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INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

**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**

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

(Articles V, XIII, XVII and XVIII, amended by a Sub-Committee of the Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome on 23rd February 2005, on the basis of the discussions of the Rail Registry Task Force which held its fourth meeting in Rome from 22nd to 24th February 2005)

INTRODUCTORY REMARKS

by the UNIDROIT Secretariat

1. A Sub-Committee of 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 session at the Headquarters of UNIDROIT in Rome on 23rd February 2005. The session was opened at 2.50 p.m. on the 23rd. In the absence of Prof. Karl Kreuzer, Chairman of the Drafting Committee, Sir Roy Goode chaired the Sub-Committee of the Drafting Committee.
2. The session was also attended by the following representatives:

Mr G. Mutz	Deputy to the Director-General of OTIF
Mr H. Rosen	Co-ordinator of the Rail Working Group
Ms I. Wolff	Germany

Mr H. Kjellin	Sweden
Mr L. Noël	Switzerland
Mr V. Rusca	Switzerland
Mr K. Houlton	United Kingdom
Mr L. Emery	United States of America
Mr S. Harris	United States of America
Mr B. von Bodungen	Member of the Rail Working Group
Mr H. Guenassia	European Investment Bank

3. The business of the Sub-Committee 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 relating to registration on the basis of the discussions and decisions of the Rail Registry Task Force at its fourth session (Rome, 22 – 24 February 2005). This was done on the basis of the mandate given to the Rail Registry Task Force at the third session of the Joint UNIDROIT/OTIF Committee of governmental experts held in Berne from 5 to 13 May 2003.

4. On the basis of the decisions taken by the Rail Registry Task Force, the following amendments have been made by the Sub-Committee of the Drafting Committee and agreed by the Rail Registry Task Force:

- (a) Adding a new introductory paragraph to Article V to specify the identification requirements for railway rolling stock for the purposes of Article 7 of the Convention;
- (b) Adding a new sentence at the beginning of Article V(2);
- (c) Amending Article V(2) (to be renumbered as Article V(3)) to include a factor to connect the Contracting State making the declaration with the item of railway rolling stock;
- (d) Amending Article V(6) (to be renumbered as Article V(7)) to clarify that failure to comply with the requirements of that article would not invalidate a registration;
- (e) Amending Article XIII(1) to replace “council of representatives, one representative” with “a body consisting of representatives”;
- (f) Inserting new Article XIII(3) to provide for privileges and immunities of the Secretariat;
- (g) Amending Article XVII(4) to provide that the amount of insurance or financial guarantee shall be not less than the amount determined by the Supervisory Authority to be appropriate, although the factors for the Supervisory Authority to take into account are yet to be determined;
- (h) Amending Article XVIII(1) to reflect the requirement of the Convention that fees be set by the Supervisory Authority, and that fees might be required to be paid in connection with other services provided by the Registry;
- (i) Amending Article XVIII(2) to add “reasonable” before “costs establishing and implementing” and to refer to the “reasonable costs of the Supervisory Authority’s Secretariat”;
- (j) Deleting Article XVIII(3), in light of the amendment to Article XVIII(1); and
- (k) Inserting footnotes to indicate issues that will require further consideration.

5. The text of the revised draft articles V, XIII, XVII and XVIII is set out in a marked up version (as against document OTIF/JGR/12 UNIDROIT 2003 – Study LXXIIH – Doc. 14, June 2003) in APPENDIX I (pp. 3 – 6) *infra* and in a clean version in APPENDIX II (pp. 7 – 10) *infra*.

APPENDIX I

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

(Articles V, XIII, XVII and XVIII, amended by a Sub-Committee of the Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome on 23rd February 2005, on the basis the discussions of the Rail Registry Working Group which held its fourth meeting in Rome from 22 to 24 February 2005)

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 V

Identification of railway rolling stock

1. For the purposes of Article 7 of the Convention, a description of an item of railway rolling stock is sufficient if: (a) it contains its manufacturer's name, its serial number and its model designation; or (b) it conforms to the method prescribed by the ensuing paragraphs.

2. For the purposes of Chapter V of the Convention, the Supervisory Authority shall, in regulations, prescribe a system for the allocation of identification numbers by the Registrar to enable the unique identification of items of railway rolling stock. The identification number shall either be affixed to the item of railway rolling stock or be associated in the International Registry with a national or regional identification number so affixed.

~~23.~~ ~~A Contracting State may by a declaration state the system of national or regional identification numbers it will use for the purpose of the preceding paragraph. For the purposes of the preceding paragraph, a Contracting State may by declaration state the system of national or regional identification numbers that shall be used [with respect to items of railway rolling stock subject to an international interest created by a debtor situated in that Contracting State at the time of the conclusion of the agreement creating or providing for the international interest].~~^{*} Such a national or regional identification system shall ensure the unique identification of items of railway rolling stock and compliance with the basic informational requirements of the Convention and this Protocol for the operation of the International Registry.

~~34.~~ A declaration by a Contracting State according to the preceding paragraph shall be made at the time of ratification, acceptance, approval of, or accession to this Protocol and shall include detailed information on the operation of the national or regional identification system.

~~45.~~ The Supervisory Authority shall review the national or regional identification system set out in a declaration by a Contracting State pursuant to paragraph ~~2~~3 and may give advice on the measures to be taken to ensure that the system complies with the conditions set out in paragraph ~~2~~3.

~~56.~~ Every registration in respect of a specific item of railway rolling stock shall be made against the identification number allocated by the Registrar pursuant to paragraph ~~4~~2.

~~67.~~ A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph ~~2~~3 has been made, shall specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol and the time during which each number has applied to the item. The debtor shall, and the creditor may, provide the International Registry with any new national or regional identification number allocated during the currency of the registration of the relevant interest. Any identification number so specified or provided shall be registered in the International Registry by the Registrar.² Failure to comply with any of the above requirements shall not invalidate the registration.

[...]

CHAPTER II DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

[...]

^{*} It will be necessary to consider: (a) whether such declarations should be limited to interests created by a debtor; and (b) the application of this provision to circumstances where the debtor is situated in different States.

² This paragraph imposes two duties. It is for consideration whether this paragraph also should specify the consequence of the failure to comply with one or both of the duties.

CHAPTER III RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XIII

The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be a body consisting council of representatives, ⁶—one representative to be appointed by each State Party.⁷

2. The Intergovernmental Organisation for International Carriage by Rail shall be the Secretariat of the Supervisory Authority and shall assist the Supervisory Authority in the performance of its functions.⁸

3. The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3) of the Convention and to the International Registry under Article 27(4) of the Convention.^{*}

34. A decision of the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be made if such State Party or the majority of the group of States Parties also votes in favour of the decision. A decision that could adversely affect the interests of a State Party or a group of States Parties shall have effect in such State Party or group of States Parties if such State Party or the majority of the group of States Parties also votes in favour of the decision.⁹

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

[...]

⁶ Issues of immunity, capacity and domicile of the council as a subject of international law will have to be addressed. Likewise, authority for internal rules of procedures may have to be provided for in the Protocol.

⁷ To make sure that the Supervisory Authority is ready to operate when the Protocol comes into effect, appropriate resolutions should be adopted. The role of signatory States during the transition period (preparatory commission) must be envisaged.

⁸ The Protocol could state that the General Assembly of OTIF must approve that OTIF becomes the Secretariat of the Supervisory Authority. To the extent that OTIF will be acting as the Secretariat, issues of immunity, capacity and domicile will have to be addressed. The financing of the activities of OTIF for the purpose of the Protocol should be provided for under the Protocol.

[‡] It is for consideration whether the Supervisory Authority should have the power to waive the exemptions and immunities of the Secretariat.

⁹ There was unanimous agreement within the Joint Committee of governmental experts that the full content of this paragraph would be maintained. In that context, it was also noted that the drafting might be simplified and that technical non-substantive amendments might be required.

^{**} This period shall be aligned with Article XVIII(2).

Article XVII
Additional modifications to Registry provisions

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by regulations of the Supervisory Authority.
2. 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.
3. 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 after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
4. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to [...]; ~~in respect of each event, not be less than the maximum value of [an item of]¹⁴ railway rolling stock as determined by the Supervisory Authority.~~
5. 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.

Article XVIII
International Registry fees

1. ~~By way of modification of Article 17(2)(h) of the Convention, the Registrar shall, subject to the approval of the~~ The Supervisory Authority shall, set and may from time to time amend the fees to be paid in connection with registrations, filings, ~~and searches~~ and other services the International Registry may provide, in accordance with its regulations.
2. The fees referred to in the preceding paragraph shall be determined so as to recover the reasonable costs of establishing and implementing (amortised over [10]^{*} years), and operating the International Registry as well as the reasonable costs of the Supervisory Authority's ~~and its~~ Secretariat 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.¹⁵
3. ~~The fees referred to in paragraph 1 may be amended by the Registrar taking into account changed economic conditions provided that any increase of the fees by more than [10] per cent shall require the approval of the Supervisory Authority.~~

¹⁴ ~~Further consideration is still needed on this point.~~

² This period shall be aligned with Article XIII(5).

¹⁵ 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.

APPENDIX II

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

(Articles V, XIII, XVII and XVIII, amended by a Sub-Committee of the Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Rome on 23rd February 2005, on the basis the discussions of the Rail Registry Working Group which held its fourth meeting in Rome from 22 to 24 February 2005)

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CHAPTER I GENERAL PROVISIONS

[...]

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1. For the purposes of Article 7 of the Convention, a description of an item of railway rolling stock is sufficient if: (a) it contains its manufacturer's name, its serial number and its model designation; or (b) it conforms to the method prescribed by the ensuing paragraphs.

2. For the purposes of Chapter V of the Convention, the Supervisory Authority shall, in regulations, prescribe a system for the allocation of identification numbers by the Registrar to enable the unique identification of items of railway rolling stock. The identification number shall either be affixed to the item of railway rolling stock or be associated in the International Registry with a national or regional identification number so affixed.

3. For the purposes of the preceding paragraph, a Contracting State may by declaration state the system of national or regional identification numbers that shall be used [with respect to items of railway rolling stock subject to an international interest created by a debtor situated in that Contracting State at the time of the conclusion of the agreement creating or providing for the international interest]. * Such a national or regional identification system shall ensure the unique identification of items of railway rolling stock and compliance with the basic informational requirements of the Convention and this Protocol for the operation of the International Registry.

4. A declaration by a Contracting State according to the preceding paragraph shall be made at the time of ratification, acceptance, approval of, or accession to this Protocol and shall include detailed information on the operation of the national or regional identification system.

5. The Supervisory Authority shall review the national or regional identification system set out in a declaration by a Contracting State pursuant to paragraph 3 and may give advice on the measures to be taken to ensure that the system complies with the conditions set out in paragraph 3.

6. Every registration in respect of a specific item of railway rolling stock shall be made against the identification number allocated by the Registrar pursuant to paragraph 2.

7. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 3 has been made, shall specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol and the time during which each number has applied to the item. The debtor shall, and the creditor may, provide the International Registry with any new national or regional identification number allocated during the currency of the registration of the relevant interest. Any identification number so specified or provided shall be registered in the International Registry by the Registrar. ² Failure to comply with any of the above requirements shall not invalidate the registration.

[...]

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

[...]

* It will be necessary to consider: (a) whether such declarations should be limited to interests created by a debtor; and (b) the application of this provision to circumstances where the debtor is situated in different States.

² This paragraph imposes two duties. It is for consideration whether this paragraph also should specify the consequence of the failure to comply with one or both of the duties.

CHAPTER III RAILWAY ROLLING STOCK REGISTRY PROVISIONS

Article XIII

The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be a body consisting of representatives, one representative to be appointed by each State Party.⁷
2. The Intergovernmental Organisation for International Carriage by Rail shall be the Secretariat of the Supervisory Authority and shall assist the Supervisory Authority in the performance of its functions.⁸
3. The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3) of the Convention and to the International Registry under Article 27(4) of the Convention.^{*}
4. A decision of the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be made if such State Party or the majority of the group of States Parties also votes in favour of the decision. A decision that could adversely affect the interests of a State Party or a group of States Parties shall have effect in such State Party or group of States Parties if such State Party or the majority of the group of States Parties also votes in favour of the decision.⁹
5. The first Registrar shall be appointed for a period not exceeding [10]^{**} years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding [10]^{**} years.

[...]

⁷ To make sure that the Supervisory Authority is ready to operate when the Protocol comes into effect, appropriate resolutions should be adopted. The role of signatory States during the transition period (preparatory commission) must be envisaged.

⁸ The Protocol could state that the General Assembly of OTIF must approve that OTIF becomes the Secretariat of the Supervisory Authority. To the extent that OTIF will be acting as the Secretariat, issues of immunity, capacity and domicile will have to be addressed. The financing of the activities of OTIF for the purpose of the Protocol should be provided for under the Protocol.

^{*} It is for consideration whether the Supervisory Authority should have the power to waive the exemptions and immunities of the Secretariat.

⁹ There was unanimous agreement within the Joint Committee of governmental experts that the full content of this paragraph would be maintained. In that context, it was also noted that the drafting might be simplified and that technical non-substantive amendments might be required.

^{**} This period shall be aligned with Article XVIII(2).

Article XVII
Additional modifications to Registry provisions

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by regulations of the Supervisory Authority.
2. 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.
3. 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 after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
4. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to [...].
5. 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.

Article XVIII
International Registry fees

1. The Supervisory Authority shall set and may from time to time amend the fees to be paid in connection with registrations, filings, searches and other services the International Registry may provide, in accordance with its regulations.
2. The fees referred to in the preceding paragraph shall be determined so as to recover the reasonable costs of establishing and implementing (amortised over [10] * years), and operating the International Registry as well as the reasonable costs of the Supervisory Authority's Secretariat 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.¹⁵

[...]

* This period shall be aligned with Article XIII(5).

¹⁵ 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.

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