

OTIF



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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 adopted by the Committee of governmental experts at its third session
held in Berne from 5 to 13 May 2003)

INTRODUCTORY REMARKS

(by the OTIF and UNIDROIT Secretariats)

1. – At the last meeting of the third session of the Joint OTIF/UNIDROIT 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 which took place in Berne from 5 to 13 May 2003, the text of the preliminary draft Rail Protocol, as established by the Drafting Committee on the basis of the decisions taken by the Joint Committee, was made available to the participants.

2. – The text of the preliminary draft Rail Protocol is set out in a marked up version (as against document OTIF/JGR/6 UNIDROIT 2002 Study LXXIIIH – Doc. 8, November 2002) in APPENDIX I (pp. 1 to 29) *infra* and in a clean version in APPENDIX II (pp. 31 to 52) *infra*. The Secretariats stress the fact that, in the clean version, the articles have been renumbered and a table of correspondence is set out in APPENDIX III (pp. 53-54) *infra*.

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

(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Berne on 7th, 9th and 12th May 2003 ~~Rome from 23 to 25 October 2002~~, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its ~~third~~ ~~second~~ session held in Berne from 5 to 13 May 2003 ~~Rome from 17 to 19 June 2002~~)

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SPECIFIC TO RAILWAY ROLLING STOCK**

(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Berne on 7th, 9th and 12th May 2003, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its third session held in Berne from 5 to 13 May 2003)

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).~~

~~(e) [“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

(a) “guarantee contract” means a contract entered into by a person as guarantor;

(b) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

~~(c & 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

~~(d & 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;

~~(e & 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 such services traction therefor;]~~⁶

~~(f & 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

~~(g & 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;~~;~~

⁴ See footnote 2.

⁵ See footnote 2.

⁶ 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).

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.

(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.
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 VII(2)~~.

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."⁴⁰]~~

A person may, in relation to railway rolling stock, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention, in an agency, trust or representative capacity on behalf of a creditor or creditors.

~~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.⁴⁴~~

⁸ See footnote 2.

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

⁴⁰ The Drafting Committee considered that this Article should be moved to Chapter III.

⁴⁴ See also footnote 3.

~~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(e) 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 area⁴², 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.⁴³~~

~~4. Any refurbishment or alteration of railway rolling stock shall not affect the rights of creditors.⁴⁴~~

1. 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.

2. 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. 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.

3. 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.

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

5. 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 1.

⁴² See footnote 2.

⁴³ 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.

⁴⁴ If this paragraph is necessary, it should be placed in a specific Article.

6. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 2 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.¹⁵

Article VI
Choice of law

[1. This Article applies only where a Contracting State has made a declaration pursuant to Article ~~[XXIIIbis xyz]~~¹⁶.]

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.]~~

¹⁵ 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.

¹⁶ This paragraph has been taken from Article VIII(1) of the Aircraft Protocol. Article xyz has not yet been drafted.

1. Any court order under Articles 8(1)(a) and (2), 10 and 13(1)(b) of the Convention authorising the creditor to take possession, custody or control of the object may specify the reasonable measures to be taken by the debtor to make it possible for the creditor to exercise its rights in accordance with the order.¹⁷

~~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.~~¹⁸

2.3. 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.

3.4. 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 ~~for a guarantor~~ from agreeing to a longer period of prior notice.⁴⁹

Article VIII

Modification of provisions regarding relief pending final determination

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXIIIbis and to the extent stated in such declaration.

2.1. 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.]~~

3. For the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within such number of 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.

¹⁷ It is for consideration whether, for reasons of connection as to the content, the reference to Article 13(1)(b) of the Convention and to custody should be transferred from this provision to a new Article VIII(1).

¹⁸ The deletion of this paragraph is the consequence of a change in paragraph 1 (no remedy left), and the fact that the remedies provided for in Articles 8(1)(a) and (2), 10 and 13(1)(b) of the Convention do not require the consent of the creditor.

⁴⁹ Wording taken from Article IX(4) of the Aircraft Protocol with adjustments by the Drafting Committee.

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]^{20, 24}.~~

Article IX²² *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 ~~XXIIIbis xyz~~²³.

Alternative A²⁴

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph ~~6~~⁷, give possession of the railway rolling stock to the creditor no later than the earlier of:

²⁰ ~~Article xyz has not yet been drafted and it may empower a Contracting State to specify different time periods where appropriate.~~

²⁴ ~~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.~~

²² ~~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. If the State having the primary insolvency jurisdiction has opted for one Alternative, at present it is not quite clear what legal consequences this will have for its rolling stock which is located in another Contracting State which did not opt for the same Alternative. The question of continuity and possible duties to co-operate should also be considered.~~

²³ ~~Article xyz has not yet been drafted.~~

²⁴ ~~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.~~

(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.]²⁵~~

~~4.5.~~ 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.

~~5.6.~~ 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.

~~6.7.~~ 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 and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

~~7.8.~~ No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

~~8.9.~~ No obligations of the debtor under the agreement may be modified without the consent of the creditor.

~~9.10.~~ 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.

~~10.11.~~ 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.

~~11.12.~~ The Convention as modified by Articles VII and XXIIbis of this Protocol shall apply to the exercise of any remedies under this Article.

²⁵

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

*Alternative B*²⁶

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 ~~XXIII~~²⁷ ~~xyz~~ 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.

*Alternative C*²⁸

2. Upon the occurrence of an insolvency-related event, ~~the debtor or~~ the insolvency administrator or the debtor, as applicable ~~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.

²⁶ ~~This Alternative is taken from Article XI of the Aircraft Protocol (Alternative B).~~

²⁷ ~~Article xyz has not yet been drafted.~~

²⁸ ~~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).~~

3. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, 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 or the debtor, as applicable, 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.~~ If the application is not granted within such number of 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, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

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 and related transaction documents. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraphs 3 and 4, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

9. Subject to paragraphs 3 and 4, 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] days²⁹ commencing with the date of the insolvency related event.³⁰~~

Article X
Insolvency assistance

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXIIIbis.

2. 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, so far as applicable.

Article Xbis
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”.

Article Xter
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.

²⁹ The Official Commentary should stress that the fixed period cannot be modified by the applicable law.

³⁰ The Drafting Committee decided not to move this definition to Article I because the definition is only used in this Article. The Drafting Committee deleted the second sentence in order to bring this paragraph in line with paragraph 3 of Alternative A.

~~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.]³⁴~~

2.4. 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 a council of representatives³², one representative to be appointed by each State Party³³ [the Intergovernmental Organisation for International Carriage by Rail].

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.³⁴

³⁴ ~~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.~~

³² 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.

³³ 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.

³⁴ 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.

3. 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.³⁵

~~[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.]~~³⁶

~~[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.]~~³⁷

*Alternative A*³⁸

~~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]³⁹ years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding [10]⁴⁰ years.

³⁵ 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.

³⁶ ~~To be decided by the Diplomatic Conference.~~

³⁷ ~~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.~~

³⁸ ~~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.~~

³⁹ ~~The Drafting Committee considers that the length of the period should be reconsidered by the Joint Committee of governmental experts at its next session.~~

⁴⁰ ~~See the preceding footnote.~~

*Article XII*⁴⁴
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.

*Article XIII*⁴²
Access to Registry

~~1.~~ The centralised functions of the International Registry shall be operated and administered by the Registrar on a 24-hour basis.⁴³

~~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~~

⁴⁴ ~~To be considered by the Joint Committee of governmental experts at its next session.~~

⁴² ~~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) (e) and (j)).~~

⁴³ ~~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.”).~~

~~(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.~~⁴⁴

~~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.~~⁴⁵

~~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].~~⁴⁶

Article XIIIbis
Designated entry points

A Contracting State may at any time designate an entity or entities ⁴⁷ as the entry point or entry points through which there may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. ⁴⁸ Such designation may permit but shall not compel the use of such designated entry point. ⁴⁹ The various entry points shall be operated at least during working hours in their respective territories. ⁵⁰

⁴⁴ 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.

⁴⁵ See footnote 2 and revised definitions (Article I(2) (c) and (j)).

⁴⁶ 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.

⁴⁷ Compared with Article XIX of the Aircraft Protocol, the words “in its territory” are deleted.

⁴⁸ Except where stated in the preceding footnote, this follows verbatim Article XIX of the Aircraft Protocol.

⁴⁹ This follows the wording of Article XIX(2) of the Aircraft Protocol without the restriction to engines.

⁵⁰ The Drafting Committee considered necessary to add a provision following the second sentence of Article XX(4) of the Aircraft Protocol.

~~[Article XIV⁵⁴
Autonomous Transnational Registries⁵²~~

~~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.]]~~

⁵⁴ ~~Not yet considered by the Joint Committee of governmental experts because referred to the Rail Registry Task Force.~~

⁵² ~~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.~~

1.2. 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.

2.3. 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.

3.4. 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 ⁶³ 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] ⁶⁴ 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. ⁶⁵~~

4.6. 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 ⁵⁶ railway rolling stock as determined by the Supervisory Authority.

5.7. 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.

⁶³ ~~The Drafting Committee kept "10 calendar days" instead of "without undue delay" in order to be consistent with paragraph 3 of this Article.~~

⁶⁴ ~~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.~~

⁶⁵ ~~See footnote 2 and revised definition in Article I(2)(c).~~

⁵⁶ Further consideration is still needed on this point.

*Article XVI*⁵⁷
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 Supervisory Authority, set and may from time to time amend the fees to be paid in connection with registrations, filings and searches. :

- (a) ~~the fees to be paid on filing of an international interest with the International Registry directly [or through a transnational registry authority⁵⁸];~~
- (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 fees 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), and operating ~~[and regulating]~~ the International Registry as well as the reasonable costs of the Supervisory Authority 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.⁵⁹ ~~[Except where it is an autonomous transnational registry authority⁶⁰] if filings are made through a transnational registry authority⁶⁴, such authority shall collect such fees and shall account to the Registrar therefor.⁶²~~

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.~~

⁵⁷ ~~To be considered by the Joint Committee of governmental experts at a future session.~~

⁵⁸ ~~See revised definition in Article I(2)(c).~~

⁵⁹ If the duties are outsourced, it is unrealistic to stipulate that the service is provided without profit. The charges will however be monitored by the Supervisory Authority and we leave it open for Contracting States to decide as a policy issue as to whether the Registrar should be permitted to offer its services at a profit. If the Registrar is a government agency, it is assumed that it will not be operating for profit.

⁶⁰ ~~See revised definition in Article I(2)(a).~~

⁶⁴ ~~See revised definition in Article I(2)(c).~~

⁶² ~~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 and this Protocol shall, for Contracting States which are parties to them ~~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 UNIDROIT Convention on International Financial Leasing 1988; [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; and]

[~~(i) as well as the~~ 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 that convention [or regulation] is in force among them and that the terms of that convention's [or regulation's] ~~terms~~ are inconsistent with the provisions of the Convention or of this Protocol.⁶³

CHAPTER VI

~~[OTHER]~~ FINAL PROVISIONS

Article XIX⁶⁴

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.

⁶³ ~~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.

⁶⁴ ~~Wording taken from Article XXVI of the Aircraft Protocol.~~

*Article XX*⁶⁵

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

*Article XXI*⁶⁶

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*⁶⁷

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.

⁶⁵ ~~Wording taken from Article 48 of the Convention and Article XXVII of the Aircraft Protocol.~~

⁶⁶ ~~Wording taken from Article XXVIII of the Aircraft Protocol.~~

⁶⁷ ~~Wording taken from Article XXIX of the Aircraft Protocol.~~

2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.

3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this 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 which and to what extent the following sub-paragraphs shall apply to such Contracting State:

(a) ~~that~~ the remedies provided in [Chapter III of the Convention and Articles VII to X-IX of this Protocol] ⁶⁸ 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;

(b) the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to railway rolling stock as far as it is used for the purpose of providing a service of public importance as specified in its declaration or determined by a competent authority of that State notified to the Depositary;

⁶⁸ 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.

(c) the Contracting State making a declaration under either of the preceding subparagraphs shall take into consideration the protection of the interests of the creditor.

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.~~

In relation to railway rolling stock Article 60 of the Convention shall be modified as follows:

(a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;

(b) replace paragraph 3 with the following:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

Article XXIIIbis
Declarations relating to certain provisions

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI and X of this Protocol.

2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article VIII of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article VIII(3).

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of one of Alternatives A, B and C of Article IX and, if it so declares, it shall specify the type of insolvency proceeding, if any, to which it will apply such Alternative. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article IX under paragraph 3 of Alternative A, paragraph 2 of Alternative B or paragraphs 4 and 13 of Alternative C, as applicable.

4. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.

*Article XXIV*⁶⁹

Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XXII, XXIIbis, XXIIIbis, XXV and 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 Depository.

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, 55, 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.⁷⁰

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.⁷¹

⁶⁹ ~~Wording taken from Article XXXII of the Aircraft Protocol.~~

⁷⁰ 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.

⁷¹ 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.~~

*Article XXVI*⁷²
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.
- [4. Declarations made pursuant to Articles 39 and 40 of the Convention shall be subject to this Article.]⁷³

*Article XXVII*⁷⁴
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*⁷⁵
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.

⁷² ~~Wording, except paragraph 4, taken from Article XXXIII of the Aircraft Protocol.~~
⁷³ ~~Needed?~~

⁷⁴ ~~Wording taken from Article XXXIV of the Aircraft Protocol.~~

⁷⁵ ~~Wording taken from Article XXXV of the Aircraft Protocol.~~

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 XXIX⁷⁶
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.

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.

⁷⁶ ~~Wording taken from Article XXXVI of the Aircraft Protocol.~~

Article XXX^{zz}
Depositary and its functions

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.
2. The Depositary shall:
 - (a) inform all Contracting States of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) the date of entry into force of this Protocol;
 - (iii) each declaration made in accordance with this Protocol, together with the date thereof;
 - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
 - (v) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;
 - (b) transmit certified true copies of this Protocol to all Contracting States;
 - (c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and
 - (d) perform such other functions customary for depositaries.

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

^{zz} ~~Wording taken from Article XXXVII of the Aircraft 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 Berne on 7th, 9th and 12th May 2003, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its third session held in Berne from 5 to 13 May 2003)

PREAMBLE

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

(as established by a Drafting Committee of the Joint UNIDROIT/OTIF Committee of governmental experts which met in Berne on 7th, 9th and 12th May 2003, on the basis of the preliminary draft submitted to the Joint Committee of governmental experts at its third session held in Berne from 5 to 13 May 2003)

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) “guarantee contract” means a contract entered into by a person as guarantor;
 - (b) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

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.

(c) “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;

(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;

(e) “public service rolling stock” means railway rolling stock habitually used for transporting the public on scheduled services, together with locomotives and ancillary railway rolling stock habitually used to provide such services;

(f) “railway vehicle” means a vehicle moveable 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;

(g) “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.

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 Article VII(2).

Article IV
Representative capacities

A person may, in relation to railway rolling stock, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention, in an agency, trust or representative capacity on behalf of a creditor or creditors.

Article V
Identification of railway rolling stock

1. 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.
2. 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. 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.
3. 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.
4. The Supervisory Authority shall review the national or regional identification system set out in a declaration by a Contracting State pursuant to paragraph 2 and may give advice on the measures to be taken to ensure that the system complies with the conditions set out in paragraph 2.
5. 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 1.
6. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 2 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

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.

Article VI
Choice of law

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVII.
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. Any court order under Articles 8(1)(a) and (2), 10 and 13(1)(b) of the Convention authorising the creditor to take possession, custody or control of the object may specify the reasonable measures to be taken by the debtor to make it possible for the creditor to exercise its rights in accordance with the order. ³
2. 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.
3. 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.

³ It is for consideration whether, for reasons of connection as to the content, the reference to Article 13(1)(b) of the Convention and to custody should be transferred from this provision to a new Article VIII(1).

Article VIII
Modification of provisions regarding relief pending final determination

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII and to the extent stated in such declaration.
2. Relief under Article 13(1) of the Convention shall not be dependent upon the agreement of the debtor.
3. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of 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.
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. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.
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 XXII(1) of this Protocol applies, being an instrument which in either case is binding on the Contracting State.

Article IX ⁴
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 XXVII.

4

If the State having the primary insolvency jurisdiction has opted for one Alternative, at present it is not quite clear what legal consequences this will have for its rolling stock which is located in another Contracting State which did not opt for the same Alternative. The question of continuity and possible duties to co-operate should also be considered.

Alternative A

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 6, 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. 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 the railway rolling stock and maintain it and its value.

6. 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 and related transaction documents. A second waiting 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 or this Protocol may be prevented or delayed after the date specified in paragraph 2.

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

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 insolvency proceedings over registered interests.

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

Alternative B

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 XXVII 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.

Alternative C

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, 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, as applicable, 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 or the debtor, as applicable, 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 the application is not granted within such number of 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, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

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 and related transaction documents. A second cure period shall not apply in respect of a default in the performance of such future obligations.

8. Subject to paragraphs 3 and 4, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

9. Subject to paragraphs 3 and 4, 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 XXV 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. ⁵

⁵ The Drafting Committee decided not to move this definition to Article I because the definition is only used in this Article. The Drafting Committee deleted the second sentence in order to bring this paragraph in line with paragraph 3 of Alternative A.

Article X
Insolvency assistance

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII.
2. 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, so far as applicable.

Article XI
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”.

Article XII
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. 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 XIII

The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be a 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. 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
4. 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.

Article XIV

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.

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.

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.

*Article XV
Access to Registry*

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

*Article XVI
Designated entry points*

A Contracting State may at any time designate an entity or entities ¹⁰ as the entry point or entry points through which there may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. ¹¹ Such designation may permit but shall not compel the use of such designated entry point. ¹² The various entry points shall be operated at least during working hours in their respective territories. ¹³

*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, 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.

¹⁰ Compared with Article XIX of the Aircraft Protocol, the words "in its territory" are deleted.

¹¹ Except where stated in the preceding footnote, this follows verbatim Article XIX of the Aircraft Protocol.

¹² This follows the wording of Article XIX(2) of the Aircraft Protocol without the restriction to engines.

¹³ The Drafting Committee considered necessary to add a provision following the second sentence of Article XX(4) of the Aircraft Protocol.

¹⁴ Further consideration is still needed on this point.

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 Supervisory Authority, set and may from time to time amend the fees to be paid in connection with registrations, filings and searches.

2. The fees referred to in the preceding paragraph shall be determined so as to recover the costs of establishing and implementing (amortised over 10 years), and operating the International Registry as well as the reasonable costs of the Supervisory Authority 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.

CHAPTER IV
JURISDICTION

Article XIX
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.

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.

CHAPTER V RELATIONSHIP WITH OTHER CONVENTIONS

Article XX Relationship with other Conventions

The Convention and this Protocol shall, for Contracting States which are parties to them, 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 Convention on International Factoring 1988;
- (g) the UNIDROIT Convention on International Financial Leasing 1988;
- [(h) the Hague Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 2002; and]
- [(i) the 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 that convention [or regulation] is in force among them and that the terms of that convention [or regulation] are inconsistent with the provisions of the Convention or of this Protocol. ¹⁶

¹⁶ 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.

CHAPTER VI FINAL PROVISIONS

Article XXI

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 XXIII.
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 XXII

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

Article XXIII
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 XXIV
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 Depository and shall state expressly the territorial units to which this Protocol applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.
4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.
5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:
 - (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this 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.

Article XXV
Public service rolling stock

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare which and to what extent the following sub-paragraphs shall apply to such Contracting State:

(a) the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to the public service rolling stock specified in its declaration or determined by a competent authority of that State notified to the Depositary;

(b) the remedies provided in [Chapter III of the Convention and Articles VII to X of this Protocol] shall not be exercisable within its territory in relation to railway rolling stock as far as it is used for the purpose of providing a service of public importance as specified in its declaration or determined by a competent authority of that State notified to the Depositary;

(c) the Contracting State making a declaration under either of the preceding sub-paragraphs shall take into consideration the protection of the interests of the creditor.

Article XXVI
Transitional Provisions

In relation to railway rolling stock Article 60 of the Convention shall be modified as follows:

(a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;

(b) replace paragraph 3 with the following:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

Article XXVII
Declarations relating to certain provisions

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI and X of this Protocol.

2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article VIII of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article VIII(3).

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of one of Alternatives A, B and C of Article IX and, if it so declares, it shall specify the type of insolvency proceeding, if any, to which it will apply such Alternative. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article IX under paragraph 3 of Alternative A, paragraph 2 of Alternative B or paragraphs 4 and 13 of Alternative C, as applicable.

4. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.

Article XXVIII
Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XXIV, XXV, XXVII, XXIX and XXX may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

Article XXIX
Declarations modifying the Convention or certain provisions thereof

1. Declarations made under the Convention, including those made under Articles 39, 40, 50, 52, 53, 54, 55, 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.¹⁷

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.¹⁸

¹⁷ 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.

¹⁸ 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

Article XXX
Subsequent declarations

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXIX 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.
- [4. Declarations made pursuant to Articles 39 and 40 of the Convention shall be subject to this Article.]

Article XXXI
Withdrawal of declarations

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXIX 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 XXXII
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.

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).

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 XXXIII

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.

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 XXIII relating to its entry into force.

Article XXXIV

Depositary and its functions

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

2. The Depositary shall:

(a) inform all Contracting States of:

- (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
- (ii) the date of entry into force of this Protocol;
- (iii) each declaration made in accordance with this Protocol, together with the date thereof;
- (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
- (v) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;

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

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

(d) perform such other functions customary for depositaries.

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

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