association of Railroads (AAR). Representatives also attended the meeting from UNIDROIT, OTIF, the Rail Working Group (RWG), and the AAR (see Attachment A for the list of participants). Pursuant to the direction given by the Committee of Experts at its Second Joint Session, the RRTF generally followed the Terms of Reference as set out in Attachment L to the Report of the Second Joint Session and which is included here as Attachment B. The RRTF, also considered in the context of its deliberations, the changes that had been proposed in the text of the Draft Protocol by the Drafting Group at its October 2002 meeting.

Existing Rail Registry Systems

The RRTF began its work by reviewing the answers to the questionnaire that had been supplied by countries to the Secretariats. Answers were received from Austria, Croatia, the Czech Republic, Estonia, Germany, Hungary, Japan, the Netherlands, Norway, the Russian Federation, the Republic of Korea, Switzerland, Thailand, Tunisia and Turkey. (Information from the United States and Canada which covered the matters raised in the questionnaire had been presented at the Second Joint Session and is reflected in the Report on that Session. Also, Ethiopia submitted this information at the Second Joint Session.)

Due to the limited number of responses and the lack of detailed information, the RRTF deemed the answers to be of limited utility. It was noted that while most of these countries had registries of some kind for their rail equipment, only one appeared to have a registry in which financial interests were registered. At least three of the registries were set up to be searchable by the debtor or creditor name and not by the asset. It was also clear that there is a multitude of identification criteria used by different countries, with at least four different systems reflected in the answers.

Alternative Methods of Establishing a Regional Registry

With respect to item two of the Terms of Reference, the RRTF looked at three options for establishing a regional registry under the Convention and Protocol: (1) a regional registry whose data could be searchable through the International Registry but whose operation would be independent of the international registry system; (2) a regional registry that would be fully subject to the International Supervisory Authority; and (3) a regional regime whose relationship

to the International Registry and Supervisory Authority would be defined at a later time. There was little support for the third option.

Option 1: Self-Governing Regional Registry

The majority of the RRTF supported the first option, a self-governing regional registry. A paper was tabled by the representatives of Canada and the United States of America outlining this option together with specific amendments to the then-current preliminary draft of the Rail Protocol (document OTIF/JGR/4 UNIDROIT 2002 – Study LXXIIIH – Doc. 6, March 2002). This paper was circulated to the RRTF membership in October 2002 but received very little comment prior to the March 2003 RRTF meeting. This paper is found at Attachment C (with the references made to the draft as amended by the Drafting Committee in October 2002).

In discussing this proposal, participants at the meeting described how this option would work. A majority of the Contracting States within a defined region may agree to establish a regional registry for the recordation of financial interests in railway rolling stock located in the region. The regional registry would make the registration data available to the International Registry, if the International Registry wished to acquire the data, so that a search could be made in either location. The Regional Supervisory Authority and Regional Registrar would have the same powers and duties as their international counterparts within the relevant region. For example, the Regional Supervisory Authority would set fees and issue regulations, including those that establish the identification criteria used in that region. The liability regime for the Regional Supervisory Authority and Regional Registrar would be the same as for the International Supervisory Authority and International Registrar, although the Regional Registrar would enjoy immunity to the extent provided by local law. It was noted that this option could allow for all registrations to be searchable in the International Registry while allowing those countries that already have efficient registries that serve the financial community quite well, to continue to operate their systems with little change.

One Secretariat representative noted that in such a regime, interests registered in the Regional Registry would not be registered in the International Registry if the Supervisory Authority found that the data coming into the International Registry from the Regional Registry did not conform to the rules for a registrable interest. Thus, it was suggested that the International Supervisory Authority needed to be in the position to ensure that the filing was proper. However, another participant stated that it was not necessary for the International Supervisory Authority to ensure compliance, as the Regional Registry would be under the identical obligation to ensure the sufficiency of the data. Moreover, it was noted that in the Attachment C proposal the International Supervisory Authority has the discretion of deciding whether to access and draw the data from the Regional Registry. Thus, the International Supervisory Authority is not obligated to take any action with respect to data from a Regional Registry.

One participant also stated that an international treaty needs to be supervised by an International Supervisory Authority so as to be sure the rules are applied consistently across the world. He believed that if a Regional Registry could override the International Supervisory Authority, then that would effectively result in a regionally-focused treaty. A participant

responded by noting that, in fact, there are separate operating rail regions in the world and Attachment C reflects the existing operating environment.

Also, a Secretariat member asserted that one can not have a Regional Registry decide if it is complying with the Convention and Rail Protocol. Other participants did not believe there are any legal or practical reasons, which would prohibit a Regional Registry from independently determining whether it is complying with the Protocol as presented in Attachment C.

A participant observed that when one considered the computer screen that would likely be filed out to register an interest, he believed the only field for which there might be a significant variation was the description of the asset. Therefore, he said, there was little need to have a Regional Supervisory Authority just for that responsibility; however, another participant stated that the rules and charges to be established by a Regional Registry Authority may go way beyond only variations in equipment descriptions. Moreover, even if the rules were to be so circumscribed, Regional Supervisory Authority would be most familiar with regional practices concerning descriptions and so would still be better suited to determine the appropriate identification criteria.

With respect to the definition of “regional rail network” in the Attachment C draft, a participant questioned the use of “legal barriers or physical incompatibility” as bases for finding that a regional rail network was isolated from other networks. He noted that physical barriers were not applicable in Europe and he believed that systems could be “somewhat” compatible. As to legal barriers, he stated that these could readily change. If these were included, he asked what would happen if these barriers were removed and therefore there was no longer a self-contained system. Another participant responded by noting that, from a practical standpoint, rail operating systems are networks that require compatibility for the network to function and the “legal barriers” reflect those compatibility requirements. Thus, the identification of separate operating regions or networks is readily apparent and is covered by the definition in Attachment C. However, with respect to the issue involving how changes in the scope of a region should be addressed, it was agreed that additional provisions may be appropriate.

Option 2: Regional Registry subject to Supervisory Authority

The RWG Chairman tabled a set of amendments, found at Attachment D, that would replace the current Article XIII, change Article V and add an Article XIIIbis. These amendments would seek to provide more guidance to the International Supervisory Authority as to identification criteria, although it was noted by some participants that they provided less express recognition of regional registries than the October 2002 Drafting Group draft. The RWG Chairman described this proposal as a middle position (between Article XIII as it appears in the October 2002 draft and the Attachment C draft) that should allow a common position to be adopted by the RRTF members. Another participant noted that Attachment C already represented a middle ground position between the concept of a fully separate and independent regional registry system specifically recognized and identified in the Protocol and the concept of the global overriding jurisdiction of the International Supervisory Authority as reflected in the current Protocol drafts.

As to paragraph 4 of Revised Article V, there was a discussion as to the rights of a creditor who lends before an asset moves out of a self-contained system and a creditor who subsequently lends on that object when it has entered another system. There was no consensus as to which creditor should be given superior position; *i.e.*, should the system require the first creditor to keep continual track of the object or should it require the second creditor to trace the object back into the prior system to determine if there was a prior lender. One member noted that this was a very unlikely scenario to occur. Others expressed discomfort with imposing a legal duty on a creditor without imposing a consequence for failure to perform the duty.

Criteria to Ensure Uniqueness and the Maintenance of Uniqueness

Regarding the third item of the Terms of Reference, there was general agreement among the RRTF members with the approach of the Attachment C draft, which provides that identification criteria are unique if they identify only one asset at any given time; however, one participant did not believe that a regional registry should not be permitted to use an identification number that may have been recycled.

That participant noted that an EU group was looking at the question of identifying criteria. He noted that the EU group generally thought that each car must have a unique identifier, so that there cannot be one number for two cars; that the one identifier must always stay with that car; that the identifier must be locatable; that the identifier needs to be permanently embossed on the car; and that the system for doing all of this must be inexpensive.

Another participant noted that in North America, the identifier was not permanently embossed, and that an immutable identifier would not be workable as a practical matter because a change in ownership usually changes the identifier. Another participant noted that the cost of redesigning the system appeared significantly greater than the cost of maintaining and accommodating the existing system.

Implications of Movements of Railway Rolling Stock into and from Regional Systems

Regarding item four of the Terms of Reference, this topic was generally covered in the discussion of item two.

Consistency with the Convention and its International Registry System

Regarding item five of the Terms of Reference, there was agreement in the RRTF on the first three items on this list: that the system be asset based, electronic in nature, and cover all the forms of registration provided for in the Convention.

As to the responsibilities of the Registrar for errors and omissions and system malfunction, it was noted that indirect damages would be excluded under the current Protocol. It was agreed

that whatever rules in this area were applicable to the International Registry would also be applicable to the Regional Registry.

As to the last attribute under item five, regarding adherence to the registration provisions of the Convention, particularly Articles 19, 22 and 26 of the Convention, it was generally agreed that Articles 22 and 26 could be expanded to cover the regional registries. Article 19 was regarded as more problematic in that searchability in the International Registry could be delayed if the data coming in from the Regional Registry had to be reformatted in order to be entered into the International Registry. It was the general view of the RRTF that the cooperation mandated by the Attachment C draft would be sufficient to obviate any need for reformatting; however, one participant believed that the Regional Registry had to comply with all of the attributes set out in item five of the Terms of Reference.

Role of the Supervisory Authority and its Relation with Regional Systems

The discussion on this subject was essentially covered in the course of discussing the two basic options under item two of the Terms of Reference.

Recommendations

It was the recommendation of the RRTF that the option providing for a self-governing Regional Registry, as set out in the amendments in Attachment C, be adopted into the Protocol, replacing the current Articles XIII and XIV. There was a minority view that the set of amendments as set out in Attachment D should be adopted into the Protocol.

Peter M. Bloch
Co-Chairman
Rail Registry Task Force

April 11, 2003

ATTACHMENT A

LIST OF PARTICIPANTS

CANADA

Mr Richard Shaw
Ms Maureen Mark
Ms Cheryl Ringor
Mr Eric Harvey

UNITED STATES OF AMERICA

Mr Peter Bloch *Co-Chairman of the Rail Registry Task Force*
Mr Louis Warchot
Mr Steven Harris
Mr Ira Winthrop

RAIL WORKING GROUP

Mr Howard Rosen, Chairman

OTIF

Mr Gerfried Mutz, Deputy to the Director-General

UNIDROIT

Ms Marina Schneider, Research Officer

ATTACHMENT B

UNIDROIT/OTIF RAIL REGISTRY TASK FORCE:

TERMS OF REFERENCE

(as adopted by the UNIDROIT/OTIF Joint Committee of governmental experts at its second session held in Rome from 17 to 19 June 2002)

(cf. Attachment L of document UNIDROIT/OTIF CGERail2/Int.Int./WP 7)

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

ATTACHMENT C

Summary of the proposed amendments to the registration-related provisions of the preliminary draft Rail Protocol under Option 1: Self-Governing Regional Registry (see p. 2 above)

These proposed amendments are designed to accommodate one or more regional registries as part of an international system for electronic registration of security interests.

The proposed amendments recognize that the world contains several railway networks that, as a practical matter, are isolated from the rest of the world. For example, railway vehicles cannot move on tracks from Australia to another country because of the ocean. Similarly, railway vehicles cannot move on tracks from Mexico to Guatemala because the track gauge differs. In some parts of the world, even where the track is interconnected, legal or political barriers prevent railway vehicles from moving across political boundaries.

Under the proposed amendments, a majority of Contracting States within a regional rail network would be free to establish a regional registry, under the supervision of a Regional Supervisory Authority and operated by a Regional Registrar. These bodies would have the same powers and duties as their international counterparts. For example, each Regional Supervisory Authority would set the fees for registration and for searching the data in the regional registry and would be responsible for promulgating regulations, including a determination of the unique identification criteria, applicable to the regional registry. (Note that the proposed amendments include a proposed revision to the definition of “unique identification criteria.”)

The regional bodies would also have the same liability as their international counterparts. Thus, a Regional Registrar would be liable for any errors and omissions with respect to the reporting of the data recorded in the regional registry. However, a Regional Registrar would enjoy immunity to the extent provided by applicable local law.

A registration against property that, at the time of registration, is located within a regional rail network having a regional registry would be made with the Regional Registrar. A registration elsewhere (with another Regional Registrar or with the international Registrar) would be ineffective. Each Regional Registry would be searchable electronically, using the applicable unique identification criteria.

In addition, the International Registry would make the data in each Regional Registry available through the International Registry. (It could satisfy this obligation by obtaining a copy of the data from each Regional Registry or, what is more likely, by providing a portal into the Regional Registries.) Although each Regional Supervisory Authority and Regional Registrar would be obligated to cooperate, all costs of making the regional data available through the International Registry would be borne by the International Registry, which could charge a fee for this service. This fee would be in addition to any fee charged by the Regional Registry.

Proposed amendments

Article 1(2)

- (a) delete the definition of “autonomous registry authority”
- (b) replace with: “unique identification criteria” means any of the following namely:
 - (i) the manufacturer’s serial number or works number and the manufacturer’s model designation; or
 - (ii) any identification system that, at the time a registration is made with respect to railway vehicles, singularly identifies the railway vehicles within a regional rail network.
 - (iii) delete
- (c) delete the definition of “designated entity”
- (e) delete the definition of “local personal property register”.
- (j) replace with: “regional rail network” means a network of interconnected trackage over which railway vehicles are operated under a common system of rules and protocol including those relating to railway vehicle identification, and which is isolated from other trackage or networks of trackage by geographic or legal barriers or physical incompatibility.
- (new) “regional registry” means a registry established pursuant to Article XIV of this Protocol in which a registration of a kind described in Article 16 of the Convention may be registered.
- (new) “Regional Registrar” means the authority operating the regional registry.
- (new) “Regional Supervisory Authority” means the Supervisory Authority named to a regional rail network

Article V

3. replace with: Any change to the description referred to in the preceding paragraph shall be notified by debtor [or creditor] to the Registrar or, if applicable, the Regional 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.

(new) In the event that railway rolling stock moves into or out of a regional rail network that is subject to a regional registry, such relocation shall be notified by debtor [or creditor] to the registrar of record at the time of or before such change takes place. The debtor [or creditor] shall reregister the interest in the registry appropriate to the new location.

Article XIII

2. delete
3. delete
4. delete
5. delete

(new) The International Registry shall provide access to the regional registries designated pursuant to Article XIV.

Article XIV delete and replace with the following

Article XIV – Regional Registries

1. A majority of Contracting States in the area covered by a regional rail network may establish the regional registry for that regional rail network by delivering written notice to the Supervisory Authority. The notice must identify all the States, both Contracting and otherwise, within the region and name the Regional Supervisory Authority and Regional Registrar.
2. A registration of a kind described in Article 16 of the Convention is effective only if it is made in the regional registry for the regional rail network within which the railway vehicle is located.
3. A regional registry established pursuant to paragraph 1 shall not be subject to the jurisdiction, rules and regulations of the Supervisory Authority or the Registrar[, including, but not limited to, rules and fees established pursuant to Articles XV and XVI of this Protocol].
4. Except as otherwise provided in paragraph 1, a Regional Supervisory Authority and Regional Registrar shall have the same powers, rights and duties with respect to a regional registry as the Supervisory Authority and Registrar have with respect to the International Registry pursuant to Articles 17, 27 and 28 of the Convention and Articles XI and XV of this Protocol. However, a Regional Registrar shall enjoy immunity [from suit] to the extent provided by the applicable law of the jurisdiction in which the Regional Registrar is located.
5. [The Regional Supervisory Authority shall have the sole authority to issue regulations with respect to the regional registry, including but not limited to the setting of fees and approval of unique identification criteria.] The Regional Supervisory Authority shall issue regulations that are consistent with [Articles 19, 22 and 26 of] the Convention and this Protocol.
6. The Supervisory Authority shall make available for search at or through the International Registry all information contained in a registration made with a regional registry. The Regional Supervisory Authority and Regional Registrar shall cooperate with the International Registry in making the information available, but the

Supervisory Authority shall bear all costs and expenses of satisfying its obligation.

7. The Supervisory Authority may impose a fee upon those who, at or through the International Registry, seek access to data contained in a registration made with a regional registry. If data maintained by a regional registry are accessed through the International Registry, the Regional Supervisory Authority also may impose upon those who seek access to the information, which fee shall be collected and remitted by the Registrar to the Regional Registrar.

Article XV

5. replace with: Notwithstanding Article 28(1) of the Convention, [there shall be no liability of the Registrar for consequential loss] and in respect of any loss arising from an error or omission by a regional registry, the Regional Registrar shall assume the liability of the Registrar thereunder, except as otherwise provided in Article XIV(4).

Article XVI

1. (a) delete '[or through a transnational registry authority]'.
2. delete '[Except where it is an autonomous transnational registry authority] if filings are made through a transnational registry authority, such authority shall collect such fees and shall account to the Registrar therefor]'.

**Proposed amendments to the preliminary draft Rail Protocol
under Option 2: Regional Registry subject to Supervisory Authority**
(see p. 3 above)

Article V

Identification and description of railway rolling stock

1. Subject to paragraph 2 below, the Supervisory Authority shall prescribe in regulations such identification criteria as will enable an item of railway rolling stock to be uniquely identified, and may prescribe different criteria for different classes of railway rolling stock and the same classes of railway rolling stock in self-contained rail network area. In so doing, the Supervisory Authority shall take into account the following considerations:

- (a) the immutability of the identifier or the ability to trace any change of identifier;
- (b) the prohibition of recycling the identifier;¹
- (c) the permanence of the identifier;
- (d) the identifier must be easily locatable on the railway rolling stock;
- (e) the compatibility of the identifier with existing practice in the self contained rail network area in which the railway rolling stock is located; and
- (f) the incorporation of the identification system of railway rolling stock identified before the Protocol comes into force in a Contracting State

2. The Supervisory Authority shall by regulations² accept the identification criteria operating in self contained rail network area where they comply with the rules of a uniform and unique system of identification of railway rolling stock applicable in the relevant self contained rail network area, taking into account the consideration listed in paragraph 1 above and are sufficient to comply with the basic informational requirements of the Convention and the Protocol in operating the International Registry.

3. 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.

~~43.~~ 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 [or if applicable, the Regional Registrar]³ 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

¹ There is an open question as to whether this criterion is important.

² This could also be subject to the approval procedure as proposed by the RWG for Article XI (3).

³ to be included if Article XIV is included.

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 ⁴, such relocation shall be notified by the debtor [or the creditor] to the Registrar [or if applicable, the Regional Registrar]⁵ immediately after such change takes place, specifying the identification criteria appropriate to the new location. ⁶

54. Any refurbishment or alteration of railway rolling stock shall not affect the rights of creditors. ^{7]}

Article XIII ⁸
Access to Registry

The centralised functions of the International Registry shall be operated and administered by the Registrar on a 24-hour basis.

Article XIII bis ⁹
Local Access to Registry

1. A Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there may be transmitted to the International Registry information required for registration. Any designation, to be effective, shall be subject to written notice, given to the Supervisory Authority by the relevant Contracting State, advising it thereof, and a written undertaking, given to the Supervisory Authority from the designated entity or entities, agreeing to comply with the obligations of a designated entity as set out herein. A Contracting State may revoke or vary such designation by giving written notice to the Supervisory Authority, such revocation or variation, as appropriate, to be effective [six] months after the date of such notice unless otherwise agreed with the Supervisory Authority. ¹⁰

⁴ See footnote 2.

⁵ to be included if Article XIV is included as amended.

⁶ 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.

⁷ If this paragraph is necessary, it should be placed in a specific Article.

⁸ It is only paragraph 1 of the current Article XIII.

⁹ It is an open question as to whether this is required if the registration is only effective when the registration reaches the International Registry.

¹⁰ This text, based on Article XIX of the Aviation Protocol, replaced the original text which, slightly modified, would read as follows:

“2. All Contracting States in the area covered by a self contained rail network area, ¹⁰ provided that they act jointly, may designate one or more (acting jointly) local personal property registers as a designated entity for the entire relevant self contained rail network area 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 a written undertaking, given to the Supervisory Authority from the designated entity, agreeing to comply with the obligations of a designated entity as set out herein. The registration facilities provided by a designated entity shall be operated and administered during working hours in its territory. Such designation may be revoked by not less than half of the States in the area covered by the relevant self contained rail network area and shall be notified to the Supervisory Authority no later than 30 days prior to the effective date of revocation.

2. The entity designated under paragraph 1 above shall 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 designated entity shall provide equal access and full co-ordination between the respective facilities but, subject to paragraph 2 of Article V, 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.¹¹

3. In the event that Article XIV applies in respect of a self contained rail network area, this Article XIII bis shall not apply to Contracting States covered thereby.¹²

3. Any designated entity designated pursuant to the preceding paragraph shall
(a) determine if it should be the exclusive access (for the purposes of registration of an international interest) to the International Registry in relation to the self contained rail network area covered by it.”

¹¹ This paragraph is largely taken from the current Article XIII (3)(b).

¹² This will only be required if Article XIV or similar provision is adopted as part of the Protocol.