

The Luxembourg Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock-Overview and Current Status

Howard Rosen* and Benjamin von Bodungen**

Abstract

This article first gives an account of the current status in relation to the approaching entry into force of the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (hereinafter: “the Rail Protocol”) and the establishment of the concomitant International Registry. It then focuses on core legal issues in relation to the Rail Protocol which Contracting States need to be aware of as they move towards ratification. Reference is also made to the recommendations of the Rail Working Group on which declarations should be made (or omitted) by Contracting States. Finally, the article addresses a potential conflict of the Rail Protocol with future equipment-specific Protocols supplementing the already existing Protocols for Aircraft Equipment and Space Assets that has surfaced in the initial stages of preparing a draft of a potential Protocol in relation to Agricultural, Construction and Mining Equipment.

*M.A. (Oxon.); Solicitor of the Senior Courts of England and Wales, Correspondent of UNIDROIT and Chairman of the Rail Working Group, a not-for-profit rail industry association under Swiss law, dedicated to the adoption of the Luxembourg Rail Protocol.

**Dr. iur., LL.M. (Hons.) (Auckland); Professor of German and International Commercial and Corporate Law, Finance and Tax Law, German Graduate School of Management and Law, Heilbronn (Germany); Of Counsel, Bird & Bird LLP, Frankfurt (Germany); Treasurer of the Rail Working Group.

I. Introduction

In February 2007, a Diplomatic Conference, sponsored jointly by the International Institute for the Unification of Private Law (UNIDROIT) and the Intergovernmental Organisation for International Carriage by Rail (OTIF) and attended by participants from 42 States and 11 international organisations, adopted the Rail Protocol. As its title suggests, the Rail Protocol applies the Convention on International Interests in Mobile Equipment (hereinafter: “the Convention”) to railway rolling stock.³ The Convention was signed in Cape Town in 2001 together with the Protocol thereto on Matters Specific to Aircraft Equipment (hereinafter: “the Aircraft Protocol”).⁴ The Convention is designed as an umbrella treaty whereby its basic objectives and all non-equipment-specific considerations are covered in the main text. Entry into force of the Convention in relation to a specific category of high-value mobile equipment necessitates the adoption of a Protocol for such category.⁵ The Protocols are intended to supplement and amend the Convention, thus catering for the specifics of the respective equipment category as well as related industry sector practices, constraints and requirements. Consequently, the Convention and the Rail Protocol must be read as one single

³The text of the Convention and the Rail Protocol may be accessed at www.unidroit.org/instruments/security-interests/cape-town-convention and www.unidroit.org/instruments/security-interests/rail-protocol respectively.

⁴Meanwhile, the group of equipment-specific protocols consisting of the Aircraft and Rail Protocols under the framework of the Convention has been expanded by another legal text, the Protocol on Matters Specific to Space Assets (hereinafter: “the Space Assets Protocol”). For further information on the Space Assets Protocol, see Stanford, *The availability of a new form of financing for commercial space activities: the extension of the Cape Town Convention to space assets*, 1 *Cape Town Conv. J.* 109-23 (2012); Sundahl, *The Cape Town Convention and the Law of Outer Space: Five Scenarios*, 3 *Cape Town Conv. J.* 109-121 (2014); Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Space Assets* (2013).

⁵See Art. 49 (1) of the Convention.

LUXEMBOURG PROTOCOL TO CAPE TOWN CONVENTION

instrument;⁶ for the sake of brevity, they will hereinafter be referred to together as “the Cape Town Treaty.” To the extent of any inconsistency between the Convention and the Rail Protocol, the latter will prevail.⁷

The Cape Town Treaty provides for the creation and protection of “international interests,” being security interests in relation to the legal positions of

- (i) a conditional seller under a title retention agreement,
- (ii) a lessor under a leasing agreement, or
- (iii) a chargee, i.e. a creditor, taking security in an item of railway rolling stock under a finance agreement.⁸

Next, the Cape Town Treaty sets the framework for a worldwide system of registering international interests in railway rolling stock on a fully-electronic basis.⁹ The International Registry envisaged by the Cape Town Treaty will be accessible through the internet 24 hours a day, seven days a week, allowing potential creditors to check any rival claims to the railway equipment being financed.¹⁰ When the Cape Town Treaty enters into force, creditors will be able to register their international interests in the International Registry and such interests will then, in almost all cases, take precedence over any and all unregistered or subsequently registered *in rem* interests.¹¹ The novel registration system will be particularly helpful in respect of railway rolling stock which operates in more than one jurisdiction because it resolves the present cross-border legal issues which arise in the case of security interests created under one law being challenged in the courts of another jurisdic-

⁶Art. 6 (1) of the Convention.

⁷Art. 6 (2) of the Convention.

⁸Art. 2 (2) of the Convention. Each of these parties is hereinafter referred to as a “creditor,” and respectively the conditional purchaser, lessee and chargor are hereinafter referred to as a “debtor.”

⁹Arts. 16-26 of the Convention; Arts. XII-XVII of the Rail Protocol.

¹⁰For a detailed overview of the International Registry in relation to the Aircraft Protocol, see Atwood, *The Cape Town Convention: The New Dublin International Registration System in Practice*, 43 UCC L. J. 637–653 (2011).

¹¹Art. 29 (1) of the Convention.

tion where the asset is physically located.¹² Finally, the Convention establishes a suite of—in part sweeping—remedies for creditors in the event of the debtor’s default,¹³ as well as its insolvency.¹⁴ These remedies include self-help remedies and interim relief measures pending final determination of a claim and thus reflect the notion that adequate and readily enforceable default remedies are pivotal from a creditor’s perspective.¹⁵

Against this background, the objectives of the Cape Town Treaty are obvious: by reducing risk for rail equipment financiers, it intends to facilitate, on a worldwide basis, more diverse, extensive and less costly private sector finance for railway equipment.¹⁶ The availability of more and cheaper private credit will lower barriers to entry into the rail sector for private operators and impel existing operators to become more efficient. In turn, this should reduce the dependency of state and private operators on public funding and lead to a more competitive and dynamic industry overall.

II. Latest Status

The Rail Protocol is not yet in force but the Grand Duchy of Luxembourg has ratified and in December 2014 the European Union also ratified the Rail Protocol in respect of its competences, opening the way for EU Member States to ratify. Germany, Switzerland, Italy and Gabon have already signed the Rail Protocol and are proceeding to ratification and the United Kingdom has indicated that it intends to do

¹²However, as can be inversely concluded from Arts. 50 (1), 1 (n) of the Convention and Art. XXIX (2) of the Rail Protocol, it is not a requirement under the Cape Town Treaty for the creation and registration of an international interest in railway rolling stock that such equipment moves cross-border.

¹³Arts. 8 - 15 of the Convention; Arts. VII-VIII of the Rail Protocol.

¹⁴Art. 30 of the Convention; Arts. X-XI of the Rail Protocol.

¹⁵Many of these remedies are, however, subject to a detailed system of opt-ins, opt-outs and reservations which give Contracting States a certain degree of flexibility for the purpose of adapting the Cape Town Treaty to their local law and other policy considerations. See also the separate section below in respect of remedies on insolvency.

¹⁶Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (2012).

the same. Other non-European states, such as South Africa, are giving serious consideration to the adoption of the Rail Protocol.

The International Registry, where international interests in railway equipment (and notices of sale) are registered and can be searched against, is a central component of the way that the Cape Town Treaty operates. In due course the registry, and in particular its website, will be able to offer a whole range of different services to stakeholders in the rail sector. So the choice of registrar is enormously important.

The Final Act of the Luxembourg Diplomatic Conference in 2007 constituted a Preparatory Commission to prepare the way for the implementation of the Cape Town Treaty.¹⁷ One of its key functions was to set up a selection process for a registrar and then to enter into a contract with the selected party with specific objectives.¹⁸ The Rail Working Group is a member of the Preparatory Commission and was also asked to be part of the negotiating team seeking out good candidates and negotiating a contract under which the registry services would be provided.

This has been far from an easy task. From the outset, the registry has been required to be at least self-financing. So the fees earned from the operation of the registry should be determined with the objective of paying out the costs of setting up and running the registry over the term of the contract with the registrar.¹⁹ On the one side, any registrar has to provide not just a high quality service, but one which is unimpeachable since any inconsistency or failings in the way the services are provided could result in major losses to creditors. Moreover the cost structure has to be such that the fees cannot be so high as to dissuade use of the registry and yet still generate sufficient fees to be able to cover the incurred costs.

It was a long search and then an even longer negotiation but ultimately last December the Preparatory Commission gave its approval to an agreement with a company in the SITA group, one of whose affiliates is already providing

¹⁷Resolution No 1.

¹⁸Resolution No 1.

¹⁹Art. XVI (2) of the Rail Protocol.

parallel services for the International Registry in Dublin established under the Aircraft Protocol. Subsequently, the individual, to act as the registrar, has been designated by SITA, offices are being made ready in Luxembourg where the registry will be located, and a Ratifications Task Force, set up pursuant to the contract with SITA, comprising representatives from both sponsoring organisations (UN-IDROIT and OTIF), the Preparatory Commission Co-Chairs (United States and Finland) as well as representatives from other States, the Rail Working Group and the registrar-designate, has been constituted to focus on stimulating states to move forward with the ratification. This is now meeting regularly.

Having the International Registries for aircraft and railway rolling stock being run by companies within the same group offers some attractive synergies. Specifically, software development or upgrade costs may be shared and a common platform with the same “look and feel” will make it easier for users to migrate from one platform to the other, particularly transport sector creditors. There is also another major benefit in that the regulations applying to the operation of the International Registry for railway rolling stock may also be created using the regulations applicable for the operation of the International Registry for aircraft as a model. Again, the similarity between the two sets of regulations, even though they will not be identical, will be a source of reassurance to both industry and professional users of the registry. Logically, a set of model draft regulations have been incorporated into the contract with the registrar although they will be updated before the Cape Town Treaty comes into force to take into account developments, software changes and other experience in running the parallel International Registry for aircraft thereafter. It is intended that these updated regulations will be published in draft form for the industry to comment on prior to them coming into force.

The Cape Town Treaty enters into force on the later of the first day of the month following the expiration of three months from the date of the fourth instrument of ratification, acceptance, approval or accession to the Protocol by a Contracting State and the date of the deposit by the Secretariat of a certificate confirming that the International

Registry is fully operational.²⁰ So there is a subjective decision to be made by the secretariat (OTIF) as to when it can give that certificate and there is a clear understanding that, bearing in mind the heavy costs of developing its software and the physical components of the registry, it will be essential that the registry only goes into operation once it is clear that there will be sufficient throughput of registrations and searches so that the economic model for the registry is sustainable in the long-term.

III. Applicability to assets and the complexities of identification

1. Definition of railway rolling stock

The Cape Town Treaty applies the Convention to railway rolling stock; the definition of railway rolling stock is deceptively simple. Essentially it encompasses all vehicles “movable on a fixed railway track or directly on, above or below a guideway” together with various components and data.²¹ It is important to note that, as distinct from the Aircraft Protocol, there is no separate regime envisaged under the Cape Town Treaty for engines. In the aviation world, engines are swapped in and out of particular aircraft on a regular basis. There are finance companies just leasing a group of engines and there is often an engine pooling system in place between individual debtors. This is not the case in the rail industry and is unlikely to be the case in the foreseeable future. On the other hand, it is possible to finance rolling stock without any locomotive system on it (for example, freight wagons). What is important to note is that the definition is not just restricted to vehicles moving on a fixed railway track. Even on such a narrower definition, it would still include not just inter-urban rail locomotives and wagons but also light rail, suburban rail units and wagons and trams, and then boring machines that run on tracks boring tunnels, gantries or cranes operating in ports, all of which run on a fixed railway track.

But actually the drafters went much further than this. The definition is opened out to cover also a vehicle which

²⁰Art. XXIII (1) of the Rail Protocol.

²¹See Art. I (e) of the Rail Protocol for the full definition.

runs directly above, on or below a guideway. The Official Commentary on the Cape Town Treaty describes a guideway as “a track or channel governing the exact line of motion of a vehicle and though in principle, the term includes the conventional railway track it is usually applied to alternative guidance structures where the wheels are not flanged.”²² So this means that monorail and maglev vehicles, people mover systems at airports, whether individual pods or units transporting a large number of passengers between, say, different parts of an airport as well as underground trains in locations such as in Paris and Lausanne, which run on guideways and not tracks, with pneumatic tyres, are all items of railway rolling stock. It will also include mountain railways running on a cable system on permanent guideways, whether they are actually railway lines or just concrete channels.

Cable cars are quite interesting. Is a fixed cable between two stations, on which the cable car runs, a guideway? Arguably it is, although the prevalent view at the moment is that it is not.

Another point to note is that there may be equipment which can run on guideways but will not necessarily always do so. There is some quite sophisticated rail engineering equipment which can either run on a road or on tracks. In our view this would certainly be covered by the Rail Protocol because it is a vehicle movable on such a guideway even if it is not doing it all the time.²³ It would not be advisable to create a system where the financing company would have to check whether the equipment was physically on a rail or other guideway at the time the financing closed. The financier should only be able to ascertain whether technically the equipment type is able to run on such a guideway.

2. *Items of railway rolling stock*

There is also a second discussion as to what constitutes an *item* of railway rolling stock. Essentially, an aircraft is

²²Goode, Official Commentary, 2nd edition (2014), Comment 5.6.

²³Logically this must be so. Otherwise conventional rolling stock which is not physically sitting on a track (for example, being transported or undergoing maintenance or even derailed) would not be covered by the Rail Protocol.

naturally identifiable as a single item whereas there can be a real issue as to where an item of rolling stock ends. Take articulated trains. Is the TGV one item of rolling stock, or is it several? Generally speaking, the intention is to follow industry practice but wagons which are permanently fixed to each other and articulated are considered to be one unit. The Preparatory Commission has already had to consider this issue further in approving the working draft of the regulations which would apply to the International Registry once the Cape Town Treaty comes into force. The current working draft (which has not been published) states that: "Where a vehicle is made up of a number of articulated sections which are physically fixed to each other, but it is possible to replace or substitute such sections in the normal course of maintenance operations, whether using specialist equipment or otherwise, each articulated section shall be regarded as an item of railway rolling stock." However, the design of rolling stock is constantly developing so we expect the draft regulations to contain a provision which will state that the registrar will publish guidance notes as to what actually constitutes *an item* of rolling stock. To ensure consistent application, these notes would have to be approved by the Supervisory Authority.

3. Identification of items of railway rolling stock

Once it is clear what constitutes an item of railway rolling stock, the next question that has to be addressed is how it is identified. There is no common system for identifying individual items of railway equipment across the world. Some operators use running numbers, others use manufacturing numbers. They can be changed duplicated or recycled. This may not be a problem in relation to immatriculation, but is not acceptable to financiers who want to have a permanent identifier which is unique both at the time it is applied and subsequently, so there is no scope for confusion as to which asset a specific security interest applies to. If the objective of the Cape Town Treaty is to facilitate true asset backed financing, then it will be essential that a creditor is able to identify precisely and unequivocally the equipment in which the interest has been created.

Originally the drafters of the Cape Town Treaty hoped to follow the example of the Aircraft Protocol and simply refer

to a manufacturer's name and identification number fixed on the equipment. This is still retained as an option where the Cape Town Treaty states that the identifier should be either affixed to the item of railway rolling stock, or associated in the International Registry with a manufacturer's name and identification number or associated with a national or regional identification number affixed on the rolling stock.²⁴ But the more this was considered, particularly taking into account the broad definition of railway rolling stock, the more referencing any external numbering system and using it in any consistent way appeared to be unrealistic.²⁵ Accordingly, the Rail Working Group itself developed the URVIS²⁶ numbering concept whereby the International Registry would issue a number to be affixed on the side of the rolling stock. It will be a 20-digit number, including a check digit, and once issued by the International Registry it can never be recycled or duplicated. This system will be reflected in the way that the registry will operate once the Cape Town Treaty comes into force (and the way that the regulations will work guiding the operation of the International Registry) but there is still work to be done, particularly with manufacturers, to work out the practicalities of fixing, in a permanent way, the new number to the rolling stock.

It is theoretically possible for a Contracting State, by declaration, to effectively opt out of the URVIS system and to insist on a system of regional or national numbers being used for the purposes of registering the international security interest against railway rolling stock. But such system will need to be subject to an agreement with the Supervisory Authority where the unique identification of each item of railway rolling stock is guaranteed by the Contracting State since otherwise the integrity of the registration system would be endangered. Nonetheless, this is not a course of action the Rail Working Group recommends. It considers that there should be a consistent system operating to identify rolling

²⁴Art. XIV (1) of the Rail Protocol.

²⁵See also the discussion in Fleetwood/Bloch, *The Cape Town International Rail Registry and the Development of State Registries*, 3 *Cape Town Conv. J.* 95 (105-107) (2014).

²⁶Unique Rail Vehicle Identification System.

stock worldwide, regardless of where the rolling stock or the debtor is located. Moreover it is submitted that there are three major problems with such regional/national approach. Firstly, logically and on the reading of Article XIV (2), any such declaration has to be “all or nothing.” It cannot be made in respect of only some railway rolling stock in a specific jurisdiction. It is highly unlikely that there is one local system of identifying all railway rolling stock in a jurisdiction, given the wide definition of the equipment.²⁷ Secondly since the Cape Town Treaty will apply by reference to the principal place of business of the debtor²⁸ who may or may not be financing railway rolling stock operating in the Contracting State making the declaration, it would lead to a chaotic situation where some equipment under a financing has a different identification to the rest. Lastly the transfer, permanently or temporarily, of rolling stock to another jurisdiction, while still financed under the initial credit agreement would potentially lead to a registration of the international interest against two identifiers relating to the same equipment.

IV. Notices of sale

The Cape Town Treaty authorises the registration in the International Registry of notices of sale of railway rolling stock.²⁹ This creates the ability to place in the public domain the transfer of title interests and the registration will also be by reference to the unique identifier of the equipment.³⁰ However, contrary to the Aircraft Protocol which extended the registration and search facilities and related priorities to cover contracts of sale³¹ searches in the International Registry in respect of such notices of sale may be for information purposes only and shall not affect the rights of any person, or have any other effect, under the Cape Town Treaty. This

²⁷See above.

²⁸Arts. 3 & 4 of the Convention.

²⁹Art. XVII of the Rail Protocol.

³⁰“The provisions of this Chapter . . . of the Convention shall, in so far as relevant, apply to these registrations” Art. XVII of the Rail Protocol. So this includes Art. XIV of the Rail Protocol addressing the issue of identification of railway rolling stock.

³¹See Art. III of the Aircraft Protocol.

is a compromise solution that was crafted very late in the development of the Rail Protocol for the reconciliation of two conflicting approaches. On the one hand, the predominant view in the rail industry had always been that the Convention essentially dealt with security interests rather than with title interests or documentation evidencing such.³² Moreover, in the absence of national registries registering title interests in rolling stock, there is not the potential conflict, as there was with the aviation sector, of rival and potentially conflicting information being kept in national registries and the International Registry in relation to title interests. On the other hand, it was felt that providing an informational record of sales could generate additional benefits because it could still act as a notification system, for the first time advising rival creditors and purchasers of a prior sale (and therefore of the owner) of the railway rolling stock.

As a consequence, the system of priorities and remedies under the Cape Town Treaty does not apply in relation to a sale transaction involving railway rolling stock. Having said this, being able to search against an asset in the International Registry to discover the notice of a sale transaction in relation to such asset can still be of major significance under national law. For example, in many civil law jurisdictions notification in the International Registry of a transfer of title is likely to place a greater burden on a (second) buyer when claiming superior ownership rights in the respective piece of railway rolling stock as a *bona fide* purchaser without actual knowledge of the first buyer's rights.³³ By way of an example, under German law the purchaser acquires ownership to an asset even if such asset does not belong to the seller, unless the purchaser is not in good faith when acquiring ownership.³⁴ Good faith on the part of the buyer is ruled out by statute if the buyer is aware, or as a result of gross

³²Rosen, *The Luxembourg Rail Protocol: a Major Advance for the Railway Industry*, 12 *Unif. L. Rev.* 427 (443) (2007).

³³Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (617) (2012).

³⁴Section 932 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*), assuming actual or constructive delivery.

negligence he is not aware, of the fact that the asset does not belong to the seller.³⁵ One may be able to argue in the future that not having searched the International Registry for a notice of sale amounts to gross negligence on the part of the buyer, thus precluding its *bona fide* acquisition of the respective asset under German law. From a comparative law perspective it will be of great interest to examine whether other jurisdictions place similar legal effects on the voluntary registration of a sale transaction in the International Registry. As a matter of practice, it can be expected that all prudent buyers will search the International Registry and desist from completing any sale transaction if their search of International Registry reveals that there could be a rival claim to the acquisition of absolute title in the railway rolling stock concerned.³⁶

V. Remedies on insolvency

1. Overview

Article IX of the Rail Protocol sets out the remedies on insolvency and has been termed the “single most significant provision economically.”³⁷ Article IX of the Rail Protocol takes account of the fact that the availability and cost of secured credit is to a large extent determined by the treatment of a security interest should the debtor become the subject of insolvency proceedings. It must be noted at the outset that the application of Article IX of the Rail Protocol hinges upon a declaration to this effect by the primary insolvency jurisdiction.³⁸ If the specific remedies contained in Article IX of the Rail Protocol are disappplied by the respective Contracting State, Article 30 (1) of the Convention comes into play which—as a minimum requirement—orders that international interests registered in the International Registry prior to the commencement of insolvency proceedings against the

³⁵Section 932 (2) of the German Civil Code (*Bürgerliches Gesetzbuch*).

³⁶Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (617) (2012).

³⁷Goode, *Official Commentary*, 2nd edition (2014), Comment 5.30.

³⁸As per Art. I (2) (d) of the Rail Protocol, the primary insolvency jurisdiction is the Contracting State in which the centre of the debtor’s main interests is situated.

debtor remain effective even after insolvency proceedings against such debtor have been opened. If a Contracting State opts for the application of Article IX of the Rail Protocol, it must also choose between the various alternatives provided by this Article. Article IX of the Rail Protocol thereby in principle follows the system of Article XI in the Aircraft Protocol which stipulates two alternatives (Alternative A and Alternative B). However, the Rail Protocol introduces an additional Alternative C which is not contained in the Aircraft Protocol.

From a creditor's perspective, Alternative A is the most desirable solution as it ensures that, within a specified and invariable waiting period, the creditor will either secure recovery of the railway rolling stock or obtain from the insolvency administrator or the debtor, as applicable, the curing of all existing defaults as well as the agreement to perform all future obligations.³⁹ The duration of the waiting period is specified in a declaration of the Contracting State where the respective debtor has its centre of main interests and thus can be verified by the creditor prior to entering into a transaction with its debtor. The remedies on insolvency under Alternative A of Article IX of the Rail Protocol are very attractive from a creditor's perspective because their exercise may in no way be prevented or delayed after expiry of the waiting period.⁴⁰ Under the Aircraft Protocol, most Contracting States have opted for the adoption of Alternative A with a waiting period of 60 calendar days.⁴¹ What is more, during the waiting period the insolvency administrator or the debtor, as the case may be, is placed under an obligation to preserve the railway rolling stock and maintain it and its value in accordance with the contractual arrangements agreed with the creditor.⁴²

The flip side of Alternative A of Article IX of the Rail

³⁹Art. IX Alternative A (3) and (7) of the Rail Protocol.

⁴⁰Art. IX Alternative A (9) of the Rail Protocol.

⁴¹This is to some extent motivated by the fact that under the OECD Sector Understanding on Export Credits for Civil Aircraft (September 1, 2011, version) this declaration is mandatory for the purpose of securing a reduction of the minimum premium rates (cf. Annex 1 no. 2 (a) of Appendix II).

⁴²Art. IX Alternative A(5)(a) of the Rail Protocol.

LUXEMBOURG PROTOCOL TO CAPE TOWN CONVENTION

Protocol is that it categorically rules out any application by the insolvency administrator or the debtor to the competent court for an order suspending its obligation to return the railway rolling stock to the creditor.⁴³ Such absoluteness may, however, conflict with the national insolvency laws of any Contracting States that traditionally take into account not only creditors' interests in effective and prompt remedies, but also opposing interests such as the protection of debtors, economy and jobs. Particularly with regard to the rail sector, there are public policy issues which militate in favour of reserving recourse to the judiciary because otherwise a peremptory creditor action could disproportionately affect the wider community.⁴⁴ Moreover, such creditor action could be either unconstitutional or in violation of basic legal expectations calling for the involvement of the courts before creditor action to repossess can be taken.

Alternative B in Article IX of the Rail Protocol takes up these considerations and, unlike Alternative A, requires the creditor to take recourse to the courts prior to repossessing the asset. The competent court then may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order.⁴⁵ In view of the broad discretion the court is furnished with under Alternative B, creditors lack certainty as to whether, when and under which circumstances they may repossess in the event of a debtor insolvency. From a creditor's perspective, the unpredictability which comes along with having to work through the court system is very unsatisfactory.⁴⁶ In essence, Alternative B establishes not much more than a "procedural structure

⁴³In theory this can be mitigated by a separate declaration by a contracting state under Art. 54 (2) of the convention but then the scope of the court's jurisdiction is unclear and may be inconsistent with the approach taken by other states.

⁴⁴Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (613) (2012).

⁴⁵Art. IX Alternative B(6) of the Rail Protocol.

⁴⁶Correspondingly, only one of the currently 57 Contracting States under the Aircraft Protocol has opted for Alternative B and that state, Mexico is currently considering a withdrawal of its application of Alternative B.

under which a creditor may beg and plead for a court's mercy."⁴⁷

Against this background, the drafters of the Rail Protocol felt that an additional insolvency option was required that does not feature in the Aircraft Protocol. This option is elaborated in Alternative C of Article IX of the Rail Protocol which attempts to retain the basic creditor protection components in Alternative A but at the same time creates a—limited and restricted—judicial restraint on the self-help provisions in Alternative A. Overall, Alternative C may be viewed as being more balanced.⁴⁸ First and foremost, this balance is achieved by reserving a right for the insolvency administrator or debtor, as the case may be, to apply to the court for an order suspending the creditor rights of repossession prior to them being triggered at the end of the initial cure period (i.e. the waiting period as per Alternative A). If the court grants the requested suspension order, it must at the same time require the insolvency administrator or the debtor, as applicable, to continue to perform during the suspension period all obligations (including making payments to the creditor) as set out in the original finance agreement.⁴⁹ In addition, the insolvency administrator or the debtor, as the case may be, is placed under an obligation to preserve the railway rolling stock and maintain it and its value in accordance with the contractual arrangements.⁵⁰ In sum, Alternative C grants the insolvency administrator or the debtor recourse to the courts but at the same time ensures that the creditor's financial position is not materially adversely affected during the suspension period.

⁴⁷Mooney, *Insolvency Law as Credit Enhancement: Insolvency-related Provisions of the Cape Town Convention and the Aircraft Equipment Protocol*, 13 *Int. Insolv. Rev.* 27 (38) (2004).

⁴⁸Rosen, *The Luxembourg Rail Protocol: a Major Advance for the Railway Industry*, 12 *Unif. L. Rev.* 427 (434) (2007); van Zwieten, *The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives*, 1 *Cape Town Conv. J.* 53 (69) (2012).

⁴⁹Art. IX Alternative C(4) of the Rail Protocol.

⁵⁰Art. IX Alternative C(6)(a) of the Rail Protocol.

Regardless of whether any option is taken, it should be noted that if declarations are made under Article XXV,⁵¹ these will qualify creditor rights to repossess financed rolling stock on a debtor default.

2. Recommendations by the Rail Working Group

The Rail Working Group has prepared a declarations matrix (hereinafter “the Declarations Matrix”) to illustrate the optimal declarations or non-declarations intended to enhance the economic benefits to be derived from the Rail Protocol.⁵² In the context of insolvency-related remedies, the Rail Working Group urges Contracting States to adopt Alternative A of Article IX of the Rail Protocol.⁵³ As explained above, Alternative A best reflects the realities of modern structured finance by ensuring that, no later than at the time of expiry of a pre-set and binding waiting period, the creditor either secures recovery of the respective item of railway rolling stock or obtains the curing of all past defaults and a commitment with respect to performance of the debtor’s future obligations.⁵⁴ In addition, the Rail Working Group advises Contracting States to provide for a waiting period of 60 calendar days under the insolvency regime established by Alternative A of Article IX of the Rail Protocol.

However, the recommendation by the Rail Working Group in relation to the application of Alternative A of Article IX of the Rail Protocol is qualified in a number of ways. First, the recommendation need not be followed by Contracting States where such remedies are already provided for under existing local law. This exception applies, e.g., to the United States in view of Section 1168 of the United States Bankruptcy Code, which pertains to rolling stock equipment and—consistent with Alternative A of Article IX of the Rail Protocol—subjects the creditor’s repossession rights to a waiting period

⁵¹The public service exemption—see below.

⁵²Cf. “Declarations Matrix and Economically-Based Recommendations (May 2015)” (available in the RWG Briefing Papers section at <http://railworkinggroup.org.nova.ch-meta.net/wp-content/uploads/2015/05/r0182.pdf>).

⁵³Form No. 23 of the Declarations Matrix.

⁵⁴Goode, Official Commentary, 2nd edition (2014), Comment 5.31.

of 60 days.⁵⁵ Next, if adopting Alternative A is not feasible for a Contracting State due to legal or public policy reasons (such as those outlined above), the adoption of Alternative C is recommended by the Rail Working Group as a second preference.⁵⁶ Finally, if a Contracting State currently faces legal, political or other difficulties in amending its national insolvency laws to reflect the realities of modern finance embedded in Article IX of the Rail Protocol, this should not, in the Rail Working Group's view, impede its adoption of the Rail Protocol as a whole.⁵⁷ Rather, the respective Contracting State should consider adoption without making any insolvency-related declaration and revisit this issue at a later point in time (e.g., in the context of an overall review or amendment of its national insolvency legislation) on the basis of a subsequent declaration.⁵⁸ As described in this article, the Rail Protocol provides significant benefits for creditors even without application of its insolvency regime. In particular, the Cape Town Treaty sets the framework for a worldwide registry of security interests in all types of railway rolling stock. This is a major step forward for the rail sector which traditionally—and unlike the aviation sector—has not benefitted from the opportunity of publicising creditors' security interests in national railway rolling stock registries.⁵⁹ So the Rail Working Group recommends the “half a loaf” approach; better to make no declaration under

⁵⁵The same rule applies to aircraft by virtue of Section 1110 of the United States Bankruptcy Code, but note that section 1168 may not apply to all rolling stock as defined in the Rail Protocol.

⁵⁶No. 27 of the Declarations Matrix.

⁵⁷See the “Additional Comments with respect to remedies on Insolvency” in the Ratifications Matrix.

⁵⁸Art. XXX (1) of the Rail Protocol provides that a State Party may make a subsequent declaration at any time after the Rail Protocol has entered into force for it, by notifying the Depository to that effect. However, as per Art. XXX (2) of the Rail Protocol, a subsequent declaration will only take effect six months after receipt by the Depository of the respective notification.

⁵⁹Rosen, *The Luxembourg Rail Protocol: a Major Advance for the Railway Industry*, 12 *Unif. L. Rev.* 427 (428) (2007).

Article IX, adopt the Rail Protocol and then to revisit the issue later than to delay adoption of the Rail Protocol.⁶⁰

3. Specifics with respect to EU Member States

With respect to Member States of the European Union, certain specifics have to be accounted for. The European Union is a Regional Economic Integration Organisation which has competence over certain matters governed by the Cape Town Treaty.⁶¹ More specifically, the Member States of the European Union have transferred their competence to the European Union as regards matters which affect Council Regulation (EC) No. 1346/2000 of May 29, 2000, on insolvency proceedings (hereinafter: the “Insolvency Proceedings Regulation”). Consequently, under European Union law they are barred from making a declaration that they will apply any of Alternatives A, B and C of Article IX of the Rail Protocol insofar as such declaration affects or alters the rules of the Insolvency Proceedings Regulation. The competence to make such declaration exclusively rests with the European Union.

The European Union, in its turn, refrained from making any declaration with respect to the applicability of the insolvency-related Alternatives of Article IX of the Rail Protocol in its instrument of approval of the Rail Protocol.⁶² This is chiefly due to a compromise reached with its Member States that each Member State should be able to make its own decision as to which rule, if any, it wanted to adopt with respect to substantive insolvency law (which arguably is not dealt with by the Insolvency Proceedings Regulation). Although the agreement with the European Union technically bars its Members States from opting into Alternative A, B or C of Article IX of the Rail Protocol, there is nothing to

⁶⁰Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (619-622) (2012).

⁶¹Art. 48 of the Convention; Art. XXII of the Rail Protocol.

⁶²Council Decision of December 4, 2014, on the approval, on behalf of the European Union, of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted in Luxembourg on February 23, 2007 (2014/888/EU), OJ L 353 of December 10, 2014, 9-12.

prevent them from amending their national insolvency law so as to reflect the terms of any of the insolvency-related Alternatives in the Rail Protocol. In a nutshell, Member States retain their competence concerning the rules of substantive insolvency law and may shape their national laws so as to result in the same substantive outcome that might be expected if they had—directly—opted for the application of Alternative A, B or C of Article IX of the Rail Protocol by way of a declaration.

VI. Public service exemption

As mentioned above in the context of insolvency proceedings, there is considerable concern about essential rolling stock being removed by a creditor where the loss to the community as a whole could be disproportionate to the loss suffered by the creditor if its repossession rights are not enforced.⁶³ Railways not only form a crucial element of the economic development of the community but also shape its social fabric.⁶⁴ For instance, commuters have a need to get to their workplace even when an operator has defaulted with its rent payments on the equipment; similarly, freight rolling stock may be required for assignments of public significance, e.g., transportation of military equipment or disposal of nuclear waste.⁶⁵ Accordingly, Article XXV of the Rail Protocol sets out some very carefully structured rules as to how the existing laws of the Contracting States to secure key transport services to the public may curtail the default and insolvency remedies under the Cape Town Treaty, subject to certain safeguards for the creditor.⁶⁶

To put it simply, application of Article XXV of the Rail Protocol requires two steps. First, a Contracting State avail-

⁶³Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (617) (2012).

⁶⁴Rosen, *Building a Railway to the Future—Progress on the Draft UNIDROIT/OTIF Rail Protocol*, 6 *Unif. L. Rev.* 50 (52) (2001).

⁶⁵von Bodungen/Schott, *The Public Service Exemption: a German Perspective*, 12 *Unif. L. Rev.* 573 (574) (2007).

⁶⁶For a detailed discussion on the balancing of public policy and private property rights in this context, see Rosen, *Public Service and the Cape Town Convention*, 2 *Cape Town Convention F.* 131 (139–143) (2013).

LUXEMBOURG PROTOCOL TO CAPE TOWN CONVENTION

ing itself of this article must designate, in a declaration, railway rolling stock which is habitually (i.e., not just occasionally) used for providing a service of public importance.⁶⁷ In addition, the Contracting State may only “continue to apply, to the extent specified in its declaration, rules of its law in force at the time which preclude, suspend or govern any of the creditor remedies provided by the Cape Town Treaty in relation to the pre-defined classes of public service railway rolling stock.”⁶⁸ Next, if the creditor is restricted in exercising its re-possession rights under the Cape Town Treaty, any person (including a governmental or other public authority), other than the creditor, exercising a local law right to take possession of the public service railway rolling stock is placed under a duty to preserve and maintain the rolling stock until it is handed over to the creditor.⁶⁹ Furthermore, the Rail Protocol imposes an obligation on the person taking the secondary possession to pay to the creditor the amount required to be paid under local law or the market lease rental in relation to such railway rolling stock, whichever amount is the greater.⁷⁰ The rent or repayment agreed upon between the creditor and the defaulting debtor is not relevant in this context. Instead, by applying market rates (subject to any provision of local law providing for higher compensation) the creditor is effectively restored to the position it would have been in had it repossessed and then remarketed the asset.⁷¹

The aforementioned maintenance and compensation obligations are aimed at ensuring that the creditor is precluded from exercising its remedies under the Cape Town Treaty only on condition that it ultimately receives what it had expected to receive under its agreement with the debtor. Nevertheless, Article XXV (4) of the Rail Protocol allows a Contracting State to make a second declaration, separate from the declaration described above, to the effect that it will not abide by the maintenance and compensation obliga-

⁶⁷ Art. XXV(1) of the Rail Protocol.

⁶⁸ Art. XXV (1) of the Rail Protocol.

⁶⁹ Art. XXV (2) of the Rail Protocol.

⁷⁰ Art. XXV (3) of the Rail Protocol.

⁷¹ Rosen, *The Luxembourg Rail Protocol: a Major Advance for the Railway Industry*, 12 *Unif. L. Rev.* 427 (441) (2007).

tions under respectively Article XXV (2) and (3) of the Rail Protocol where local law, which means not just statute but also judicial and administrative decisions depending on the law of the declaring state,⁷² does not provide for them.⁷³ The only comfort Article XXV (4) of the Rail Protocol offers to creditors in the case of such declaration is that it does not bar any person from agreeing with the creditor to perform the obligations specified in Article XXV (2) and (3) of the Rail Protocol. So even if the central government was not prepared—or constitutionally not allowed—to assume such obligations directly, a municipal or other local government agency could step in here by guaranteeing the obligations which the central government excluded by way of its second declaration, thus providing in advance the comfort needed for the creditor to enter into the respective transaction.

The drafters of Article XXV of the Rail Protocol calculated that Contracting States would be extremely cautious when employing this Article. Correspondingly, the Rail Working Group strongly advises against making any declaration under this Article.⁷⁴ Any such declaration adversely affects creditors' rights under the Cape Town Treaty and effectively imperils private sector credit in relation to assets used for providing services of public importance. While the first declaration permitted by Article XXV of the Rail Protocol ultimately could be tolerated since Article XXV (2) and (3) of the Rail Protocol arguably ensure that the creditor still reaps the benefits of its bargain, the second declaration is confiscatory in nature and thus unacceptable from a creditor's perspective (unless it is ready to forgo its security on the assets financed). The Rail Protocol explicitly reminds Contracting States of this fact by requesting them to take into consideration the effect any declaration may have on the

⁷²Goode, *Official Commentary*, 2nd edition (2014), Comment 5.79.

⁷³It is argued that this provision should be applied narrowly. If there is provision for maintenance and not compensation, then the Contracting State should not make the declaration. If there is provision for maintenance and compensation but it is not identical to what is set out in Art. XXV (2)–(3)—in practice most likely—then this should also preclude the declaration or at worst the declaration should maintain the existing rules and not further weaken the creditor's rights.

⁷⁴Nos. 36-39 of the Declarations Matrix.

availability of credit.⁷⁵ What is more, the requirement, in the case of derogating the compensation obligation, to effectively state publicly that the creditor runs the risk of sequestration without compensation, may lead Contracting States to shy away from such declaration which presumably would eliminate private finance for the rail industry in the State making such declaration.⁷⁶ However, it may be argued in some jurisdictions that this second declaration would be confiscatory and as such unconstitutional⁷⁷ or in breach of international human rights' conventions.⁷⁸ In sum, Article XXV of the Rail Protocol establishes a well-balanced mechanism. It recognizes that a Contracting State may have to curtail creditor repossession rights for public policy or constitutional reasons, but the State's power can only be exercised in narrow circumstances and as long as the creditor's position is not materially disadvantaged.⁷⁹

VII. Pre-existing interests

It is very easy to look at a protocol such as the Rail Protocol on an academic level, analysing the respective rights under the Rail Protocol, but there are also significant practical issues which need to be considered once the Rail Protocol is in force. One obvious, major, question comes from the fact that states will not ratify the Rail Protocol at the same time and, even when ratifying, will not necessarily make the same declarations.⁸⁰ This could be described as the problem of "horizontal applicability"—how will the Rail Protocol apply

⁷⁵Art. XXV(6) of the Rail Protocol.

⁷⁶Rosen, *Public Service and the Cape Town Convention*, 2 *Cape Town Conv. J.* 131 (143) (2013).

⁷⁷Rosen, *Public Service and the Cape Town Convention*, 2 *Cape Town Conv. J.* 131 (131–132) (2013).

⁷⁸For example Art. 17 of the Universal Declaration of Human Rights and Art. 1 of the 1952 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms although the latter is qualified by "public interest."

⁷⁹Rosen/Fleetwood/von Bodungen, *The Luxembourg Rail Protocol—Extending Cape Town Benefits to the Rail Industry*, 17 *Unif. L. Rev.* 609 (618) (2012).

⁸⁰The Rail Working Group is pressing policy makers to ensure that in contiguous areas the Rail Protocol is adopted with broadly identical ratifications (although this becomes more complex within the EU as

at the same time in different jurisdictions. Moreover, this is not just a question of how Contracting States ratify the Rail Protocol but also if and when they do so. Since we have to assume that not every Contracting State will ratify the Rail Protocol on the same day, practitioners will have to deal with an incomplete concurrent applicability for some years to come. This was also one key reason why, somewhat to the surprise of first-time observers, the Cape Town Treaty delivers rights to a creditor (and in some cases a debtor) based on where the debtor is “situated”⁸¹ and not on where the rolling stock is located, since the rolling stock can move between jurisdictions. But this in turn inevitably leads to a second practical issue which could be called “vertical applicability”—the problem of pre-existing interests.

Railway rolling stock is usually a long-life asset. Individual items have been known to operate for more than 60 years and the initial useful life of freight rolling stock is generally considered to be 24 years.⁸² Accordingly, financings or leases can easily last 15 years. How does one deal with claims of creditors arising in relation to railway rolling stock prior to the date the Rail Protocol has come into force in the jurisdiction where the debtor has its principal domicile?⁸³

The starting point for this discussion is Article 60 of the Convention. In principle, the Cape Town Treaty does not apply to any pre-existing right or interest, which therefore retains the priority it has under any applicable law before the Rail Protocol comes into force in the state concerned, unless a Contracting State makes a declaration otherwise.⁸⁴

A “pre-existing right or interest” is defined as a right or interest of any kind in or over the rolling stock created or arising before the date the Rail Protocol comes into force in

member states will not make declarations under Art. IX but can only make changes as a matter of (different) domestic law).

⁸¹Art. 3 (1) of the Convention.

⁸²After which usually a major overhaul is necessary.

⁸³See Goode, *Official Commentary*, 2nd edition (2014), Comment 4.350.

⁸⁴Art. 60 (1) of the Convention.

the jurisdiction where the debtor is situated.⁸⁵ The determination of where the debtor is domiciled or “situated” is defined in detail as being the place where it has its centre of administration or, if it has no such centre of administration its place of business or principal place of business (if there are more than one) at the time the right or interest in question is created.⁸⁶

In marked contrast to the Aircraft Protocol, the Rail Protocol makes a significant modification to Article 60 of the Convention by creating a revised version of Article 60 (3) of the Convention. Article 60 (3) permits a Contracting State to make a declaration as to the date when pre-existing rights or interests, which of course cannot be registered as international interests since they pre-date the Rail Protocol coming into force, are overreached by the rights and protections created under the Rail Protocol in relation to those assets where the security interest is created after the Rail Protocol comes into effect in the applicable debtor jurisdiction.⁸⁷ However, the pre-existing right or interest has protection for a minimum of three years following the date of the declaration.⁸⁸ This of course will also only apply if an international interest has not already been created and registered.⁸⁹

Article XXVI of the Rail Protocol makes it clear that in the event a Contracting State makes a declaration to limit the priority and other rights attaching to pre-existing rights or interests, that superior position can only remain for a period not shorter than three years but not longer than 10 years after the date of the declaration. This change reflects a clear policy decision concerning the vertical applicability issue.

⁸⁵See Art. 1(v) of the Convention.

⁸⁶Art. 60(2)(b) of the Convention as modified by Art. XXVI of the Rail Protocol.

⁸⁷Moreover, the priority of competing pre-existing interests which are non-registered must be determined by the applicable local law.

⁸⁸Art. 60 (3) of the Convention.

⁸⁹It is theoretically possible for a debtor to create an international interest over an asset when it is located in a jurisdiction which has already ratified the Rail Protocol and then for a subsequent interest to be created by another debtor in the jurisdiction which has not ratified at the time that second debtor creates the interest.

The drafters had in mind that Contracting States would make a declaration under Article 60 (3) of the Convention, as amended by the Rail Protocol and they wanted to limit the period of uncertainty where any creditor could not be sure that the registry accurately and completely reflected the creditor claims on a specific asset. So practitioners would still need to deal with a period of time where a pre-existing right or interest could take precedence to a subsequently registered international interest, created when the debtor was in a state in which the Protocol was in force, but this would be for a limited period of time after which the creditor could then assume that there could be no rival interests.

Clearly this is not a perfect situation. On the one side, creditors holding pre-existing rights or interests do not have access to the benefits of the Rail Protocol, as a creditor. On the other hand, creditors taking a security interest on an asset within the transitional period, of up to 10 years, cannot be sure that there is not a pre-existing interest or right lurking out there which can “trump” the registered international interest. And how can the priority of the pre-existing interest be retained once the transitional period expires?

The answer to this dilemma is twofold. First, a creditor holding a pre-existing right or interest may take advantage of another innovation in Article 60 (3) of the Convention as amended by the Rail Protocol where the registration of the pre-existing interest during the transitional period means that it then retains its priority as against later created international interests, even if registered before the registration of the pre-existing interest.⁹⁰ However this does not suddenly ascribe to that creditor an international interest with the corresponding benefits under the Cape Town Treaty; just a priority. The second step will be for creditors holding pre-existing interests to create an additional security interest over the pledged or leased asset as soon as the Rail Protocol comes into force in the jurisdiction where the debtor is then situated, taking care not to extinguish the pre-existing interest or right, in that process, since otherwise any international interest registered after the date of the pre-existing interest

⁹⁰See the last sentence of Art. 60 (3) of the Convention as modified by Art. XXVI of the Rail Protocol.

or right but before the date the replacement interest is registered, would take priority.⁹¹

VIII. Potential conflicts with other protocols

The Rail Protocol casts a wide net in terms of setting its scope, encompassing as it does all vehicles movable on a fixed railway track or directly on, above or below a guideway.⁹² This causes no major issues in relation to equipment covered by the existing Aircraft and Space Assets Protocols because airframes, helicopters and satellites can be clearly distinguished from railway rolling stock. However, the broad definition of railway rolling stock triggers a potential overlap of the Railway Protocol with subsequent Protocols that was not contemplated at the time of its creation.⁹³ This conflict has surfaced during the initial stages of preparing a Fourth Protocol to the Convention on Matters Specific to Agricultural, Construction and Mining Equipment (hereinafter “the MAC Protocol”) which applies the Convention to said categories of equipment. It suggests itself that a piece of mining equipment such as a lorry used for the removal of rocks and stones may move on a guideway and in this case will constitute railway rolling stock for the purposes of the Rail Protocol. At the same time it could also be subject to the—future—MAC Protocol due to its use for mining purposes.

The Study Group entrusted with preparing a draft of the potential MAC Protocol has suggested several approaches to solve the overlap. First, both Protocols could work alongside each other and parties who want to ensure their international interest retains priority would have to register this interest in the respective equipment in the registries under

⁹¹The Rail Working Group will be publishing, in due course, suggestions for a “Luxembourg clause” for existing or new financings where the Rail Protocol is not yet in force in the country where the debtor is located so as to ensure that the parties will execute a new security agreement as needed to create the international interest once the Rail Protocol does come into force.

⁹²See above.

⁹³UNIDROIT 2015, Study 72K—SG2—Doc. 6, para. 34 (available at <http://www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-06-e.pdf>).

both the Rail and the MAC Protocols.⁹⁴ Next, the “first in time” registration logic embedded in the Convention⁹⁵ could be applied, providing that in case of a piece of equipment that could be registered under either the MAC or the Rail Protocol, the first registration in time would prevail (i.e., preclude any subsequent registration under the other Protocol).⁹⁶ Finally, the conflict between the two Protocols could be dissolved through limiting the scope of the—yet to be—MAC Protocol and excluding any type of equipment therefrom that is to be treated as an object under the Rail Protocol.⁹⁷

The potential registration of an international interest in two separate registries not only could be quite burdensome on the parties involved but may also cause legal uncertainty. In particular, it may raise significant priority issues if the registration of an international interest in relation to the same piece of equipment is not made in both registries and at exactly the same time. On the other hand, a “first in time” rule with respect to the determination of the relevant International Registry contains an element of arbitrariness. The Study Group therefore favours dealing with the interaction between the Rail Protocol and the MAC Protocol as a matter of scope. An overlap between both texts should be precluded from the outset by way of the MAC Protocol bending to the Rail Protocol. However, exclusion of equipment from the MAC Protocol should only be triggered where a Contracting State actually applies both Protocols. The current draft of the MAC Protocol thus provides that it does not apply in relation to agricultural, construction and mining equipment “where the object [. . .] is capable of being an object under the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment and the

⁹⁴UNIDROIT 2015, Study 72K—SG2—Doc. 6, para. 38.

⁹⁵Art. 29 of the Convention.

⁹⁶UNIDROIT 2015, Study 72K—SG2—Doc. 6, para. 38.

⁹⁷UNIDROIT 2015, Study 72K—SG1—Doc. 5, para. 25 (available at <http://www.unidroit.org/english/documents/2015/study72k/s-72k-sg01-05-e.pdf>).

Luxembourg Protocol is in force in the relevant Contracting State.”⁹⁸

IX. Conclusions

That the Cape Town Treaty is still work in progress should not be a great surprise. Its objectives are ambitious, creating for the first time a global legal structure to facilitate private finance of railway equipment. The way forward it proposes, creating a system of internationally enforceable rights combined with the registry notifying all interested parties of any competing interests in specific items of rolling stock, is a simple solution to a complex problem. But what emerges is an instrument designed to deal with both the initial concept and the collateral issues which inevitably arise in implementing such a concept, a highly nuanced treaty, carefully designed to deal with legacy issues and at the same time with built-in flexibility to deal with new circumstances as business, legal thinking and technology advances.

For the academic observer it is a finely tuned watch where the solutions to different issues are carefully crafted and integrated. To the practitioner, whose first concern is preventative, to ensure that a purchaser or creditor is not buying or financing an asset on which others have rival claims, it is a big clock whose chimes are heard everywhere, creating for the first time a public registry and notice system. And in each case it will also need time to build and implement. But the Cape Town Treaty is well under way. The different components are being assembled carefully and will spring into life soon. The end result is surely worth working for—a common global system where the private sector will carry the bulk of the finance requirements for railway equipment, being a catalyst not just for a more efficient rail industry but also for the economic development which it brings and all the social, legal and environmental problems it will help to solve.

⁹⁸No. 4 of Annexes 1, 2 and 3 to the Third preliminary annotated draft of a fourth protocol to the Cape Town Convention on matters specific to agricultural, construction and mining equipment (MAC Protocol), UNIDROIT 2015, Study 72K—SG2—Doc. 7 (available at <http://www.unidroit.org/english/documents/2015/study72k/sg02/s-72k-sg02-07-e.pdf>).