

International security rights in railway  
vehicles, etc.

— Railway Protocol

*Report by the Cape Town Inquiry II*

— *International security rights in rolling railway stock*

*Stockholm*



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SOU 2016:43

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## To Minister Morgan Johansson

On 17 June 2015, the Government decided to appoint a special investigator to consider whether Sweden should accede to the Luxembourg Protocol on matters specific to railway rolling stock to the Convention on International Interests in Mobile Equipment (*Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock*, hereinafter referred to as the Railway Protocol or the Protocol).

The assignment also included proposing explanations for the protocol that Sweden should provide upon accession and specifying how the provisions of the protocol should be incorporated into Swedish law. The special investigator was also tasked with deciding whether Sweden should appoint special contact points to handle contact with the international registry. Finally, the assignment included submitting the constitutional proposals required for Sweden to accede to the proto-protocol or otherwise deemed appropriate for the provisions of the protocol to be fully applicable.

On the same day, Ralf G Larsson, now President of the Court of Appeal, was appointed as special investigator.

As of 17 June 2015, Judge Sara Skouras was appointed as an expert in the investigation. On 10 August 2015, Josefin Malmin, Ministry of Justice, was appointed as a subject matter expert in the investigation. On 17 August 2015, Lars Falksveden, Secretary of State at the Ministry of Enterprise and Innovation, Maria Chambers, lawyer at the Swedish Bar Association, Petra Jansson, Chief Legal Officer at the Swedish Export Credit Agency, Andreas Kappen, legal officer at the Swedish Enforcement Authority, Magnus Rundgren, Chief Legal Officer at the Swedish Bankers' Association, Johan Schelin, Associate Professor at the Department of Law, Stockholm University, Chief Legal Officer Mikael Wågberg, Train Operators, and Lawyer Susanna Angantyr, Transport Agency, as experts in the investigation.

Court of Appeal Judge Sandra Moradi was appointed as secretary to the inquiry on 22 June 2015.

On 1 September 2015, Johan Schelin was dismissed as an expert in the investigation. On the same day, Professor Göran Millqvist was appointed as an expert to represent the Department of Law, Stockholm University. On 11 January, Josefin Mallmin was dismissed and on the same day, legal expert Johan Nordin was appointed as an expert in the investigation.

The Secretary General, Anna Ek, has assisted the inquiry with text editing and layout of the report. The summary of the report has been translated by the Language Service at the Ministry for Foreign Affairs. The inquiry, which has been named the Cape Town Inquiry II – International Security Rights in Rolling Stock (Ju 2015:07), hereby submits the report *International Security Rights in Railway Vehicles, etc. – The Railway Protocol* (SOU 2016:43). The investigation's assignment is hereby completed.

Malmö, June 2016.

Ralf G Larsson

/Sandra Moradi

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# Summary

## **The Committee's proposal**

The main task of the inquiry has been to consider whether Sweden should accede to the Rail Protocol. After analysing the Protocol, the inquiry proposes in its report that Sweden should accede to the Protocol. The main reason for the inquiry's proposal is the economic benefits to be gained in the financing of rolling stock for Swedish companies working with railways, tramways or underground railways (hereinafter referred to as railway companies). The Protocol will also benefit state-owned railway operators by making more capital available for investment in new rolling stock. This will reduce the need for both direct state aid and indirect aid or guarantees.

In the aviation industry, leasing and other mainly private financing solutions have led to significantly increased investment over the past 20 years. One explanation for this is that lenders are secured through the registration of their security rights or mortgages. A comparison can be made with the railway sector, where investment has stagnated. Here, there are no national public registers where lenders can register their security rights in financed assets.

The possibility of registering international security rights in a common international register is crucial for the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the application of the various protocols. As with property covered by the Cape Town Convention Protocol on matters specific to aircraft objects (the Aircraft Protocol), there will be an international register for security rights in property covered by the Rail Protocol.

The inquiry further proposes that the protocol be given the status of Swedish law through amendments to the Act (2015:860) on international security rights in movable property and that certain constitutional amendments be made to the Priority Rights Act (1970:979) and the Movable Property Purchase Act (1845:50 p.1).

and that certain constitutional amendments be made to the Priority Rights Act (1970:979) and the Movable Property Purchase Act (1845:50 p. 1).

### **Financing of rolling stock – opportunities and challenges**

The Cape Town Convention's Rail Protocol regulates how security rights in certain types of movable property should be handled in *asset-based financing*. Rolling stock is a special type of movable property; it represents high economic value and moves across national borders.

Railway companies' operations are capital-intensive and their investment needs are significant. The need for large financial resources before operations can commence, combined with limited financing solutions, has been one of the obstacles to effective competition in the railway sector.

Rolling stock is mainly financed through leasing and loans from banks and other credit institutions. For certain types of loans and credits, favourable terms can be obtained through state-supported guarantees, known as export credits.

Common to most types of financing for rolling stock is that the financier obtains a security interest in it. Due to its high economic value and long service life, rolling stock is very well suited for such asset-based financing. The fact that rolling stock moves across national borders complicates matters for financiers with security rights in rolling stock, as such security rights are regulated differently in different legal systems. Furthermore, there are no national or international public registers where lenders can register their security rights in rolling stock. When financing through leasing, the provisions of the Movable Property Purchase Act are often applied. In order to achieve a right of separation in property for the creditor, the Act requires publication in a local newspaper and registration with the Enforcement Authority. This system is cumbersome and also has a strong national character, which may be a deterrent, particularly for foreign financiers.

The main issue is what measures a security holder, such as a lessor, can take if the person who has provided the security or the lessee fails to fulfil their obligations. Another important issue is

what protection the security holder has in insolvency proceedings against the person who has provided the security. Issues concerning the creditor's rights in relation to other creditors are governed by property law rules that differ from country to country. Furthermore, the lack of a public register for security rights in rolling stock creates uncertainty among financiers, which can lead to fewer and poorer financing opportunities.

### **Need for common rules on security rights in rolling stock**

Since the late 1980s, the International Institute for the Unification of Private Law (Unidroit) has been working to develop common substantive rules for security rights in certain types of mobile property in order to simplify international financing and reduce risks. This work resulted in the Cape Town Convention in 2001, which, together with the Aircraft Protocol, entered into force on 1 March 2006. Various types of movable property, such as aircraft, railway rolling stock and space equipment, are regulated in the three associated protocols. On 1 April 2016, Sweden acceded to the Cape Town Convention and the Aircraft Protocol. However, the Railway Protocol and the Protocol relating to space equipment have not yet entered into force. The Railway Protocol will only enter into force once four countries have approved or ratified the protocol.

The Railway Protocol specifies what applies when security rights exist in rolling stock. The main purpose of the Cape Town Convention and the Railway Protocol is to provide clear and uniform rules on security rights in connection with the financing of rolling stock. This increases predictability for financiers, which in turn benefits operators, who can thereby obtain better financing terms.

### **The Railway Protocol and the International Registry**

The Railway Protocol, like the Cape Town Convention, is a so-called mixed agreement, which means that it regulates certain areas of law where EU Member States have transferred their competence to the EU, such as questions of applicable law and recognition of court decisions. The EU acceded to

the Convention and the Protocol in 2009 and 2014 respectively, and then issued a statement specifying the areas in which the EU has competence. The EU's accession does not in itself bind the Member States to the agreements, but it is a prerequisite for a Member State to be able to accede.

The Cape Town Convention, together with the Rail Protocol, is unique in that it creates an entirely new system based on the establishment of so-called international security rights, which are to be recognised in all contracting states. According to the Convention, three different types of agreements can give rise to an international security right:

1. leasing agreements, where the lessor, as the owner, has a security interest in the property when it is leased out
2. purchases with retention of title, where the seller has a security right in the property before full payment has been made or before any other condition has been fulfilled, and
3. pledges or security transfers, where a guarantor gives a security holder a security interest in certain property to secure the fulfilment of existing or future obligations.

International security interests may, but need not, be registered in an international registry where their order of priority can be determined. The international registry for property covered by the Railway Protocol is located in Luxembourg. It will be possible to make registrations and searches in the registry 24 hours a day, every day of the year. The register is currently under construction and will become operational as soon as the Railway Protocol enters into force.

In addition to issues of priority between different international security rights, the Protocol, together with the Convention, regulates what should happen if the debtor (i.e. a lessee, buyer in a sale with retention of title or guarantor) fails to meet its obligations or if insolvency proceedings are initiated against the debtor. The measures available to the creditor (i.e. a lessor, seller with retention of title or guarantor) under the Convention and the Protocol are intended to be powerful and effective.

and should, as far as possible, be taken without the involvement of national courts or authorities.

### The system of declarations

The Railway Protocol is not a protocol that a state can simply choose to accede to or not. Upon accession, the state must also decide which declarations to submit and, in some cases, how the declaration should be worded. The Railway Protocol is designed to be applicable in different legal systems. The purpose of the system of declarations is to enable as many countries as possible to accede, regardless of their national legal systems. To achieve this, the Protocol is structured around a system of declarations that affect the applicability of the provisions in the various countries. Some declarations are so-called *opt-in* declarations, which means that by submitting a declaration, a certain provision becomes applicable. These are often provisions that extend the protection of creditors and speed up the proceedings in the event of a debtor's insolvency or breach of contract. Other provisions in the Protocol are so fundamental that a declaration by a country is required for them not to apply.

applied, known as *opt-out* declarations.

Under EU law, EU Member States are prevented from making declarations concerning provisions in areas where the EU has exclusive competence.

Accession documents and declarations must be submitted to Unidroit, which acts as the depositary for a list of the declarations submitted by each country. This list is updated on an ongoing basis and is available on Unidroit's website, where it is also possible to see which states have acceded.<sup>1</sup>

### Consequences of accession

The group that will be most affected by Swedish accession is Swedish train operators, banks and other companies involved in the financing of rolling stock. The Railway Protocol creates conditions for increased private financing through

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<sup>1</sup><http://www.unidroit.org>

making it easier for lenders to monitor their investments. This monitoring will be made possible by the international register. This will be a register for both domestic and international transactions, as well as a universal system for identifying rolling stock.

Companies wishing to make registrations or searches in the international register are free to register as users and thus gain access to the register. Access to the protocol does not entail any obligations for Swedish companies.

Accession to the Rail Protocol will not entail any direct costs for Sweden. There is currently no register of rolling stock in Sweden that could be used for the purposes of the Rail Protocol. The international register will be financed through fees and will thus be self-financing. Registration of an international security interest will also be voluntary. Access to the Protocol will therefore not entail any indirect costs or reduced revenue in the form of fees, etc.

It is the committee's assessment that accession to the Protocol will result in financial savings for large and small companies operating in Sweden, some of which are owned by the Swedish state/county councils. However, in the committee's opinion, it is not possible to predict exactly what these effects will be and how significant they will be.

Swedish credit security law would benefit from modernisation. As things stand, both Swedish and foreign lenders find it difficult to understand the legislation governing security rights in movable property, including rolling stock. Swedish accession to and implementation of the Cape Town Convention's Rail Protocol would bring about a clear improvement in credit security law in the areas covered by the Protocol. As a creditor with a registered international security right, the position becomes significantly more predictable and reliable in insolvency proceedings concerning a Swedish debtor, compared with if Sweden had not acceded to the Railway Protocol. This will in turn lead to better and cheaper financing for Swedish railway companies.

**Entry into force**

The Railway Protocol will enter into force on the later of the following dates (Article XXIII.1):

- a) the first day of the month following the expiration of three months after the date on which the fourth instrument of ratification, acceptance, approval or accession has been deposited.
- b) The date on which the Secretariat of the Depositary deposits a certificate confirming that the international register is fully operational.

No new Swedish system needs to be established or changed as a result of Sweden's accession.



# Summary

## **The Inquiry's proposals**

The main remit of the Inquiry has been to consider whether Sweden should accede to the Luxembourg Rail Protocol. Following an analysis of the Protocol, the Inquiry proposes in its report that Sweden should accede to it. The primary reason for the Inquiry's proposal is the economic advantages to be gained by Swedish undertakings operating railways, light railways and subways (hereafter 'railway undertakings') when financing railway rolling stock. The Protocol will also benefit state rail operators by making more investment capital for new railway rolling stock available. This would reduce the need for both direct state aid and indirect support or guarantees.

In the aviation industry, leasing and other mainly private financing solutions have led to substantially increased investments in the last 20 years. Among other things, this is because creditors are safeguarded through the registration of their interest or mortgage. This can be compared with the railway sector, in which investments have stagnated, and there are no national public registries in which creditors can register their interests in financed assets.

The possibility to register international interests in a joint international registry is crucial to the application of the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and its various protocols. In the same way as applies to property covered by the Aircraft Equipment Protocol, there will be an international registry for interests in property covered by the Rail Protocol in which creditors can register their interests in railway rolling stock.

The Inquiry also proposes that the Protocol be given the status of Swedish law via amendments to the Act on international interests

in movable property (2015:860), and that certain amendments be made to the Rights of Priority Act (1970:979) and the Act on the purchase of movable property that the purchaser allows to remain in the vendor's custody (1845:50, p.1).

### **Financing of railway rolling stock – opportunities and challenges**

The Rail Protocol of the Cape Town Convention regulates how interests in certain types of mobile assets are to be dealt with in terms of asset-based financing. Railway rolling stock is a special type of movable asset, as it represents high financial values and moves across national borders.

The operations of railway undertakings require substantial capital, and the need for investment is considerable. The need for substantial financial resources before start-up and the limited financing solutions available have been a barrier to effective competition in the rail sector.

Railway rolling stock is mainly financed through leasing and loans from banks and other credit institutions. With certain types of loans and credits, favourable terms can be obtained through state-supported guarantees, known as export credits.

One feature shared by the majority of types of financing of railway rolling stock is that the financier acquires an interest in the rolling stock. Because of its high financial value and long life, railway rolling stock is well suited to this kind of asset-based financing. The fact that railway rolling stock moves across national borders makes things more difficult for financiers with interests in rolling stock, because such interests are regulated differently in different legal systems. Nor are there any national or international public registries in which creditors can register their interests in railway rolling stock. When assets are financed through leasing, the provisions applied are often those of the Act on the purchase of movable property that the purchaser allows to remain in the vendor's custody (1845:50, p.1). For the creditor to attain a right of reclamation of property, the Act requires an official announcement in the local press and registration with the Swedish Enforcement Authority. This arrangement is elaborate and is also strongly national in tone, which may deter foreign financiers in particular.

This is primarily an issue of what measures the holder of an interest, such as a lessor, can take if the party providing the security or the lessee does not fulfil their commitments. Another important matter is the protection to which the holder of the interest is entitled in the event of insolvency proceedings against the party providing the security. Issues of the creditor's rights in relation to other creditors are regulated through provisions of property law that differ between countries. Moreover, the lack of a public register for interests in railway rolling stock generates uncertainty among financiers, which may lead to fewer and weaker financing options.

### **Need for joint regulations for interests in railway rolling stock**

Within the International Institute for the Unification of Private Law (UNIDROIT), work has been underway since the end of the 1980s to draw up common substantive rules for interests in certain types of mobile assets that will simplify international financing and reduce risks. This work resulted in 2001 in the Cape Town Convention, which entered into force on 1 March 2006, together with the Aircraft Equipment Protocol. Various types of movable property such as aircraft equipment, railway rolling stock and space assets are regulated in the three associated protocols. On 1 April 2016, Sweden acceded to the Cape Town Convention and the Aircraft Equipment Protocol. However, the Rail Protocol has not yet entered into force. This will only happen once four countries have approved or ratified the Protocol.

The Rail Protocol outlines what is to apply to interests in railway rolling stock. The main purpose of the Cape Town Convention and the Rail Protocol is to provide clear and uniform regulations on interests connected with the financing of railway rolling stock. This increases predictability for financiers, which in turn benefits operators as they can enjoy better conditions for financing.

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<sup>1</sup> The Rail Protocol was signed in 2007 and the Space Assets Protocol was signed in 2012. The latter two protocols have not yet entered into force.

### The Rail Protocol and international register

Both the Cape Town Convention and the Rail Protocol are what are known as mixed agreements, which means that they regulate certain legal areas in which the EU Member States have transferred their competence to the EU, such as issues of applicable law and the recognition of court decisions. The EU acceded to the Convention and Protocol in 2009 and 2014 respectively, providing a declaration concerning the areas in which the EU has competence. The EU's accession does not in itself bind EU Member States to the agreements, but it was a prerequisite for Member States to be able to accede.

The Cape Town Convention and Rail Protocol are unique in that they create a completely new system based on the establishment of 'international interests' that must be recognised in all contracting States. Under the Convention, three different types of agreement can give rise to an international interest:

1. leasing agreements, in which the lessor as owner has an interest in the asset leased;
2. title reservation agreements, in which the seller has an interest in the asset prior to full payment, or until some other condition has been fulfilled; and
3. security agreements, in which the provider of a security grants a chargee an interest in a certain asset as security for the performance of existing or future obligations.

International interests can be – but do not have to be – registered with an international registry in which their internal order of priority can be established. The International Registry for property covered by the Rail Protocol is located in Luxembourg. It will be possible to register in and search the registry 24 hours a day, every day of the year. The registry is currently being established, and it will be put into operation as soon as the Rail Protocol enters into force.

In addition to questions of priority among various international interests, the Protocol, together with the Convention, regulates what should happen if the debtor (i.e. a lessee, buyer under a title reservation agreement, or security chargor) does not fulfil their obligations or if insolvency proceedings are initiated against the debtor.

The measures offered to the creditor (i.e. a lessor, seller under a title reservation, or security chargee) by the Convention are intended to be powerful and effective and must, as far as possible, be available without the involvement of a national court or authority.

### **The system of declarations**

The Rail Protocol is not a protocol that a State can simply choose to accede to or not. Moreover, upon accession the State must decide which declarations to make, and in certain cases, how to word the declaration. The Rail Protocol is designed to be applicable in different legal systems. The aim of the declaration system is for as many countries as possible to accede, regardless of the design of their national legal system. To achieve this, the Protocol is based on a system using declarations that affect the applicability of the provisions in different countries.

Certain declarations are ‘opt-in’ declarations, which means that by making a declaration, the relevant provision becomes applicable. This often applies to provisions that increase creditors’ protection and make the proceedings in the event of a debtor’s insolvency or breach of agreement quicker and more efficient. Other provisions in the Protocol are so fundamental that they require a declaration from a country for them not to apply (an ‘opt-out’ declaration).

In view of EU law, EU Member States are not permitted to make declarations concerning provisions in areas in which the EU has exclusive competence.

The accession document and the declarations are to be submitted to UNIDROIT, which in its capacity as depositary keeps a list of which declarations each country has made. This list is continuously updated and is available at the UNIDROIT website, where there is also a list of the States that have acceded.

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<sup>2</sup><http://www.unidroit.org>

### Consequences of accession

The primary group that will be affected by Swedish accession is Swedish train operators, banks and other undertakings involved in financing rolling stock. The Rail Protocol creates conditions for increased private financing by making it easier for creditors to look after their investments. The international registry will make this possible. The registry will be for both national and international transactions, and will thus constitute a universal system for the identification of railway rolling stock.

Undertakings that wish to make registrations and searches in the international registry can register as users and thus obtain access to the registry. Accession to the Protocol does not entail any obligations for Swedish undertakings.

Accession to the Protocol will not entail any direct costs to Sweden. There is currently no register of railway rolling stock in Sweden that could be used for the purposes that the Rail Protocol offers. The international registry will be funded through fees, and is thus self-financing. Registration of an international interest will also be voluntary. Accession to the Protocol thus does not entail any indirect costs or reduced revenues in the form of fees etc.

In the Inquiry's assessment, accession to the Protocol will mean financial savings for large and small undertakings operating in Sweden – some owned by the Swedish State/county councils. In the view of the Inquiry it is, however, not possible to predict the exact nature and scale of these effects.

Swedish credit securities law could do with modernisation. As things stand, both Swedish and foreign creditors find it difficult to understand legislation concerning interests in movable property, including railway rolling stock. Swedish accession to, and implementation of, the Rail Protocol to the Cape Town Convention would clearly improve credit securities law in the areas covered by the Protocol. The position of creditors with registered international interests will become considerably more predictable and reliable in insolvency proceedings with respect to a Swedish debtor as compared with if Sweden does not accede to the Rail Protocol. In turn, this will lead to better and cheaper financing for Swedish railway undertakings.

**Entry into force**

The Rail Protocol will enter into force on the later of (Article XXIII.1):

- a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession; and
- b) the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.

Swedish accession will not require the establishment or amendment of any new Swedish systems.



# 1 Draft legislation

## 1.1 **Proposal for Act amending the Act (2015:860) on international security rights in movable property**

The following is hereby prescribed with regard to the Act (2015:860) on international security rights in movable property

that Sections 1, 3, 7 and 8 shall have the following wording,

that a new section, Section 9, shall be inserted, which shall have the following wording,

that a new heading with the following meaning shall be inserted immediately before Section 9.

*Current wording*

*Proposed wording*

### Section 1

This Act applies to security rights and other rights governed by the Convention on International Interests in Mobile Equipment of 16 November 2001 (the Cape Town Convention) and *the Protocol* to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Objects (the Aircraft Protocol).

This Act applies to security rights and other rights governed by the Convention on International Interests in Mobile Equipment of 16 November 2001 (the Cape Town Convention) and *the Protocol* to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Objects (the Aircraft Protocol) *and on Matters Specific to Railway Rolling Stock (the Railway Protocol)*.

The Act also applies, to the extent provided for in the Convention, to security rights and other rights that have arisen under other law and that are covered by Sweden's declarations to Articles 39 and 40 of the Convention. The declarations, together with declarations relating to Article 54(2) of the Convention and Articles XII and XIII of *the Protocol*, are contained in Sweden's agreements with foreign powers (SÖ).

The Act also applies, to the extent provided for in the Convention, to security rights and other rights that have arisen under other legislation and that are covered by Sweden's declarations to Articles 39 and 40 of the Convention. The declarations are found, together with declarations relating to Article 54.2 of the Convention, Articles XII and XIII of *the Aviation Protocol and Article X of the Rail Protocol*, in Sweden's agreements with foreign powers (SÖ).

#### Article

Articles I–VII, IX, XII–XVI and XX–XXV of the Aviation Protocol shall apply as law in this country in the wording of the original texts.

Articles I–VII, IX, XII–XVI and XX–XXV of the Aviation Protocol and Articles I–V, VII, X, XI and XIV–XX of *the Rail Protocol* shall apply as law in this country in the wording of the original texts.  
the country.

The original English text of *the Protocol*, together with a Swedish translation, is included as Annex 2 to this Act. The texts in the other original languages – Arabic, Chinese, French, Russian and Spanish – are included in SÖ. The original texts have equal validity.

The original English text of *the Protocol* is included, together with a Swedish translation, as Annexes 2 and 3 to this Act. The texts in the other original languages – Arabic, Chinese, French, Russian and Spanish – are included in the SÖ. The original texts have the same validity.

#### 7 §

If there is Swedish jurisdiction under any of the provisions of the Cape Town Convention  
or the Protocol on Aviation that

If there is Swedish jurisdiction under any of the provisions of the Cape Town Convention,  
the Aviation Protocol or *the Rail Protocol*

is specified in Sections 2 and 3 and no other competent court exists, Stockholm District Court shall have jurisdiction.

the *protocol* specified in Sections 2 and 3 and there is no other competent court, Stockholm District Court shall have jurisdiction.  
shall have jurisdiction.

#### Section 8

In an insolvency situation under Article I.2m of the Aviation Protocol, if the debtor has its centre of main interests in Sweden as specified in Article I.2n, Article XI alternative A shall apply. In applying this provision, the waiting period specified in the article shall not exceed 60 calendar days.

In an insolvency situation under Article I.2m of the Aviation Protocol, if the debtor has its centre of main interests in Sweden as specified in Article I.2n, Article XI alternative A *of the Aviation Protocol* shall apply. In applying this provision, the waiting period specified in the article may not exceed 60 calendar days.  
days.

*In an insolvency situation under Article I.2c of the Rail Protocol, if the debtor has its main interests in Sweden as specified in Article I.2d, Article IX alternative A of the Rail Protocol shall apply. In applying this provision, the waiting period specified in the article may not exceed 60 calendar days.*

The contracting parties may, by written agreement, decide that the first paragraph shall not apply.

The contracting parties may, by written agreement, decide that the first *or second* paragraph shall not apply.  
.

#### ***Effects of registration in the International Register of Security Rights in Rolling Stock***

#### 9 §

*The purchase of rolling stock is valid against the seller's creditors upon conclusion of the agreement, if a security right in the object of purchase is registered in the international register in connection with the purchase.*

*security right in the object of purchase is registered in the international register in connection with the purchase. This presupposes that the seller is specified as the debtor and the buyer as the creditor in the registration.*

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This Act shall enter into force on the date determined by the Government.

## 1.2 Proposal for Act amending the Priority Rights Act (1970:979)

It is hereby prescribed that Section 4 of the Priority Rights Act (1970:979) shall have the following wording.

*Current wording*

*Proposed wording*

### Section 4<sup>1</sup>

- Preferential rights apply to
1. maritime liens and air liens,
  2. international security rights in aircraft *and* aircraft engines registered under the Act (2015:860) on international security rights in movable property,
  2. international security rights in aircraft, aircraft engines *and rolling stock* registered under the Act (2015:860) on international security rights in movable property,
  3. lien and right to retain movable property as security for a claim (right of retention), lien based on registration or notification under the Act (1998:1479) on Central Securities Depositories and the Accounting of Financial Instruments, and lien based on registration under the Act (2011:1200) on Electricity Certificates,
  4. lien due to mortgage in ships or shipbuilding or in aircraft and spare parts for aircraft,
  5. registration of boat building advances pursuant to the Act (1975:605) on the Registration of Boat Building Advances.

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This Act shall enter into force on the date determined by the Government.

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<sup>1</sup> Latest wording SFS 2016:68.

### **1.3 Proposal for an Act amending the Act (1845:50 p.1) on the sale of movable property which the buyer leaves in the seller's care**

It is hereby stipulated that, with regard to the Act (1845:50 p. 1) on trade in movable property that the buyer leaves in the seller's care, a new section, Section 5, shall be inserted into the Act with the following wording.

*Current wording*

*Proposed wording*

*Section*

*The Act (2015:860) on inter-  
international security rights in movable  
property, there is a provision that deviates  
from this Act and takes precedence over this  
Act.*

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This Act shall enter into force on the date determined by the Government.

## 2 Introduction

### 2.1 Investigation's assignment

On 16 November 2001, in Cape Town, South Africa, *the Convention on International Interests in Mobile Equipment* was signed, translated into the Convention on International Interests in Mobile Equipment (hereinafter referred to as the Cape Town Convention or the Convention). Sweden ratified the Convention on 1 April 2016. The associated Protocol on Matters Specific to Railway Rolling Stock (hereinafter referred to as the Railway Protocol or the Protocol) was signed in Luxembourg in 2014 and has not yet entered into force. Luxembourg and the EU have acceded to the Protocol.

On 17 June 2015, the Government decided to appoint a special investigator to analyse the provisions of the Railway Protocol and, after comparing them with current Swedish law and applicable EU law, propose whether Sweden should accede to the Protocol or not. The assignment includes investigating the consequences of Swedish accession.

Regardless of the inquiry's proposal regarding accession, the inquiry shall also take a position on a number of issues that would arise if Sweden chooses to accede to the Protocol.

The Protocol allows the contracting state to limit or extend the applicability of certain provisions by submitting declarations on individual articles. The inquiry has been tasked with analysing the meaning of all possible declarations and, based on this analysis, proposing which declarations Sweden should submit upon accession. The inquiry shall also propose how the Protocol should be incorporated into Swedish law.

Upon accession, Sweden will have the opportunity to appoint one or more bodies as contact points with the task of transmitting the information required for registration in the international register. The inquiry shall consider

whether Sweden should designate such contact points upon accession and propose which organisation or organisations should be assigned this task. Finally, the inquiry shall submit proposals for new legislation and legislative amendments required for Sweden's accession to the Protocol or otherwise deemed appropriate. In its conclusions, the inquiry shall strive to make proposals that are in line with the declarations made by Sweden upon its accession to the Cape Town Convention and the associated Protocol on Special Interests in Aircraft (the Aircraft Protocol).

## **2.2 The inquiry's work**

The inquiry began its work in July 2015 and has since held regular meetings with experts and specialists. Where necessary, smaller meetings have been held with certain experts who have expertise in a specific area and with external stakeholders. The secretariat, together with three of the experts, lawyer Maria Chambers, professor Göran Millqvist and judge Sara Skouras, held a meeting with the chair of the Rail Working Group, Howard Rosen, one of the key figures in the development of the Protocol and who has experience in assisting states considering acceding to the Protocol. Meetings have also been held with representatives of MTR Express and AB Transito.

During the investigation, the secretariat has been in regular contact with the experts, as well as with Howard Rosen and Mervi Kaikkonen, who are representatives of the preparatory commission tasked with assisting the supervisory authority in creating the international register.

The secretariat also visited France to participate in a conference. The conference discussed issues such as the structure and regulation of the international register, the EU's fourth railway package and its impact on the provisions of the Railway Protocol, and the economic consequences of the Protocol for the railway sector.

According to the directive, the inquiry shall, to the extent deemed appropriate, examine the solutions that other states intend to choose when acceding to the Railway Protocol. There has been considerable interest in the Railway Protocol in the United Kingdom, which signed the protocol on

26 February 2016. The inquiry has been in regular contact with the responsible person at the British Department for Transport in order to follow the United Kingdom's process towards ratification.

In accordance with the directives, the inquiry has obtained comments from the Swedish Business Regulation Board (NNR). The Board has not had any comments on the proposals presented by the inquiry in the report.

## **2.3      e structure of the report**

The report is divided into twelve chapters. Chapter 3 describes the financing of rolling stock and the EU's work towards a unified railway system. Chapter 4 provides a brief description of the Cape Town Convention and the background and structure of the Railway Protocol. Chapter 5 deals with the substantive provisions of the Protocol. This is followed, in Chapter 6, by proposals on the declarations that Sweden should make upon accession to the Protocol. In Chapter 7, the inquiry describes how the international register is planned to function. Chapter 8 contains the inquiry's considerations regarding the issues of accession to the Protocol. Chapter 9 contains the inquiry's proposals concerning the incorporation of the Protocol. Issues concerning entry into force and transitional provisions are dealt with in Chapter 10. An impact assessment is provided in Chapter 11 and a constitutional commentary in Chapter 12.

## **2.4      Translation**

The Railway Protocol is available in official versions in English, French and German, and the investigation has been based on the English version. The Swedish translation found in Appendix 3 to the report is based on the translation made in connection with the EU's accession to the Protocol in 2014. The translation has subsequently been supplemented and adjusted in accordance with the inquiry's understanding.

The terminology in the agreement is highly technical in nature, and several general terms are given a specific meaning in the protocol. The report uses the inquiry's Swedish translations of the various terms and concepts, in some cases followed by the English term in parentheses. The Swedish translation of the Cape Town Convention

The translation found in Appendix 2 is the translation found in Government Bill 2015/16:12. To be sure of the correct wording, please refer to the texts in one of the original languages.

## 3 Background

### 3.1 Introduction

Since the early 1990s, rail travel in Sweden has doubled. Infrastructure expansion and investments in new transport systems have been crucial to this development. However, maintenance and new investments have not kept pace. In spring 2014, the Government adopted the National Transport System Plan 2014–2025. This development highlights the great need for sustainable, fast and comfortable transport such as rail. The existence of effective ways of financing rail vehicles is therefore of great importance for the implementation of this plan.

The Cape Town Convention provides substantive provisions on the financing of movable property, known as *asset-based financing*. Different types of movable property – aircraft objects, railway rolling stock and space equipment – are regulated in the three associated protocols.<sup>1</sup> The Railway Protocol specifies what applies when security rights exist in railway rolling stock. The main purpose of the Cape Town Convention and the Railway Protocol is to provide clear and uniform rules for the financing of railway rolling stock in order to increase predictability for financiers, which in turn benefits operators who can thereby obtain better financing terms.

This chapter begins by explaining the terminology that will be used in the report. Section 3.3 briefly describes the deregulation of the Swedish railway system. Section 3.4 discusses how rolling stock is financed in Sweden, and finally, in

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<sup>1</sup> The Aviation Protocol entered into force on 1 March 2006 after being ratified by eight states. The Railway Protocol was signed in 2007 and the Protocol on Space Equipment was signed in 2012. The latter two protocols have not yet entered into force.

Section 3.5 describes the EU's work towards a unified railway system in Europe.

Later chapters describe in more detail the consequences that the provisions of the Convention and the Protocol will have on the railway sector in Sweden.

## 3.2 Terminology

The Railway Protocol applies to rolling stock as described in Article 1.2 of the Protocol. This refers to vehicles that move on fixed railway tracks, or directly on, over or under a guideway. This also includes propulsion systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment details and parts that are installed on or integrated into the vehicles, including all associated data, manuals and registers. Rolling stock is a term that does not normally appear in Swedish legislation or is used in the Swedish railway industry; instead, the term railway vehicle is used.

In Chapter 1, Section 4 of the Railway Act (2004:519), railway vehicle refers to traction vehicles and other rolling stock that can be driven on railway tracks and that consist of one or more subsystems or parts of subsystems. A railway vehicle is defined in EU law as a vehicle that runs on railway lines on its own wheels, with or without traction, consisting of one or more structural and functional subsystems or parts of such subsystems.

The concept of rolling stock as defined in the Protocol also includes underground trains and trams, which are not covered by the concept of railway vehicles under either EU or Swedish law. Instead, these are referred to as rail vehicles. According to the classification made by the Swedish Transport Agency, there are three types of track facilities in Swedish law, namely railways, tramways and metros.

The inquiry uses the terms rolling stock, railway vehicles and railway undertakings in the report in line with the Protocol, which also covers track-bound vehicles other than railway vehicles within the meaning of EU law and companies that work with these.

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<sup>2</sup> Article 2c of Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (recast).

### 3.3 Deregulation

The Swedish rail transport market is now formally open to free competition between all railway companies. Over the years, the right to organise and operate transport in various market segments has been extended to include all types of freight and passenger transport. Competitive tendering has been in place since the 1990s. Freight transport was opened up to competition on 1 January 1996. Publicly procured passenger transport has been competitively procured since the 1990s. The passenger transport market has since undergone gradual deregulation, with the last part of the market being opened up to competition in October 2010.

One of the motives behind the market opening was to provide travellers and transport buyers with a wider range of choices, which would be the result of increased competition in the market. Another motive for opening up passenger transport was to keep pace with developments at EU level. Among other things, Sweden needed to allow commercial international passenger transport by rail with domestic cabotage in accordance with the EU's third railway package from 2010.<sup>3</sup> With the so-called fourth railway package, national passenger transport markets are also being opened up to competition through requirements for competitive tendering for public service contracts on railways and open access for commercial passenger transport on national railway markets, but with the possibility of exemptions from both competitive tendering and open access, see section 3.5.

Together with countries such as the United Kingdom, New Zealand and Estonia, Sweden currently has one of the most deregulated and liberal railway markets. Germany and Denmark also have fully or partially deregulated markets.

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<sup>3</sup> Cabotage is the transport of passengers or goods within a country's borders by a company registered outside that country. On 14 May 2010, new rules on cabotage within the EU were introduced, see Articles 8–10 of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market.

<sup>4</sup> Summary of the study Rail Liberalisation Index 2011, IBM Global Business Service, April 2011.

## **3.4 Financing of rolling railway equipment**

### **3.4.1 Introduction**

Firstly, it should be noted that rolling stock represents considerable economic value. A standard passenger train costs between SEK 80 and 100 million, depending on its size. For a high-speed train, the cost increases to around SEK 250 million. This type of property is also well suited to various forms of financing. The technical life span of a railway vehicle is approximately 30 years.

Ownership and management of railway vehicles (locomotives, railcars, freight cars, passenger cars, but also work vehicles) can take several forms. In many cases, railway companies own and manage their own vehicles. This applies, for example, to most of SJ AB's<sup>5</sup> locomotives and railcars. It also applies to Green Cargo AB's (Green Cargo) locomotives and those of most other freight operators. Furthermore, track contractors and maintenance companies have access to work vehicles, for example.

Furthermore, vehicles are leased from other railway companies or from various rolling stock companies. AB Transitio (Transitio) acts as a rolling stock company for a large proportion of the vehicles (mainly railcars) used in the traffic procured by the regional public transport authorities. The vehicles are then available to the railway company that has the contract to operate the service. Transitio is jointly owned by the regional public transport authorities, but the three largest (Stockholm, Skåne and West Sweden) own the vehicles used in their services themselves, see section 3.4.3. There are also a number of private rolling stock companies for the rental of mainly freight wagons.

Railway companies wishing to establish themselves in the fully commercial passenger transport market have found it difficult to obtain access to completely or reasonably new vehicles at reasonable costs. The reason for this is the lack of interoperability, which makes it difficult to transfer vehicles between different countries, especially in the case of railcars or railcar-like vehicles. Work is underway within the EU to improve interoperability, see section 3.5. In addition, some older railway companies in Europe have limited interest in divesting

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<sup>5</sup> SJ AB was formed in 2001 through the corporatisation and break-up of SJ; the old SJ was divided into several state-owned companies, including SJ AB, Green Cargo and Jernhusen.

vehicles to potential competitors in view of continued market opening within the EU.

The investment requirement for passenger transport is greater than for freight transport, and there are several reasons for this difference; one important explanation is that passenger rail companies must finance their vehicles themselves with their own or borrowed capital, while freight companies can establish themselves in the market with leased vehicles. As an alternative customers in the freight market have the option of owning the vehicles themselves. Vehicle costs are estimated to account for around 15-20 per cent of the total costs of train operations, assuming that the vehicles have a normal depreciation period.

The significant financial commitments involved in purchasing new or "less used" vehicles may have affected the extent of new entrants to the railway market.

### **3.4.2 Bank loans**

One way to finance a railway vehicle is through bank loans, which usually require some form of collateral. The collateral may consist of a transfer of ownership of the vehicle or a mortgage on the company.

One example of a company that finances railway equipment in several European countries through loans is Eurofima. This involves the financing of locomotives, passenger carriages, railcars and freight wagons. The company has its headquarters in Basel, Switzerland. A number of state-owned railway companies formed this company in 1955. The various state-owned railway companies jointly own Eurofima and each have a share in the company. The Swedish state owns two per cent of the company. Eurofima's task is to pledge locomotives and carriages when taking out loans in connection with investments in new locomotives and carriages.

Today, this cooperation covers the railways in the following countries: Belgium, Bosnia and Herzegovina, Bulgaria, Denmark, France, Greece, Italy, Croatia, Luxembourg, Macedonia, Montenegro, the Netherlands, Norway, Portugal, Switzerland, Serbia, Slovakia,

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<sup>6</sup> Christer Persson, A review of railway deregulation, enhanced market control and increased competition, p. 17.

Slovenia, Spain, Sweden, the Czech Republic, Turkey, Germany, Hungary and Austria.

However, Sweden, Germany and France do not take out new loans from Eurofima as they do not want to give state-owned companies such as SJ AB a competitive advantage.<sup>7</sup>

### **3.4.3 Leasing in the railway sector**

Leasing is very common in the railway sector to finance the purchase of rolling stock. There are two main categories of leasing: operating leasing and finance leasing. The division into these categories is primarily an accounting issue and, depending on the accounting principles applied by the company, has an impact on how the leased assets and leasing fees are treated in the lessee's and lessor's income statements and balance sheets. In both cases, the property is owned by the lessor, while the right of use is granted to the lessee through a leasing agreement.

Delivery times for new vehicles are often several years. Through leasing, the operator can rent, for example, a train while waiting for new ones to be delivered. Leasing does not tie up the company's own funds in the same way as a purchase does, and railway companies can rent vehicles for shorter or longer periods through leasing agreements. *Subleasing*, where the lessee subleases the vehicle to another lessee, is common.

#### **Financial leasing**

In its pure form, financial leasing resembles hire purchase in that it is the lessee who essentially bears the risks and enjoys the benefits associated with ownership of the asset, but where the lessee is not intended to become the owner of the asset (for the distinction between purchase and financial leasing with option rights, see below). There are usually three parties involved: the lessee (the train operator), the lessor (a leasing company or other financial institution) and the supplier (often the same as the manufacturer). The lessee chooses the type of rolling stock it wants

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<sup>7</sup> Information from the Ministry of Enterprise and Innovation.

and then enters into an agreement with the lessor for the leasing of this vehicle. The lessor purchases the railway vehicle from the supplier and delivers it to the lessee.

The line between purchase and financial leasing with option rights is not entirely easy to draw. The 1988 leasing inquiry<sup>8</sup> stated that leasing agreements can be reclassified in cases where ownership of the leased object automatically transfers to the lessee or where this can be done at an option price which, at the time the agreement is entered into, deviates to such an extent from the estimated market price at the time of the option that it is obvious that such an option will be exercised.<sup>9</sup>

In the case of financial leasing, the lessee is normally responsible for servicing, maintenance, insurance, etc. during the leasing period. The contract period for financial leasing usually corresponds to the economic life of the object, and the agreement is normally non-terminable. What distinguishes financial leasing from other types of right-of-use agreements is primarily that the lessor, as the financier, enables the lessee to acquire and use the property in return for payment, in principle without any requirement for capital contribution or special security. This payment shall cover all or most of the acquisition cost of the property.<sup>10</sup> In financial leasing, the interest rate is usually variable, which means that the leasing fee changes when the interest rate changes. In the event of seizure or bankruptcy of the user, the lessor has a right of separation.

## Operating leases

In the case of operational leasing, the fee shall be reported as an expense in the lessee's company. However, no asset or liability shall be recognised. Nor does the lessee bear the financial risk for the railway vehicle at the end of the lease period. It is common for service

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<sup>8</sup> Financial leasing of movable property, SOU 1994:120.

<sup>9</sup> See the Leasing Inquiry's final report (SOU 1994:120), section 4.2.3 on the effect of different types of options and p. 119 ff. on the effect of purchase and sale options at very low and very high prices, respectively – only clear cases should give rise to reclassification, as the estimate of the future value of the object may be uncertain, mainly due to the nature of the object, the instability of the current market and the length of the contract period. In dubio, the agreement should therefore be considered a leasing agreement in accordance with its form.

<sup>10</sup> SOU 1994:120, p. 60.

<sup>11</sup> Torgny Hästad, *Property Rights in Movable Property*, sixth edition, p. 151.

of the leased equipment is included in the leasing fee. Most operational leasing agreements run for three to five years.

One example is Transitio, a major player in the financing of passenger transport vehicles in Sweden. The company reports all its leasing agreements in accordance with the rules for operational leasing. Transitio was formed in 1999 as a result of the deregulation that took place in the railway sector at that time. Since 1999, more county councils/regions have become shareholders, each with a 5 per cent stake. Today, 20 of 21 county councils/regions are shareholders in the company.

The company's business concept is to acquire and manage railway vehicles for leasing to its owners and to provide heavy maintenance and so-called high-value components. The aim is to contribute to the development of regional transport for the company's owners and to optimise the cost-effectiveness of railway operations. The company acquires and finances vehicles on behalf of its owners. Acquisition only begins when a binding assignment is in place. The commissioning owner must provide security in the form of a personal guarantee corresponding to the company's total cost and loss exposure for the acquisition. Lease agreements preferably run for 8–10 years. A small number of vehicles are owned by the company, while most are leased from Swedish commercial banks.

### **Sale and lease back**

In a sale and lease back transaction, the train operator sells its railway vehicles – new or older – to a lessor and then immediately leases them back. This procedure is common in both new acquisitions and refinancing. The railway vehicle remains at the disposal of the train operator at all times and never leaves the company's possession. Sale and lease back can be attractive to a train operator for various reasons. It frees up financial resources for the company and can also limit the residual value risk for a railway vehicle. Sale and lease back is also common when phasing out a particular model. Train operators then sell vehicles over a longer period of time and then lease them for as long as they need them. If they had sold all vehicles at the same time, the large supply could have led to lower market prices. Both financial and operational leasing can be used in

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<sup>12</sup> AB Transitio Annual Report 2014, p. 11.

sale and lease back. In these cases, the investor has no property rights protection for their acquisition unless the provisions of the Movable Property Purchase Act have been observed.<sup>13</sup>

### 3.4.4 Public Private Partnership (PPP)

Public-private partnerships (PPPs) are a form of procurement for large infrastructure projects used in a number of countries, partly as a way of creating scope for urgent investments. In PPPs, private companies provide financing for the infrastructure project as part of their commitment. The public client pays an annual fee during the operating period, or alternatively, the private company is granted the right to charge user fees. Public expenditure is spread over the life of the project, placing less strain on the budget and allowing priority projects to be implemented earlier.

PPP comes in many different forms, but essentially it involves cooperation between the public and private sectors, with the private sector providing a public service. The model is based on the public sector procuring a functioning service rather than just a physical facility. The private sector takes overall responsibility for design, financing, construction, operation and maintenance under a long-term commitment, normally lasting 20–30 years. The private sector invests capital at risk in the project and receives compensation during the operating period only when the service is made available for use. The project is usually handed over to the public sector at the end of the contract period without additional payment and to a predetermined standard.<sup>15</sup> The project company often receives compensation from the public sector based primarily on the service being kept available to users, or alternatively in the form of user fees from end users.<sup>16</sup>

The PPP model has been used in a number of countries, including the United Kingdom, Finland and Norway. A variant of PPP procurement was used in the procurement of the Arlanda Line between Stockholm Central Station and Arlanda Airport.

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<sup>13</sup> Håstad, op. cit., p. 151.

<sup>14</sup> Stockholm Chamber of Commerce, Report 2006:4, p. 6 ff.

<sup>15</sup> A st.

<sup>16</sup> A st.

### 3.4.5 State-supported export credits

#### Definition and purpose

State-supported export credits (hereinafter referred to as export credits) are a means for governments to promote domestic manufacturing and exports. Through national export credit agencies, which may be either state agencies or private insurance companies with state mandates, governments offer financing support to foreign buyers. This state support can take the form of either direct lending, refinancing of loans from private institutions, or state guarantees in the form of export credit guarantees<sup>17</sup> and export credit insurance, known as *pure cover*.

The Swedish Export Credit Agency (EKN) is an authority tasked with promoting Swedish exports and the internationalisation and international competitiveness of Swedish companies. AB Svensk Exportkredit (SEK) is a company wholly owned by the state. SEK works to lend money to Swedish export companies and their buyers abroad. SEK also plays an important role as a refinancing agent for credits granted by banks and exporters to foreign buyers of Swedish exports.

In addition to being a way of supporting domestic manufacturing, export credit is also an important form of financing for smaller companies in so-called high-risk countries, usually developing countries. Loans to these companies naturally entail a greater risk for the financier. If financing is available at all for these economically weaker companies, it is often so expensive that it is impractical to use. By acting as a guarantor and supporting the loans, the state also offers these companies an opportunity to finance their purchases of rolling stock. The export credit system can therefore help to strengthen companies in developing countries and give them an opportunity to compete with financially stronger companies.

Since loans with export credits are a way of reducing the risks for financiers, this type of financing has been particularly important during economic downturns, when private financiers are usually less risk-averse.

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<sup>17</sup> State guarantee provided by the Swedish Export Credit Agency (EKN) for payment for exports of goods, construction contracts and consulting services abroad, transfer of inventions, etc. The guarantee is a form of insurance against losses that may arise due to political conditions abroad or non-payment by the debtor.

Support in the form of export credit guarantees may be relevant regardless of the creditworthiness of the buyer, borrower or country. The key point is that the guarantee can help to reduce the capital requirements for the lending company, thereby facilitating financing. This explains the need to support even larger export companies' transactions, which can often be very substantial in scope.

### **The OECD and export credits**

The Organisation for Economic Co-operation and Development (OECD) works, among other things, to promote policies for increased world trade on a multilateral and non-discriminatory basis in accordance with international commitments. As part of this work, since 1963 there has been a special group within the OECD's Directorate for Trade and Agriculture that works with officially supported export credits (ECG). All OECD member countries (including Sweden), with the exception of Chile and Iceland, are members of the ECG. The European Commission also participates in the meetings held by the ECG. The ECG provides a forum for the exchange of information on member states' export credit systems and various international transactions. Representatives of the member states discuss and coordinate within the ECG various national rules on export credits, such as measures against bribery and for sustainable financing, as well as responsibility for environmental impact. The ECG continuously analyses and assesses the export credit systems of the various Member States, including the types of support and products offered, and also monitors the financial performance of the Member States.

In order to prevent distortion of competition and to promote trade on equal terms, the OECD has concluded an agreement on terms and conditions for export credits: "the Arrangement on Officially Supported Export Credits" (hereinafter referred to as "the Arrangement"). This arrangement has been developed by another type of export credit group, namely the Participants. The Commission represents the EU countries, which together constitute a party to The Arrangement. The Commission negotiates after regular coordination and consultation with the EU countries. The Arrangement provides a framework for state aid to exports, with restrictions on how favourable terms Member States may offer to foreign buyers.

The aim is to establish international rules for export credits, where competition is based on the price and quality of the exported goods and not on the financial terms offered. In this way, fair trade is to be maintained. The latest version of the agreement is from October 2015.

### The rail sector understanding (RSU)

In certain sectors, the technical and financial conditions are so specific that separate agreements are required for the use of export credits. To this end, the OECD has developed five different Sector Understandings<sup>19</sup> with specific provisions regarding export credits for each sector. The railway sector is one such sector, with its own agreement entitled "Sector Understanding on Export Credits for Rail Infrastructure" (RSU). The agreement, like The Arrangement as a whole, is a so-called *gentlemen's agreement*, and the RSU constitutes Annex 5 to The Arrangement. The agreement within the railway sector entered into force on 1 January 2014 for a four-year trial period. The parties to the agreement are Australia, Canada, the EU (including all EU Member States), Japan, Korea, New Zealand, Norway, Switzerland and the United States. The export credit agencies in these countries shall support national exports by offering direct loans to foreign buyers for the purchase of goods or services from a country with exports, or by issuing insurance or guarantees to exporters and banks to cover credit risks in their export credit transactions ("insurance"). The RSU regulates the terms and conditions for export credits provided for the purchase of railway infrastructure that is essential for the operation of railway vehicles, such as railway controls (e.g. signalling, etc.), electricity, tracks, rolling stock and related construction works.

<sup>18</sup> The October 2015 Arrangement on Officially Supported Export Credits [TAD/PG(2015)7]. The document is available on the OECD website <http://www.oecd.org>. This version is applicable from 1 July and 17 September 2015 (depending on when the latest amendments entered into force).

<sup>19</sup> According to Chapter 1, paragraph 6 of the Arrangement, this applies to the following areas: 'Ships', 'Nuclear Power Plants', 'Civil Aircraft', 'Renewable Energy, Climate Change Mitigation and Adaptation, and Water Projects' and 'Rail Infrastructure'.

<sup>20</sup> Rail infrastructure assets essential to operating trains, including rail control (e.g. signalling and other rail IT), electrification, tracks, rolling stock, and related construction work.

The purpose of an agreement in the railway sector is to meet the varying needs of public authorities and exporters, in both advanced and emerging economies, while promoting the use of rail as an alternative to road and air transport in order to support greener growth. This will be achieved by increasing the repayment period for these types of export credits from a maximum of 8.5 or 10 years to 12 or 14 years.

The RSU is designed to take into account the relatively long repayment periods involved in financing railway vehicles, etc., compared to other markets, and the increasing use of PPP financing.

### **3.5 A unified railway system within the European Union**

Since the early 1990s, work has been underway within the European Union (EU) to build a unified railway system in Europe. The aim of this work is to increase the efficiency and competitiveness of railways in relation to other modes of transport.

The European rail network is currently quite fragmented. Member States use different safety standards and technical systems. For cross-border rail traffic, for example, safety approvals must be obtained from several national authorities and several different signalling systems must be managed. This makes it complicated and expensive for new railway operators and new technical equipment to enter the railway market. To overcome these obstacles, the EU has presented a number of regulatory packages, known as the railway packages. The packages consist of a number of directives aimed at harmonising the rules of the various Member States. To date, the EU has adopted three different railway packages. The first railway package was incorporated into Swedish law through, among other things, the new Railway Act and Railway Ordinance, which came into force on 1 July 2004. The second railway package was incorporated through amendments to the Railway Act and the third railway package through, among other things, the Railway Ordinance, which came into force on 1 July 2007.

### 3.5.1 The national vehicle register ( )

Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (the Interoperability Directive) is a recast and consolidation of the two previous interoperability directives, one for high-speed trains and one for conventional trains.<sup>21</sup> The Interoperability Directive is part of the third railway package. The new features of this Directive included rules on vehicle authorisations aimed at clarifying and simplifying the authorisation process in order to facilitate the movement of vehicles between different Member States and thereby create better conditions for the establishment of new companies and a better functioning market. According to the Directive, each Member State shall keep a register of railway vehicles authorised on its territory.<sup>22</sup> Articles 32 and 33 stipulate that a vehicle must be marked with its assigned European vehicle number and registered in the national vehicle register.

The purpose of the national vehicle registers is to make it easier for registration authorities to:

- register assigned vehicle numbers and authorisations,
- search for summary information within the EU on a specific vehicle,
- follow up on legal aspects such as obligations and disclosures of a legal nature,
- retrieve information for inspections, particularly those related to safety and maintenance,
- facilitate contact with owners and holders,
- double-check certain safety requirements before issuing a safety certificate, and
- follow up on a specific vehicle.

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<sup>21</sup> Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system. Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system.

<sup>22</sup> Interoperability Directive, Article 33. With regard to EU legislation, there are provisions on marking and registration in Commission Decision 2007/756/EC (specification of the national vehicle register) and in Commission Decision 2012/757/EU (TSI 'Operation and Traffic Management' and amendment to Decision 2007/756/EC).

The provision has been incorporated into Swedish law by stipulating in Chapter 8, Section 8a of the Railway Act that the supervisory authority shall keep a register of railway vehicles. Chapter 2, Section 22 of the same Act stipulates that railway vehicles shall be marked with a European vehicle number, an owner designation and an interoperability designation. The Transport Agency shall assign such a number and such markings to the railway vehicle in connection with the vehicle being approved for use.

There are three categories of railway vehicles that are not subject to the requirement for registration in the national vehicle register, these are:

1. passenger and freight wagons approved in another EEA country or in Switzerland, where no additional approval is required;
2. railway vehicles that are exempt from approval requirements (e.g. certain work vehicles with a maximum speed of less than 20 km/h; these do not require approval from the Transport Agency and are therefore not assigned a vehicle number) and
3. metro carriages and trams.

The vehicle number may be changed if a freight wagon or passenger carriage is rebuilt, but in that case the previous number remains traceable in the register.

The national registers are linked via a common search engine, the European Centralised Virtual Vehicle Register (ECVVR), which allows users to retrieve information from all national vehicle registers. All national vehicle registers have been linked since January 2016.

The Swedish Transport Agency issues permits to operate rail traffic (traffic operations) in relation to underground and tramway operations, [see, for example, the Act (1990:1157) on safety in underground and tramway operations and official regulations in the form of JvSFS 2007:6, TSFS 2012:33 and TSFS 2013:44]. This means that the operator is responsible for maintenance, which in practice means that the operator must keep some form of register of its carriages, but these are not included in the national vehicle register.

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<sup>23</sup> <http://www.era.europa.eu>.

This means that the national vehicle register does not cover all railway vehicles covered by Article I(2) of the Railway Protocol.<sup>24</sup> Due to the fact that the vehicle number in the above-mentioned register can be changed and that certain vehicles are exempt from registration, this register cannot be used to register security rights in rolling railway rolling stock, cf. the international register in Chapter 7.

### **3.5.2 Fourth n the railway package**

There is agreement on a fourth railway package between the European Parliament and the Council of Ministers, but the package has not yet been formally adopted.<sup>25</sup> The aim of the fourth railway package is to remove the remaining obstacles to the creation of a single European railway area. The proposed legislation aims to reform the EU railway sector by promoting competition and innovation in the domestic passenger transport markets. Among other things, the proposals will give train companies throughout the EU equal access to the railway network in all EU countries in order to be able to operate passenger services. This will be achieved either by launching their own commercial services to compete with other operators or by bidding for public procurement contracts for services. The proposals also include safeguards to prevent conflicts of interest and increase transparency in financial flows between infrastructure managers and train operators.

The comprehensive European harmonisation only regulates railway vehicles and does not cover metro cars and trams.

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<sup>24</sup> For a detailed description of which railway vehicles are covered by the Railway Protocol and thus also by the Cape Town Convention, see section 5.3.2.

<sup>25</sup> European Commission, Press release, Rail Transport: Landmark deal will deliver better rail services to passengers, Brussels, 20 April 2016.

## 4 The Cape Town Convention and the Rail Protocol – background and structure

### 4.1 Background

The value of a security interest in certain property depends on its priority in relation to other security interests in the property and on the measures that the security holder can take if the debtor fails to meet its obligations or becomes subject to insolvency proceedings.

Provisions governing property rights and liens differ between legal systems. This creates problems in international transactions, particularly when it comes to property that can move across national borders. International financing agreements often require extensive investigations into which country's substantive provisions govern security rights. Such investigations are both time-consuming and resource-intensive, and yet rarely provide complete certainty for financiers. The difficulty of obtaining an overview and information about the encumbrances on the property in each individual case is also a risk factor. Together, this creates uncertainty that hinders and increases the cost of financing.

In order to reduce the risks involved in financing certain types of movable property and to increase predictability in matters of property rights and liens, work began in the late 1980s within Unidroit to draft a convention on international security rights in *movable* equipment. The aim of this work was to develop and agree on substantive rules for security rights that would be applied by all contracting states. By also creating an international register where these international security rights, regardless of

nationality, financiers would be able to obtain information about any encumbrances on the property.

In 1992, Unidroit appointed various working groups to investigate the possibilities of creating common provisions for security rights in international transactions involving movable property, particularly aircraft, rolling stock and space property. On the initiative of Unidroit, the Rail Working Group (RWG) was formed to assist Unidroit in developing a protocol that supplemented and modified certain rules of the Convention to suit the railway sector in particular. The RWG, which played an important role in the development of both the Convention and the Railway Protocol, is a cross-industry association. The RWG works to promote the ratification of the Railway Protocol and its adoption in a form that will encourage better and more cost-effective financing of private sector investment in railway rolling stock. Its members include Bombardier, Deutsche Bahn, English, Welsh and Scottish Railways, the European Investment Bank, the Intergovernmental Organisation for International Carriage by Rail (OTIF), the International Union of Railways (UIC) and the Association of the European Rail Industry (Unife).

After more than ten years of work and a series of diplomatic negotiations, the Cape Town Convention was signed on 16 November 2001. The Convention was signed by 20 countries and entered into force on 1 March 2006. Since then, a large number of states have acceded to it, including the EU in 2009. By spring 2016, the Convention had been acceded to by 71 states and the EU.

Article 2.3 of the Convention states that it covers three main categories of movable property:

- aircraft hulls, aircraft engines and helicopters,
- rolling stock, and
- space objects.

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<sup>1</sup> See the status of the Convention on the Unidroit website <http://www.unidroit.org>

The three categories are regulated in three different protocols which should be read in conjunction with the Convention.

The Aviation Protocol was signed in Cape Town at the same time as the Convention and is the oldest of the three protocols. In 2013, the Government appointed a committee (the Cape Town Committee, SOU 2014:79) to consider, among other things, whether Sweden should accede to the Cape Town Convention and the Aviation Protocol. The report and the bill (prop. 2015/16:12, Better opportunities for financing aircraft) adopted by the Riksdag in autumn 2015 proposed that Sweden should accede to the Cape Town Convention and the Aircraft Protocol, which Sweden did on 1 April 2016.

In February 2007, the Rail Protocol was signed. The Protocol will only enter into force once four states have ratified it and OTIF has issued a certificate stating that the International Rail Register is in use (see Article XXIII). The Rail Protocol has not yet entered into force because not enough countries have acceded to it. In May 2016, six states (Gabon, Germany, Italy, Luxembourg, Switzerland and the United Kingdom) had signed the Protocol, and Luxembourg and the EU had ratified it.

The third protocol to the Convention concerns space assets and was signed in Berlin in March 2012: "Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Space Assets". This protocol has not yet entered into force either.

According to Article 51 of the Convention, it is possible to extend the scope of the Convention through one or more protocols. Such protocols shall cover objects in any other category of identifiable movable property of significant value, together with related rights, than those categories specified in Article 2(3) of the Convention. There are currently proposals to begin work on a fourth protocol to the Convention, which will cover certain types of movable property in agriculture, construction and mining.

The Convention and the respective protocols should be read as a single instrument. Following accession to the Cape Town Convention on 1 April 2016, Sweden is now in a position to also accede to the Railway Protocol.

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<sup>2</sup> Unidroit, Status-Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007).

<sup>3</sup> See Resolution No. 5 of the diplomatic Conference in Luxembourg, relating to Article 2(3) and Article 51 of the Convention on International Interests in Mobile Equipment.

The Cape Town Convention has been discussed in detail in both SOU 2014:79 and Prop. 2015/16:12. This report will only discuss those parts of the Convention that are relevant to understanding and applying the Railway Protocol.

## 4.2 Purpose

The Cape Town Convention and the associated protocols have been created to increase predictability in financing where certain property constitutes security for a claim. The Convention regulates international security rights that are to be recognised and treated in the same way in all contracting states. Uniform substantive provisions governing the creation, protection, priority and realisation of these security rights increase predictability and reduce the risk of losses in transactions. The idea is that a common and predictable system will provide economic benefits for all parties. The purpose of the Rail Protocol is to modify and supplement the rules of the Convention to suit the rail sector.

The Cape Town Convention and the Rail Protocol aim to achieve the following objectives:<sup>5</sup>

1. To facilitate the acquisition and financing of certain types of valuable movable property by creating an international security right that is recognised in all contracting states.
2. To provide creditors with the means to protect their rights in the event of a breach of contract by the debtor and in the event of the debtor's insolvency, and, in cases where there is evidence of a breach of contract, to enable creditors to take interim measures pending a final decision.
3. Establishing an international register where international security rights can be registered and providing information to third parties about existing security rights in the property. This will enable the creditor's interests to be protected against later registered security rights or unregistered security rights.

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<sup>4</sup> See Government Bill 2015/16:12 and SOU 2014:79.

<sup>5</sup> Roy Goode, *Convention on International Interests In Mobile Equipment and Luxembourg Protocol thereto on Matters Specific to railway rolling stock: Official Commentary*, second edition, Unidroit, 2014, p. 15.

4. To ensure, through the various protocols, that the specific interests of each sector are taken into account.
5. To make potential creditors more inclined to grant credit, increase creditworthiness and thereby reduce borrowing costs. This is particularly true in developing countries, where financiers perceive the protection of security rights to be insufficient in these countries.

The intention has been to make the provisions practical and to reflect the most important international principles in financing through security rights. The Convention also emphasises the importance of party autonomy, i.e. that the contracting parties still have the opportunity to decide on various issues. Importance has also been attached to ensuring that the provisions are clear so that the parties can predict their application and that the scope for different interpretations is limited.

The ambition has not been for the Convention and Protocol to resolve all issues and ambiguities that may arise in connection with financing through security rights. There are still several issues that, according to the Convention, are left to national law to resolve. Which country's provisions are to be applied is determined according to inter

## **4.3 Reading and interpreting the texts**

### **4.3.1 Two texts – one instrument**

The provisions of the Convention cannot be applied independently, but are dependent on the existence of an associated protocol relating to a specific type of movable property. As mentioned earlier, the Convention will not enter into force until there is at least one protocol relating to one of the types of property specified in Article 2(3) of the Convention (Article 49). A State cannot choose to accede to a Protocol without also acceding to the Convention. However, it is possible to first accede to the Convention and then later accede to one of the existing Protocols. But only a few States have made use of this option.

The provisions of the Convention are general in nature for different types of property and are supplemented by the sector-specific provisions in the various protocols. This solution, with two different texts that complement each other, has several advantages. One is that repetitions of the Convention's provisions are avoided, which is particularly important in the case of the protocols on cultural property.

The text of the convention is kept simple and the key provisions of the convention are not weighed down by various technical terms specific to the different sectors. A single convention also ensures a uniform interpretation of the main provisions, and the scope of the convention can be expanded by adding further protocols. Another advantage is that the various sectors have not had to wait for each other, but the protocols have been adopted as they have been completed.

According to Article 6(1) of the Convention, the Convention and the Protocol shall be read together and interpreted as a single instrument. In case of ambiguity or contradiction, the wording of the Protocol shall prevail (Article 6(2)). In order to provide a clearer overview of how the provisions of the Convention and the Railway Protocol interact, the RWG and Unidroit have jointly produced a text: "Unofficial Consolidated Text of the Convention on International Interest in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock". The text is intended as an aid to the application of the provisions of the Convention and the Protocol and is not legally binding.

#### **4.3.2 The official commentary**

The provisions of the Convention and the Protocol are very comprehensive and legally technical. When the Convention was signed, it was decided that an official commentary would be produced in order to make the document more accessible to those who would be applying its provisions in their work. The task of preparing the official commentary on the Convention and the Rail Protocol was given to Professor Sir Roy Goode, who was, among other things, chair of the Unidroit working group that drafted the Convention and who has since been involved in various ways in preparing the final text of the Convention. The first official commentary was published in 2008, and a further edition was published in 2014.

The commentary is not legally binding but constitutes the main source of guidance on how the provisions of the Convention and the Protocol should be applied and interpreted. It is intended for use by, among others, governments and national courts. The work of producing a

commentary is consistent with one of the principles underlying the drafting of both instruments, namely that the provisions should be predictable.

### **4.3.3 Interpretation issues**

Provisions on the interpretation of the Convention are set out in Article 5. Among other things, it stipulates that, in interpreting the Convention, regard shall be had to its objectives as expressed in the preamble to the Convention, its international character and the need to promote uniformity and predictability in its application. The provisions shall be given an independent and universal interpretation, regardless of how the individual State Party has implemented it in national law, known as autonomous interpretation.

## **4.4 The system of declarations of**

A prerequisite for different states with different legal systems to be able to agree on the substantive provisions of the Cape Town Convention and the Protocol was that they could, to a certain extent, determine the applicability of the provisions. It is not possible to make any reservations to the Convention and the Protocol. Instead, both texts have been structured around a system of declarations that the contracting states may make or refrain from making. Certain declarations must be made in connection with accession to the instrument, while others may be made later. Declarations may also be withdrawn by the contracting state. All declarations and withdrawals of declarations under the Protocol shall be notified in writing to the depositary, i.e. Unidroit (Article XXXI).

The choice of declarations affects the rights and obligations of the contracting states. Some declarations are so-called opt-in declarations, which means that a certain provision becomes applicable. These are often provisions that extend the protection of creditors and make proceedings in the event of the debtor's insolvency or breach of contract faster and more efficient. Other provisions in the Convention and the Protocols are so fundamental that a declaration by a country is required for them not to apply, known as opt-out declarations.

An analysis of the various declarations in the Protocol is provided below in Chapter 6.

Certain declarations are specifically designed to minimise the financial risks involved in a transaction and thereby create economic advantages. These declarations primarily concern the creditor's rights in the event of the debtor's insolvency and breach of contract. With regard to the aviation protocol, these declarations have been identified in the OECD's ASU as qualifying declarations. If the state has issued certain qualifying declarations, it is considered to have fulfilled the requirements. The state can then be included on the Cape Town List, which is a list of states that meet the requirements for obtaining a reduction on the minimum premium set by the OECD, i.e. a certain discount on export credits.

As stated above in section 3.4.5, one of the OECD's tasks is to promote international trade by establishing fair and equitable conditions. As the Rail Protocol has not yet entered into force, no similar system has been negotiated. This means that Sweden does not currently need to make any declarations on this basis.

## **4.5 The Cape Town Convention, the Rail Protocol and EU law**

The Cape Town Convention and the protocols are what are known in EU law as mixed agreements. This means that they partly regulate areas of law where EU Member States have transferred their competence to the EU, namely issues of court jurisdiction, issues of choice of law and various insolvency law issues.

The EU acceded to the Convention and the Aviation Protocol in 2009 and to the Rail Protocol in 2014. Through the EU's accession, those parts of the Convention and Protocols where the EU has exclusive competence are binding on the Member States. However, those parts of the agreements where the EU's competence is not exclusive only become binding on the Member States once they themselves have acceded.

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<sup>6</sup> For a more detailed description of the OECD Cape Town List, see Government Bill 2015/16:12.

Under EU law, EU Member States are prevented from making declarations concerning provisions in areas where the EU has exclusive competence.



## 5 Substantive provisions of the Railway Protocol

### 5.1 Outline

This chapter analyses the substantive provisions of the Protocol and what applies in different situations, such as the debtor's insolvency and breach of contract.

The system of declarations that the Contracting States may or may not make is of great importance for the application of the Rail Protocol, and a number of the Protocol's provisions are only applicable if a declaration has been made. The provisions of the Protocol that are affected by declarations will be analysed collectively in Chapter 6. Since the provisions of the Protocol are so dependent on declarations having been made, these will also be described to some extent here.

On 30 December 2015, Sweden deposited its instrument of ratification and declarations to the Cape Town Convention and the Aviation Protocol. The Convention and the Aviation Protocol thus entered into force on 1 April 2016. The impact of the declarations submitted by Sweden in connection with its accession to the Cape Town Convention on the Rail Protocol will be analysed separately in section 6.3.

The analysis in this chapter is based on Professor Sir Roy Goode's official commentary on the Convention and the Protocol.<sup>1</sup> The aim is to provide an overview of the structure of the Protocol and the consequences of the various provisions by giving a detailed account of them. The intention is not to provide a Swedish translation of the commentary; for a complete analysis of

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<sup>1</sup> Goode, R. – Official Commentary on the Convention on International Interests in Mobile Equipment (Cape Town, 2001) and Protocol thereto on Matters specific to Railway Rolling Stock (Luxembourg, 2007). (Second Edition).

the provisions, please refer to the official commentary. There is no official Swedish translation of the Convention or the Railway Protocol. The translations given in the following chapters are those which the inquiry considers to be most consistent with the English terms. The Swedish translation is also consistent with the terminology and translation of the Aviation Protocol.

Chapter III of the Rail Protocol deals with issues relating to the registration procedure. These will be dealt with separately in Chapter 7.

## 5.2 Introduction

The Rail Protocol consists of a total of 34 articles divided into six chapters.

- Chapter I – Scope and general provisions
- Chapter II – Measures in the event of breach of contract, priority and transfers
- Chapter III – Provisions on the registration of international interests in rolling stock
- Chapter IV – Jurisdiction
- Chapter V – Relationship with other treaties
- Chapter VI – Final provisions.

The Railway Protocol adapts the provisions of the Convention on international interests to the financing of railway rolling stock.

As stated earlier, the provisions of the Rail Protocol should be read in conjunction with the rules of the Cape Town Convention. The link between the two instruments is clearly stated in Article II of the Protocol, which states that the Convention and the Protocol shall be referred to as the "*Convention on International Interests in Mobile Equipment as applied to railway rolling stock*". The Convention and the Protocol will be supplemented by regulations from the supervisory authority, see Article 17.2(d) of the Convention and Articles XIV.1 and XV.1 of the Protocol. These regulations may concern the procedure relating to the international register or

temporary suspension of the registry, e.g. due to maintenance, technical problems or security issues.

## **5.3 Scope and general provisions (Chapter I)**

### **5.3.1 Introduction and terminology**

Article I.2 of the Rail Protocol defines five different terms that are more or less specific to the financing of railway rolling stock. These terms are guarantee (Article I.2a), guarantor (Article I.2b), insolvency situation (Article I.2c), State with primary jurisdiction over the insolvency proceedings (Article I.2d) and railway rolling stock (Article I.2e).

The term "*insolvency-related event*" refers here to the commencement of insolvency proceedings or the debtor's announcement of a suspension of payments. It may also refer to an actual suspension of payments in cases where the creditor is prevented from commencing insolvency proceedings against the debtor or from taking action under the Convention, under law or following a government measure (see Article I.2c). In the event of insolvency, the provisions of Article IX shall apply provided that the State with primary jurisdiction over the insolvency proceedings has made a declaration to apply the Article. Primary jurisdiction is held by the Contracting State in which the debtor has its centre of main interests. This refers to the State in which the debtor has its registered office or, if it does not have one, the State in which the company was formed (Article I.2d). If the State with primary jurisdiction has not made a declaration to apply the insolvency provision of the Protocol, national insolvency law applies. A State may also specify in its declaration that the provision shall only apply to certain types of insolvency proceedings.

Rolling stock as defined in Article I.2e is described in more detail in section 5.3.2.

The Parties shall, for the most part, decide for themselves whether or not to apply the provisions of the Protocol (Article III). By written agreement, they may waive the application of Article IX and, in their relations with each other, agree to waive or modify the application of all provisions of the Protocol, except those relating to Articles VII.3 and VII.4. However, such an agreed limitation may only apply to relations between the Parties.

relationship. The right of third parties to invoke the provisions of the Railway Protocol – provided that they are otherwise applicable – is therefore not affected. The only exception is Article IX on measures in the event of insolvency, which may be waived even if it affects the rights of third parties. It is not clear from the wording of the article, but the parties do not have the right to *derogate from or vary* the application of Article IX. A Member State must use one of the options A, B or C; see the use of the word ‘exclude’ in Article III with regard to Article IX. It is also possible to waive the application of the entire article by means of a written agreement.<sup>2</sup>

### 5.3.2 Property covered by the Rail Protocol

The Cape Town Convention and the Rail Protocol apply to rolling stock as defined in Article 1.2e of the Protocol. The definition covers two types of railway vehicles: vehicles that run on fixed railway tracks and vehicles that are guided directly on, over or under a guideway that regulates the exact path of the vehicle: such as a traditional railway track. The latter type of railway vehicle includes monorail trains, maglev trains<sup>5</sup> that hover above the tracks via electromagnetic force, trains that move people between different terminals at airports, funicular railways and other cable cars.<sup>6</sup> However, the guideway must be physically in place, which means that a guidance system (e.g. GPS) that guides a vehicle falls outside the definition.<sup>7</sup>

The two types of railway vehicles mentioned above are covered by Article 1.2e regardless of speed, size, load capacity or whether they are used for the transport of passengers, goods or for shunting. The definition covers these vehicles even if they are not currently running on tracks or guideways for various reasons. The important thing is that finan-

<sup>2</sup> Goode, op. cit., p. 168, and Article III of the Protocol.

<sup>3</sup> Rail Working Group, ‘What equipment is covered by the Luxembourg Protocol?’. However, a film camera rolling on a railway track does not qualify as a vehicle.

<sup>4</sup> A monorail is a track for trains that runs on a single beam instead of two parallel rails. Monorail trains are wider than the track they run on. There are two main types of monorail systems: suspended trains that run suspended below the track, and most systems of the second type that run high above the ground on pillars.

<sup>5</sup> Maglev trains are a modern form of train that uses magnetic forces, maglev technology, as a means of propulsion. Maglev trains are available to a limited extent in Japan, China and Germany.

<sup>6</sup> Goode, op. cit. p. 166.

<sup>7</sup> Rail Working Group, ‘What equipment is covered by the Luxembourg Protocol?’.

at the time of concluding the financing agreement, ensures that the vehicle is technically capable of running on tracks or being guided on, over or under a guideway.

The definition does not cover trolleybuses<sup>8</sup> which, unlike trams, do not run on rails but are powered by connection to overhead lines that do not control the exact movement of the vehicle, nor does it cover vehicles that are '*trucking* vehicles', i.e. vehicle trains that run on roads and consist of a vehicle (lorry) with several trailers (e.g. in Australia).<sup>9</sup>

What constitutes rolling stock for registration purposes under Article I.2e depends on the design of a train and on how easily the carriages can be separated. A tram is assembled in such a way that the entire set of carriages is designed as a single unit, with cable sleeves, etc., running along the tram. It is therefore not possible to divide the tram into shorter sections without considerable effort and work. Therefore, the tram as a whole is a relevant unit for registration purposes. The same applies to trains where adjacent carriages are not only attached to a shared bogie, but are permanently connected so that the train functions as a single unit and should be treated as such for registration purposes. However, in the case of trains consisting of separate carriages where the carriages are mounted on bogies that are easily removable and interchangeable, each carriage shall be considered a distinct registrable unit.

Article I.2e also covers various components, equipment details and parts that are installed on or integrated into the vehicles. The various components may be propulsion systems, which are systems for delivering motive power to a train; an engine that powers a locomotive, an articulated set of carriages or a motor coach. Components also include brakes, an axle (to which rotating wheels are attached), and a pantograph, which is a sliding contact that transfers traction current from a contact wire to a trolleybus or to an electric railway, tramway or metro vehicle. The pantographs consist of a contact rail that slides against the contact wire and picks up the current, and a pressure mechanism that presses the contact rail against the contact wire in the dynamic environment in which the vehicle is moving.

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<sup>8</sup> Technically speaking, a trolleybus is essentially a normal bus, where the combustion engine has been replaced by an electric motor.

<sup>9</sup> Goode, *op. cit.* p. 166.

<sup>10</sup> A a p. 167.

Rights in components (including engines) prior to installation or after removal are outside the scope of the Convention as they do not constitute ‘objects’ within the meaning of Article 1u of the Convention, but are instead governed by applicable national law.<sup>11</sup>

### **5.3.3 Sale**

According to the Convention, there is no possibility of registering ordinary sales in the international register. The provisions of the Convention apply to rolling stock as specified in Article II.1 of the Railway Protocol. The Aircraft Protocol and the Protocol relating to space property extend the scope of the registration and priority provisions of the Convention to also cover sales and future sales. Unlike these protocols, Article XVII of the Railway Protocol only allows the registration of notices of sale for information purposes. Questions of priority between different security rights and their associated rights are not affected by the registration of such a notice of sale. In some States, the existence of notices of sale in the international registry may be relevant to questions of priority between different security rights under national law. In practice, creditors may search these registrations to check whether there are any other claimants.<sup>12</sup>

### **5.3.4 Issues of representation (Article IV)**

Article IV enables an agent, trustee or other representative to enter into a security agreement, register the international interest in the manner specified in Article 16(3) of the Convention and invoke the rights and interests under the Convention in its capacity as agent, trustee or other representative. This article reflects the important role that a representative plays in financing involving many parties.

The question of whether a representative has the right to take action under the Protocol on behalf of the creditor is governed by the agreement between them.

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<sup>11</sup> A st.

<sup>12</sup> A a p. 190.

Article IV is intended to simplify administration in acquisitions and financing involving multiple parties.

### **5.3.5 Identification of railway rolling stock in the agreement (Article V)**

The requirements for identifying rolling stock in an agreement on international security rights are not as strict as those for registration in the international registry (Article V.1; cf. Article XIV). The same applies to exemption clauses on immunity.

In an agreement creating an international interest, it is sufficient for the rolling stock to be identified by one of the following four alternative methods:

- a description of the rolling stock as a unit,
- a description identifying the rolling stock by type,
- a declaration that the agreement covers all existing and future rolling stock, or
- a declaration that the agreement covers all existing and future rolling stock, with the exception of specifically designated parts or types.<sup>14</sup>

According to Article V.2, for the purposes of Article 7 of the Convention (which concerns formal requirements), a security right in a future acquisition of rolling stock identified under Article V.1 shall be considered to constitute an international interest. No new transfer document is required if the pledgor, the seller with retention of title or the lessor acquires the right to dispose of the rolling stock already identified under Article V.1. This is to facilitate planned future acquisitions of rolling stock.

Article V.2 thus overrides Article 2.2 of the Convention, which stipulates that the object must be individually identifiable.<sup>15</sup>

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<sup>13</sup> Ibid. p. 399.

<sup>14</sup> Ibid. p. 400.

<sup>15</sup> Ibid. p. 401.

### 5.3.6 Choice of law (Article VI)

The Convention does not contain any provisions on choice of law; instead, the applicable law is determined by the rules of private international law of the State having jurisdiction. The Protocol refers to the applicable law in a number of matters, such as Articles VI, IX and XI.

However, the Protocol allows the parties to agree on which law, in whole or in part, shall apply to their respective rights and obligations (Article VI). This option increases predictability for the parties and also allows them to opt out of mandatory legislation in the country of the court by choosing the law of another state.<sup>16</sup> The article is only applicable if a contracting state has made a declaration under Article XXVII that it should be; in other words, it is a so-called *opt-in* provision. The parties' choice of law must then be respected by all states that have made a declaration under Article XXVII.1.

In Sweden, as in other EU Member States, the choice of law is normally determined in accordance with the provisions of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations), which applies to civil and commercial contractual obligations in the event of conflicts of law. The question of choice of law therefore falls within the competence of the EU. The EU acceded to the Convention in 2009 and to the Protocol in 2014, without making a declaration under Article XXX(1) that Article VI would apply. EU countries are therefore prevented from making such a declaration.<sup>18</sup> The EU's competence and the consequences thereof are further developed in Chapter 6.4.

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<sup>16</sup> Ibid. p. 402 f, which also provides an example of national provisions that cannot be waived by agreement.

<sup>17</sup> Ibid. p. 401.

<sup>18</sup> Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Protocol on matters specific to railway rolling stock to the Convention on International Interests in Mobile Equipment, adopted in Luxembourg on 23 February 2007 (2014/888/EU). Unidroit, Declarations lodged by the European Union under the Luxembourg Protocol at the time of the deposit of its instrument of approval.

## **5.4 Remedies for breach of contract, etc. (Chapter II)**

### **5.4.1 Introduction**

Provisions on measures in the event of breach of contract are set out in Chapter III of the Convention. These are supplemented and modified by Articles VII–XI of the Rail Protocol. Therefore, each subsection begins with a summary of the Convention's rules on breach of contract, followed by a description of how the Rail Protocol supplements and modifies these provisions.

### **5.4.2 Measures in the event of a breach of contract under the Convention**

Measures in the event of default in the Convention are set out in Articles 8–10, 12, 14 and 15. Once a default (see Article 11 of the Convention) has been established, the creditor has the option of taking any of the measures set out in Articles 8–10. The provisions on remedies for breach of contract in the Convention do not apply to security rights that have come into the possession of the security holder for repair, storage, etc. The measures that may be taken depend on the type of agreement on which the international security right is based, which is determined by national law. Different sanctions may therefore apply depending on which country's law is applicable.

Unlike other security holders, a lessor and a seller with retention of title have ownership rights to the object. Applicable measures in the event of breach of contract are therefore regulated separately for both groups of creditors.

A security holder (who is not a lessor or seller with retention of title) has essentially three possible measures to take in the event of a breach of contract by the security provider:

- the security holder may take possession of the pledged object or otherwise take control of it,
- the chargee has the right to sell or lease the pledged object, and
- the chargee may appropriate any income or proceeds arising from the administration or use of the object (Article 8).

Whether or not the application of Article 8 requires a court decision depends on the declaration made by the Contracting State under Article 54(2) (see section 6.3 for the declarations made by Sweden upon accession to the Convention).

In order for the security holder to be able to take any of the measures, the person who provided the security must at some point have consented to this, e.g. in a pledge agreement. Otherwise, the security holder may request that a court decide that one of the measures may be taken.

To protect the debtor, the Convention stipulates that measures must be taken in a commercially reasonable manner (Article 8.3, cf. Article VII of the Protocol). Article 8 also contains other protections for the debtor that cannot be waived by agreement (cf. Article 15). Among other things, it stipulates that any surplus resulting from measures taken by the chargee under the Convention shall accrue to the debtor (known as the prohibition of forfeiture of the charge, *lex commissoria*).

Another measure that a chargee may use is redemption, i.e. the transfer of ownership of the pledged property to the chargee (Article 9). This requires an agreement with the person who provided the security and other interested parties or a court decision. In most cases, even after a breach of contract, the person who provided the security is entitled to have the pledge returned if the secured amount has been paid (Article 9.4). This provision is also mandatory for the protection of the debtor.

In the case of a breach of a leasing agreement or a contract of sale with retention of title, the creditor has the right to terminate the agreement and repossess the object (Article 10). The creditor may choose between applying to the court for a decision on these measures or taking them on his own initiative with the debtor's consent.

However, at the commencement of insolvency proceedings, the possibilities for a lessor or seller with a retention of title to repossess its property on the grounds of breach of contract may be affected by national law. It will then be crucial whether the State in which the debtor is located has made a declaration to apply option A in Article IX of the Protocol or not. If such a declaration has been made, national insolvency law cannot prevent the property from being removed from the estate (see Chapter 6).

In addition to the measures listed above, the parties may agree on other measures that the creditor may take and that are possible under the applicable law (Article 12). The only limitation is the mandatory provisions set out in Article 15.

As a general rule, the measures specified in the Convention shall be taken in accordance with the procedural rules applicable in the State where the measures are to be taken (Article 14).

#### **5.4.3 Measures in the event of a breach of contract under the Rail Protocol (Articles VII-XI)**

The application of the provisions of Chapter II of the Protocol depends to a large extent on the declarations made by the individual Contracting States. As mentioned above, the possibility for the creditor to take action in the event of a breach of contract by the debtor is of great importance for the Convention and the Protocol to have the desired effect, namely to increase predictability and reduce the creditor's risk exposure.

According to the official commentary, Articles VII–IX should be read together.

#### **Export**

It follows from Article VII.1 that, in addition to the measures specified in Chapter III of the Convention, a creditor may have the rolling stock exported and removed from the territory in which it is located. All types of creditors under the Convention, i.e. security holders, sellers with retention of title and lessors, may take both measures. Under Article 13 of the Convention, the creditor may export and remove the rolling stock from the country before a final decision has been made in the matter.

However, the measures in the Protocol are only available if the Contracting State where the rolling stock is located has made a declaration to apply Article VIII – or at least the sixth paragraph of that Article. In order for the creditor to be able to export the railway vehicle, in addition to a declaration as above, the following is also required.

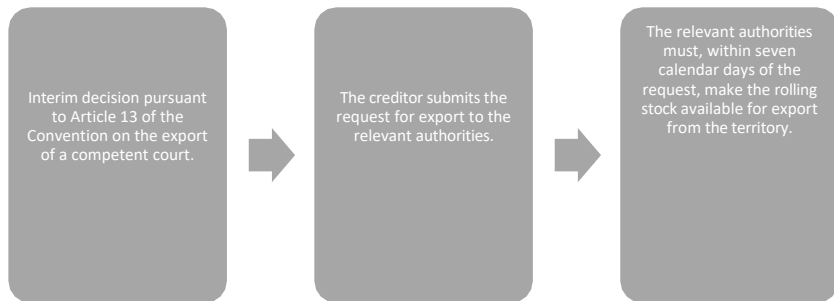
- the debtor has at some point consented to it,

- that there has indeed been a breach of contract on the part of the debtor in accordance with Article 11 of the Convention, and
- that all holders of registered security interests with higher priority than the creditor have consented in writing to the action being taken (Article VII.2). However, the creditor is not required to obtain consent from holders of non-registrable legal rights and security interests covered by Article 39 of the Convention.

If the above conditions are met, there are two ways for the creditor to implement the measures provided for in the Protocol. The above requirements apply regardless of which of the following options the creditor chooses for exporting and moving the rolling stock.

The first way is through an interim court order under Article VIII.6. The sequence of events is then as shown in Figure 5.1.<sup>19</sup>

**Figure 5.1      Export with a court decision (Article VIII(6))**



Laws and regulations relating to railway safety matters may not be disregarded on the basis of a procedure under Article VIII.2 and 6 (see Article VIII.7).

The second option available to the creditor is export without a court order.

<sup>19</sup> Cf. Goode, *op. cit.* p. 174 f.

### **Export without a court order (Article VII.6)**

A chargee who intends to export railway rolling stock without a court order shall, within a reasonable time, inform the debtor and other interested persons in writing (see Article 1m of the Convention).

These requirements do not apply to a creditor who chooses to take legal action, as the court may, under Article 13.3, require that the persons concerned be notified of the application.

Article VII.6 applies only to security holders and is similar to the provision in Article 8.4 of the Convention, which refers to a security holder who is to sell or lease the object. A lessor and a seller with a retention of title are not affected by these requirements, nor are they affected by the conditions in Article 8.3 of the Convention (that measures must be taken in a commercially reasonable manner). The reason for this is that a lessor and a seller with retention of title, unlike other security right holders, have ownership of the object. They can therefore assert the right to control their own property.

The provision in Article 8(3) of the Convention that the measures specified therein shall be taken in a commercially reasonable manner is replaced, in the case of rolling stock, by Article VII(3) and is also extended to cover all available measures.<sup>20</sup> This provision is binding on the parties.

### **5.4.4 Amendment of the provisions on provisional measures (Article VIII)**

In addition to the addition concerning interim proceedings involving the export and movement of railway rolling stock, Article VIII contains other modifications to the provisions of Article 13 of the Convention concerning interim measures. As previously stated, the provisions of Article VIII are only applicable if a Contracting State has made a declaration to that effect; see section 6.4.3 on the inquiry's proposal in this regard. In such a declaration, the State specifies how many working days are meant by the term "promptly" in Article 13.1 of the Convention. According to Article VIII.3, a point (e) concerning sale shall be added to the provisional measures listed in Article 13.1 of the Convention

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<sup>20</sup> A a p. 177.

and distribution of the proceeds from the sale. However, an interim decision to that effect requires that the debtor and the creditor have expressly agreed that the court may decide on the sale and distribution of the proceeds thereof. Such an agreement may be made at any time.

The parties may also agree, under Article VIII.5, that the court shall *not* require the creditor to provide security for its interim claim under Article 13.2 of the Convention. This provision on the provision of security is otherwise mandatory under Article 15 of the Convention. An agreement that the creditor shall not be required to provide security does not deprive the debtor of the possibility of claiming compensation from the creditor if the latter fails to fulfil its obligations.<sup>21</sup>

#### **5.4.5 Measures in the event of insolvency**

##### **Treatment of international security rights in the event of the debtor's insolvency under the Convention (Article 30)**

As a general rule, an international security interest may be enforced in insolvency proceedings against the debtor, provided that the security interest was registered in accordance with the Convention before the commencement of the insolvency proceedings (Article 30.1). Under the Convention, insolvency proceedings include bankruptcy, liquidation and other judicial or administrative proceedings in which the debtor's assets and business are controlled or supervised by a court for the purpose of reconstruction or liquidation. Interim proceedings are also covered.

The right of separation or priority of an international interest registered in the international registry cannot be set aside by national law. For example, if a Contracting State requires that a security interest of a certain type must be registered in a national registry in order to be recognised in insolvency proceedings, such a provision shall have no effect if the Convention applies. However, this presupposes that the international security interest was registered in the international registry before the commencement of the insolvency proceedings. The date on which the insolvency proceedings are deemed to have commenced is determined by the applicable law. If

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<sup>21</sup> A a p. 409.

the Contracting State has made declarations under Articles 40 and 50(2), security rights other than international interests may also be protected in the debtor's insolvency proceedings.<sup>22</sup>

If an international interest confers priority or a right of separation under national law (which is applicable under private international law), it is protected in the debtor's bankruptcy even if it has not been registered in the international registry (Article 30(2)). Article 30 therefore does not affect the enforceability of an international interest if it is enforceable under the applicable national law without being registered.

The provisions of the Convention on insolvency do not affect the application of national provisions on recovery in bankruptcy or procedural rules on priority rights to such property as the bankruptcy administrator (or equivalent) controls or supervises (Article 30.3). An example of the latter would be the main rule that attachment may not take place after a decision on bankruptcy or the commencement of corporate restructuring has been announced (see Chapter 3, Section 7 of the Bankruptcy Act [1987:672] and Chapter 2, Section 17 of the Corporate Restructuring Act).

### **Measures in the event of insolvency under the Railway Protocol (Article IX)**

There are special provisions for property covered by the Railway Protocol in the event of insolvency.

Article IX on the rights of creditors in the event of the debtor's insolvency is central to the application of the Protocol and is the single article with the greatest economic significance. The provisions of insolvency law differ between the various contracting states, but this article creates a special regulation of insolvency issues for rolling stock.

The provisions on insolvency measures are consistent with Article XI of the Aircraft Protocol, but with a third option, referred to as C. This option contains the basic rights of the creditor but gives the insolvency administrator/debtor the right to turn

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<sup>22</sup> Sweden has made a declaration to Article 40 of the Convention, which means that even seizure is covered by the security rights registered in the international register shall be protected in the debtor's bankruptcy.

to the court and request a stay of the creditor's ability to repossess the rolling stock, see below. When Article XI of the Aircraft Protocol was being drafted, it was considered so important that a special group, the Insolvency Working Group, consisting of experts in insolvency law from different legal systems, was tasked with this. The insolvency provisions in the Aircraft Protocol served as a model for the drafting of Article IX of the Railway Protocol. The purpose of the provisions in Article IX is to protect the rights of creditors in an effective and predictable manner when the debtor becomes subject to *insolvency* proceedings or if an insolvency-related event occurs.

The provisions of *Article IX* are intended to ensure that creditors are not disadvantaged by the debtor's *insolvency*.

Article IX of the Rail Protocol modifies Article 30.3 of the Convention. The term "insolvency proceedings" has the same meaning as in the Convention, namely bankruptcy, liquidation or other judicial or administrative proceedings, including provisional ones, where the debtor's assets and business are controlled or supervised by a court for the purpose of reconstruction or liquidation (Article 1.1 of the Convention).

Article IX applies only to the State with primary jurisdiction over insolvency proceedings that has made a declaration under Article XXVII.3 (see section 6.4.3 for the Commission's proposal in this regard). The State with primary jurisdiction over insolvency proceedings refers to the Contracting State where the debtor has its centre of main interests and its registered office or seat, or, in the absence thereof, the State where the company is incorporated (see Article I.2).

If that State has not made a declaration that Article IX shall apply, national insolvency law will apply. A State may also choose in its declaration that Article IX shall apply only to certain types of insolvency proceedings.

The protection afforded to creditors under the insolvency provisions of Article IX means that creditors must be compensated by the debtor or insolvency administrator within a certain period of time, failing which the object in which the security interest is held will be transferred to the creditor.

Three different options are set out in Article IX, and a declaration that the article is to be applied must also specify which of the three options is to be applied: A, B or C. Option A sets out clear rules on time limits and the transfer of the railway vehicle to the creditor. Options B and C are based to a greater extent on flexibility and freedom of action. A State may also choose to apply one of the

options to apply to certain types of insolvency proceedings and the other option to other types.

The provisions of Article IX have been added primarily in the interests of the creditor, and if the parties agree, they may, despite the State having made a declaration that the article shall apply, agree to exclude its application. Exclusion means that the parties may choose not to apply the article at all. They cannot therefore decide that the article should be applied in a different way or that the other option should be chosen; it is either one or the other.<sup>24</sup>

### **Alternative A**

Option A stipulates that when an insolvency situation arises, the insolvency administrator or debtor must hand over the rolling stock/rolling stock to the creditor, either when the waiting period specified by the State in its declaration has expired or at the time when the creditor would have been entitled to take possession of the rolling stock if this Article did not apply (Article IX.A.3). Alternative A presupposes that the creditor has an international interest that can be enforced in the insolvency proceedings, either because it was registered in the international registry before the commencement of the insolvency proceedings or because it otherwise has priority under national law (see Article 30.1 and 2 of the Convention).

As long as the creditor has not been able to take possession of the object in accordance with paragraph 3, the insolvency administrator or the debtor shall take measures to preserve the rolling stock and maintain its value in accordance with the agreement (Article IX.A.5a). Such duty of care may involve using the rolling stock in accordance with agreements made in order to preserve and maintain its value (Article IX.A.6). The duty of care ceases as soon as the creditor has been able to take possession of the rolling stock. Pending taking possession of the object, the creditor may also request the use of other interim measures available under applicable law (Article IX.A.5b). The applicable law is, as a general rule, the law of the court, unless the parties have agreed otherwise.

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<sup>23</sup> Goode, *op. cit.* p. 416.

<sup>24</sup> *Ibid.* p. 417.

If the debtor, by the date specified in Article IX.A.3 has cured all breaches of the agreement other than those that led to the commencement of insolvency proceedings and has undertaken to fulfil all future obligations under the agreement, the debtor or the insolvency administrator may retain possession of the rolling stock (Article IX.A.7).

The Swedish rules on the effect of a decision on corporate restructuring on agreements entered into by the debtor are found in Chapter 2, Section 20 of the Corporate Restructuring Act (1996:764). It states, among other things, that if the debtor's counterparty, prior to the decision on corporate restructuring, has obtained the right to terminate a contract due to actual or anticipated delay in payment or other performance but does not do so, the right to termination shall lapse if the debtor, with the consent of the reconstructor, requests within a reasonable time that the contract be performed. If a contract is to be performed and the time for the counterparty's performance has arrived, the debtor shall, at the counterparty's request, perform its corresponding obligations or, if a deferral has been granted for certain obligations, provide security for them. If the time for the counterparty's performance has *not* yet arrived, the counterparty shall be entitled to obtain security for the debtor's future performance to the extent that this is necessary for special reasons to protect him against loss. There is therefore no equivalent in Swedish law to the provision in the Protocol that the debtor must both remedy the breach of contract *and* undertake to fulfil all future obligations under the contract.

All measures referred to in Article IX concerning actions in the event of default, i.e. measures under Chapter III of the Convention and the possibility of export, shall be made available by the competent administrative authorities within seven calendar days of the date on which the creditor has notified the authority that the creditor is entitled to take the measures. The competent authorities shall promptly offer the creditor cooperation and assistance in implementing the measures in accordance with the laws and regulations applicable to railway security (Article IX.A.8).

Option A limits the applicability of national insolvency law by stipulating that no action prescribed under the Convention or the Protocol may be prevented or delayed after the time specified in paragraph 3 (see Article IX.A.9). Nor may any of the debtor's obligations under the agreement be modified without the consent of the creditor (Article IX.A.10).

The purpose of Alternative A is to create clear and predictable rules that cannot be affected by national provisions. If a Contracting State has declared that Alternative A shall apply and the conditions for this are met, a court in that Contracting State cannot prevent measures under the Protocol from being taken in respect of a security right in rolling stock or change the terms of the agreement without the consent of the creditor. Similarly, any national provisions stipulating that no action may be taken during, for example, a restructuring of the company, shall not be valid once the waiting period has expired.<sup>25</sup> The provision in Article 30.3b of the Convention that national procedural rules on priority rights to the object shall apply is therefore not applicable.

### Option B

When an insolvency situation arises, under option B, the insolvency administrator or the debtor shall, at the request of the creditor, notify the creditor within a certain period of time whether the debtor intends to cure all breaches of contract and undertake to fulfil all future obligations under the agreement giving rise to the security interest. Alternatively, under the same conditions, the insolvency administrator or the debtor shall notify the creditor whether the creditor may take possession of the rolling stock (Article IX.B.3). Such a takeover shall then take place in accordance with the rules of applicable national law, which may be the law of the country of the court or the law agreed upon by the parties. The time limit within which the debtor must notify the creditor shall be specified in the State's declaration that alternative B shall apply. Unlike under option A, the debtor or insolvency administrator is not required to give notice until the creditor requests it. Nor does the time limit specified by the State in its declaration begin to run until the debtor or insolvency administrator has received a request from the creditor.

Option B does not prevent the court from requiring, under applicable law, that additional measures be taken or that additional security be provided (Article IX.B.4).

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<sup>25</sup> A a p. 419.

Unlike option A, the application of option B requires the creditor to prove its claim and show that the international security interest has been registered (Article IX.B.5). The reason why there is no similar provision in option A is that option B involves the national court, and it is to this court that the evidence must be presented. The requirement that the creditor must prove that the international interest is registered means that a creditor cannot invoke the provisions of Alternative B without registering its international interest in the international registry. If the debtor or insolvency administrator fails to notify the creditor as provided for in paragraph 3, or if the creditor is unable to repossess the rolling stock despite the debtor or insolvency administrator having promised to do so, the national court may authorise the creditor to take possession of the rolling stock and may also attach to such possession any conditions it considers necessary. The national court may be deemed to have the same power to take measures if the debtor or the insolvency administrator has undertaken to remedy all breaches of contract and to fulfil all future obligations under the contract, but fails to do so. This means that without a court order or the consent of the debtor, the creditor may not take over the rolling stock.

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As long as a case is pending in a national court concerning a claim related to an international security interest, the rolling stock may not be sold (Article IX.B.7).

### Option C

Like Alternative A, Alternative C requires that, when an insolvency situation arises, the insolvency administrator or the debtor must, within the remedy period<sup>27</sup>, cure all breaches of the agreement on which the security interest is based. The debtor may instead offer the creditor to take over the rolling stock (Article IX.C.2).

One of the differences between these two options is when the remedy period/time limit should start to run. According to Article IX.C.15, the remedy period

<sup>26</sup> A a p. 420.

<sup>27</sup> See Article IX.C.15 for the meaning of a period of action. In alternative A, Article IX.A.4 refers to this period of action as a time limit.

period for option C should commence on the date on which the insolvency situation arose and apply for the period specified by the State in its declaration. The deadline in option A, on the other hand, commences when the debtor or insolvency administrator receives a request from the creditor and applies for the period specified by the State in its declaration.

During the action period, the debtor shall continue to fulfil its obligations to the creditor, such as payments under the agreement.<sup>28</sup>

The difference between options B and C is that, before the end of the action period, the insolvency administrator or, depending on the circumstances, the debtor may apply to the court for a deferral with the obligation to allow the creditor to take possession of the rolling stock. The deferral period shall commence when the action period expires and shall end at the latest when the agreement or an extension thereof expires. Deferral shall be granted on terms deemed reasonable by the court (IX.C.4). Instead of the creditor having the opportunity to apply for repossession of the rolling stock as specified in Article IX.B.5, the insolvency administrator himself or, depending on the circumstances, the debtor may apply to the court for a deferral with the obligation to give the creditor the opportunity to take possession of the rolling stock.<sup>29</sup>

If a deferral is requested, the application for this must be made during the action period or thereafter. A deferral may be granted for a period beginning when the action period expires and ending no later than when the agreement or any extension thereof expires.<sup>30</sup> If the court grants the insolvency administrator/debtor a deferral, all amounts due to the creditor during the deferral period shall be paid from the bankruptcy estate or by the debtor when they fall due. The creditor shall be entitled to payment of these amounts before other creditors. The insolvency administrator or the debtor shall fulfil all obligations arising during the deferral period.

The court, which is not obliged to give a decision on the amounts due to the creditor (which the debtor still owes) before the deferral period, has the option of making such a decision as a condition for granting deferral. In fact, there appears to be no obstacle to the court requiring

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<sup>28</sup> Goode, *op. cit.* p. 421.

<sup>29</sup> A *st.*

<sup>30</sup> Art. IX.C.4.

that all breaches of contract are remedied (except for the commencement of insolvency proceedings) as a condition for granting a moratorium.

#### **5.4.6 Assistance in insolvency (Article X)**

Article X requires national courts to cooperate as far as possible with foreign courts and insolvency practitioners in insolvency proceedings.

The article is an *opt-in* provision and requires the contracting state to have made a declaration under Article XXVII.1 that the provision shall apply. Once this has been done, foreign courts and insolvency practitioners applying Article IX may require the greatest possible cooperation from the courts of the contracting state that has made the declaration.

#### **5.4.7 Provisions concerning the debtor (Article XI)**

Article XI regulates the persons to whom the debtor has the right of actual possession and use of the rolling stock. Unless there has been a breach of contract under Article 11 of the Convention, the debtor is protected against interference by the creditor and holders of all security rights in the object from which the debtor is free under Article 29.4 of the Convention.

### **5.5 Jurisdiction (Chapter IV)**

As a general rule, the parties themselves may agree on which state's courts shall have jurisdiction to examine applications based on the Convention (Article 42). In the Convention, "court" means a national court or an administrative tribunal or arbitral tribunal established by a Contracting State. However, privately appointed arbitral tribunals are not covered.

The Convention is not intended to affect the national procedural rules of the Contracting States, unless otherwise provided in the Convention. One consequence of this is that the parties cannot depart from fundamental principles of the order of instances. The parties may therefore

agree that an action shall be brought before a court of appeal when the district court is the court of first instance (cf. Chapter 10, Section 16 of the Code of Judicial Procedure).

The state agreed upon by the parties must be a state that has acceded to the Convention. Unless otherwise agreed, such international jurisdiction shall be exclusive, i.e. it shall exclude the courts of other States. The agreement on jurisdiction regulates the relationship between the parties and does not affect the jurisdiction of a court in hearing a dispute between a party to the agreement and a third party. The provisions apply even if national law provides otherwise.

A general statement that all issues arising from the contract shall be examined by the courts of a particular country is sufficient. However, it is a prerequisite that the agreement on jurisdiction is in writing and meets any formal requirements that may be imposed by the national law of the state in which the parties have been given jurisdiction (Article 42.2).

If the parties have not agreed on jurisdiction, the question of which court has jurisdiction shall be answered with the help of private international law provisions.

The main rule that the parties' choice of jurisdiction must be respected has two exceptions, in which case the courts of other Contracting States also have jurisdiction.

The first exception applies to the examination of a request for provisional measures (see Article 13). In such cases, the courts of the Contracting State where the object is located also have jurisdiction (Article 43). If the application for interim measures concerns a request by the creditor to lease the object, the courts of the State where the debtor is located have jurisdiction. The second exception concerns claims against the registry. Only the courts where this body has its headquarters have jurisdiction to hear an action for damages or to decide on measures against the body (Article 44).

Article XVIII of the Protocol extends jurisdiction to rolling stock. In such cases, the courts of the Contracting State where the object is located also have jurisdiction and the right to issue interim orders under Article 13 of the Convention.

A significant proportion of rolling stock is state-owned, and in some countries it is consistent with the rules on state sovereignty that such companies may invoke immunity. This may apply to jurisdiction and/or measures under the Convention and the Protocol. Article XVIII provides that a waiver of immunity

is valid, provided that the agreement is in writing and clearly identifies the rolling stock in accordance with Article V.1.<sup>31</sup>

## **5.6 Relationship to other conventions (Chapter V)**

### **5.6.1 The Leasing Convention (Article XIX)**

The 1988 Convention on International Financial Leasing (hereinafter referred to as the Leasing Convention) regulates the relationship between the parties to an international financial leasing agreement, such as lessors, lessees and manufacturers. To a certain extent, it also regulates what applies in the event of the lessee's bankruptcy. Article XIX gives the Cape Town Convention precedence over the Leasing Convention insofar as it applies to rolling stock.

Sweden has not acceded to the Leasing Convention.

### **5.6.2 COTIF (Article XX)**

The Convention concerning International Carriage by Rail (COTIF) regulates international rail transport. COTIF has been acceded to by both the EU and the vast majority of European states. Sweden acceded to the Convention concerning International Carriage by Rail (COTIF 1999), as revised by the 1999 Protocol, on 12 June 2015. COTIF 1999 was drawn up by OTIF, the intergovernmental organisation for international rail transport, which mainly governs the regulation of international rail transport for passengers and goods in Europe, North Africa and the Middle East.

OTIF, as the secretariat of the Supervisory Authority, is responsible for assisting the Supervisory Authority (Article XII.6) and for certifying that the International Registry is fully operational and depositing a certificate confirming this (this is a condition for the Protocol to enter into force, see Article XXIII).<sup>32</sup> To the extent that the exercise of these functions would be incompatible with COTIF, Article XX of the Cape Town Convention takes precedence over COTIF.

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<sup>31</sup> Goode, op. cit. p. 205.

<sup>32</sup> See also section 7.2.1.

## 5.7 Final provisions (Chapter VI)

The final chapter of the Protocol contains various formal provisions on accession and termination. It also contains the fundamental provision that a State may not accede to the Protocol without first acceding to the Convention (Article XXI.5). It also specifies in relation to which articles of the Protocol declarations may be made and to what extent declarations made in relation to the Convention shall also apply to the Protocol (Articles XXVIII and XXIX). These provisions are explained in more detail in Chapter 6.

Article XXVI modifies Article 60 of the Convention with regard to its application to rolling stock; a Contracting State may choose the solution set out in Article XXVI.b of the Protocol by making a declaration under Article 60.1 of the Convention; see section 5.7.1 below for further details.

Unidroit is also the depositary for the Protocol, and all instruments relating to ratification, acceptance, approval and accession shall be deposited with it (Article XXXIV). The depositary is responsible for communicating certain information to the Contracting States (paragraph 2) and to provide the supervisory authority and the registrar with copies of all instruments of ratification, acceptance, approval or accession, notify them of the date of deposit of these instruments, of all declarations, withdrawals and amendments to declarations, and of all notifications of denunciation, specifying the date of such notifications.

### 5.7.1 Article XXVI – Limitation on the applicability of transitional provisions

The Convention contains transitional provisions governing how existing security rights are to be treated when a State accedes to the Convention and the Protocol (Article 60). The main rule is that, upon accession, security rights retain the priority they had under national law. They therefore do not need to be registered in the international registry in order to retain their priority. The consequence of this is that a creditor will need to check whether there are any security rights in the object other than those registered in the international registry. This only applies to security rights that exist when the Convention enters into force in relation to the State. Security rights that arise after

accession and which are not covered by any declaration under Article 39 must be registered in the international registry in order to obtain priority.

The Convention enters into force with respect to rolling stock when the Railway Protocol enters into force, see Article XXIII.

Upon accession to the Convention, the main rule is that the Convention shall not apply to existing rights or security interests, which retain the priority they had under national law before the Convention entered into force in relation to the State (Article 60.1). A security holder therefore does not need to register its international security interest under the provisions of the Convention upon accession. This applies even if the right or security interest could in itself be registered in the international registry and even if, under the Convention, it would have lower priority than a previously registered right.

Only rights or security interests that arose prior to the registration of an international security interest have priority under Article 60. A holder of an international security interest registered in the international registry is thus protected against rights or security interests that arose later.

However, a Contracting State may choose a different solution by making a declaration under Article 60(3) of the Convention, as modified by Article XXVI(b) of the Protocol.

Such a declaration means that holders of existing security rights must register them in the international registry within a certain period of time determined by the state in order to retain their priority under national law. The possibility of making such a declaration has been introduced to enable a State to limit the need for creditors to further check existing security rights in the same object that have not been registered in the international registry. A declaration under Article 60(3) must be made upon accession and cannot subsequently be withdrawn or amended by a new declaration (Articles 57 and 58). Upon accession to the Convention and the Aircraft Protocol, Sweden chose not to make such a declaration.

The inquiry considers that Sweden has no interest in making such a declaration with regard to rolling stock. According to the report, it is, on the contrary, positive that the security rights that already exist retain their priority even after accession, without any further action being required. Since there are no national registers for rolling stock

for the purpose of registering security rights, this should not be a major practical issue either.



## 6 Explanations to the Protocol

### 6.1 Outline

In this chapter, the inquiry explains the meaning of the individual declarations to the Protocol that a contracting state may submit. The EU's accession to the Convention in 2009 and to the Protocol in 2014, as well as the declarations made by Sweden upon accession to the Cape Town Convention, are relevant to the declarations that Sweden may make to the Rail Protocol. These issues are therefore also addressed in this chapter. Several of the declarations have already been touched upon in the previous chapter on the substantive provisions of the Protocol. However, in order to best illustrate the system of declarations, we have chosen to gather everyone here, even if this inevitably leads to some repetition.

The inquiry's view is that before the question of Sweden's possible accession can be answered, we must take a position on what declarations Sweden should make upon accession, as the choice of declarations is decisive for the consequences of accession.

Government Bill 2015/16:12 states that some of the declarations that Sweden can make to the aviation protocol are necessary for Sweden to be included on the OECD's so-called Cape Town List and thus qualify for discounts on export credits. These are primarily declarations regulating procedures in the event of the debtor's insolvency, but also issues concerning choice of law, deregistration and export, and interim measures. With regard to the Rail Protocol, no similar list has yet been drawn up as the Protocol has not entered into force.

The RWG has a list of the declarations contained in the Convention and the Protocol with recommendations to contracting states on which declarations should or should not be made in order to achieve the best economic results from the provisions of the Railway Protocol

provisions.<sup>1</sup> Although there are not yet any selected declarations for the Railway Protocol that could lead to a discount on export credits, there are other economic reasons for Sweden to make certain declarations.

## 6.2 Introduction

As mentioned earlier, the Rail Protocol largely follows the provisions of the Aviation Protocol, and in drafting the Rail Protocol, every effort was made not to deviate from the structure of the Aviation Protocol.

During the work on the Cape Town Convention and the associated protocols, it became apparent that some of the provisions could conflict with various legal principles in the legal systems of certain states. In order to enable as many States as possible to accede to the Convention and the associated protocols, despite the differences that might exist in national legal systems, the possibility was introduced for States to choose whether or not to apply certain articles of the Convention and the protocols. This choice is made in the form of declarations submitted in writing and deposited with Unidroit.

According to Article XXIX of the Protocol, all declarations made under the Convention shall also be deemed to have been made under the Protocol, unless otherwise specified.

Declarations are normally made upon accession to the Protocol, but it is also possible for a Contracting State to make a declaration at any time after the Protocol has entered into force in relation to that State, by notifying the depositary (Article XXX). With the exception of declarations under Articles XXII.2 and XXVII.2 of the Protocol, other declarations are optional.<sup>2</sup> The declaration shall take effect six months after the depositary has received the notification and shall not have effect in relation to rights and interests arising prior to that date.

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<sup>1</sup> Rail Working Group, Declarations Matrix and Economically-Based Recommendations, 28-05-15.

<sup>2</sup> Goode, R. – Official Commentary on the Convention on International Interests in Mobile Equipment (Cape Town, 2001) and Protocol thereto on Matters specific to Railway Rolling Stock (Luxembourg, 2007). (Second Edition), p. 208.

All declarations may be withdrawn at any time by the contracting State. Withdrawal shall take effect only six months after the notification has been received by the depositary (see Article XXXI).

### **6.2.1 Provisions and information concerning the submission of declarations**

Unidroit, in its capacity as depositary, has issued a memorandum setting out the provisions of the Convention and the Protocol to which declarations may be made.<sup>3</sup> Forms for making the various declarations are attached to the memorandum. The Contracting States are not obliged to use these forms when making a declaration, but it is recommended by Unidroit. For some of the declarations, there are alternative forms for the various choices that the Contracting State may make in the declaration. In view of the great importance of the submission of declarations and the linguistic nuances that may exist, the Unidroit Governing Council has decided to recommend that Contracting States submit their declarations in one of Unidroit's working languages, English or French.

The depositary is responsible, among other things, for informing all other Contracting States, the supervisory authority and the registration authority of any declarations made or withdrawn by a Contracting State. Information on declarations made is also available on the Unidroit website.<sup>4</sup> Unidroit also welcomes information from Contracting States on national legislation and how it interacts with the provisions of the Convention and the Protocol. The information is then posted on the Unidroit website with a view to increasing understanding among countries on the application of the Convention and the Protocol.

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<sup>3</sup> UNIDROIT 2009, DC10/DEP Doc. 1, The system of declaration under the Convention on International Interests in Mobile Equipment as applied to Railway Rolling Stock, an explanatory memorandum for the assistance of states and regional economic integration organisations in the completing of declarations.

<sup>4</sup><http://www.unidroit.org/depositary-2007-luxembourg>

**6.2.2 Different types of declarations**

The various declarations that may be made to the Protocol can be divided into five different groups:

- 1. mandatory declarations,
- 2. opt-in declarations (necessary for a particular provision to be applicable),
- 3. opt-out declarations (necessary for a particular provision not to be applicable),
- 4. declarations concerning the contracting state's own laws, and
- 5. declarations concerning territorial areas.

**Declarations to the Protocol**

The provisions concerning the declarations that may be made under the Protocol are set out in Articles XXVII to XXXI.

**Table 6.1                      Declarations to the Protocol**

Type of declaration	Article of the Protocol
Mandatory <sup>5</sup>	Art. XXII.2, XXVII.2
Opt in	Art. VI, VIII, IX and X
Opt out	Art. XXV.4 <sup>6</sup>
Regarding national laws	Articles XIII, XIV, XXIV and XXV
Concerning territorial areas	Art. XXIV

<sup>5</sup> Declarations under Article XXVII.2 may only be made by regional economic integration organisations.  
<sup>6</sup> According to the memorandum from Unidroit, the Rail Protocol does not contain an opt-out declaration, but this is contradicted by the wording of Article XXV.4 and Goode p. 207.

## **6.3 Declarations made by Sweden upon accession to the Cape Town Convention**

As mentioned above, all declarations made to the Convention shall also be deemed to have been made to the Protocol, unless otherwise specified (Article XXIX).

According to the terms of reference of the inquiry, it is not part of our mandate to analyse the significance of the declarations made by Sweden to the Cape Town Convention in relation to the Rail Protocol in the event of accession to the Rail Protocol. However, according to Article 6.1 of the Convention, the Convention and the Protocol shall be read together and interpreted as a single instrument. For the application of the Protocol, the declarations made by Sweden to the Convention are therefore of great importance. A description of these declarations is provided below.

### **6.3.1 Declarations on Articles 39.1 and 39.4 of the Cape Town Convention**

The provisions of the Cape Town Convention on priority ranking mean that registered international security rights have better priority in an object than unregistered security rights. The consequence of accession to the Convention would then be that security rights arising from a provision of national law and not from an agreement, known as legal security rights, would always have lower priority because they cannot be registered in the international register. In order to protect legal security rights which, under national law, have higher priority than the types of security rights covered by the Convention, a Contracting State may make a declaration under Article 39(1)(a). The legal security rights covered by the declaration will then have priority over a registered international security right, even though they cannot be registered in the international registry.

Sweden has submitted a general declaration to Article 39.1a, which means that all categories of legal security rights and rights, even after Swedish accession, take precedence over a registered international security right. The legal security rights referred to are those which, according to current and future provisions in Swedish law

take precedence over a security right of the same type as an international security right.

A prerequisite for the priority of legal security rights is, according to Article 39.3, that the international security right was not registered in the international register when the declaration under Article 39.1a was deposited. In order to protect legal security rights even in relation to already registered international security rights, the contracting state must submit a declaration to Article 39.4. To avoid any loss of rights for holders of such legal security rights that currently have the highest priority, Sweden has submitted a declaration to that article.

Sweden has also made a declaration to Article 39.1b to the effect that nothing in the Convention shall affect the Swedish State's ability to retain an object under Swedish law for payment of services. The same applies in relation to government agencies and organisations and other private actors that provide public services.

### **6.3.2 Explanation of Article 40 of the Cape Town Convention**

Like Article 39, Article 40 aims to protect legal security rights. The difference is that the security rights covered by a declaration under Article 40 must be registered in the international registry in order to obtain priority and that, after registration, they shall be treated as international security rights. A declaration under Article 40 cannot be general in nature; the security rights covered must be specified separately.

Sweden has submitted a declaration to Article 40 which means that a decision by a court or the Enforcement Authority on attachment, payment security or seizure may be registered in the international register if it relates to property covered by the Convention.

### **6.3.3 Declaration on Article 54.2 of the Cape Town Convention**

A State acceding to the Cape Town Convention must submit a declaration to Article 54.2. The declaration shall specify whether a measure available to the creditor under the Convention or the Protocol

and whose enforcement under the provisions of the agreements does not require an application to a court, may be taken only after a decision by a court.

A Swedish declaration that measures may be taken without a court decision, except in cases expressly provided for in the Convention or the Protocol, does not therefore mean that there is a departure from the requirement for a court decision in situations where such a decision is required under Swedish law. The practical significance of such a declaration is that creditors with limited knowledge of Swedish law can rely on the provisions of the Convention and the Protocol without further legal investigation.

Sweden has submitted a declaration to the effect that all measures available to the creditor under any of the agreements, where it is not expressly stated that a court decision is required, may be taken without the involvement of a court.

## **6.4 EU accession to the Cape Town Convention and the Rail Protocol**

### **6.4.1 EU accession and the question of competence**

The Cape Town Convention and the Railway Protocol are what are known in EU law as mixed agreements. This means that they partly regulate areas of law where EU Member States have transferred their competence to the EU. The question of whether a provision in an international agreement falls within the exclusive competence of the EU has, according to the case law of the Court of Justice of the EU, been considered to depend on whether internal EU law may be affected by the international commitment (cf. Article 3(2) of the Treaty on the Functioning of the European Union, TFEU).

With the EU's accession to the Convention in 2009 and the Protocol in 2014, those parts of the Convention and the Protocol where the EU has exclusive competence are binding on the Member States (cf. Article 216(2) TFEU). Those parts of the agreements where the EU's competence is not exclusive become binding on the Member States only when they themselves accede to them.

Under Article 48 of the Cape Town Convention, a regional economic integration organisation, such as the EU, which is constituted by sovereign States and has competence over certain matters governed by the Convention, may sign, accept and approve the Convention or

accede to it. In such cases, the regional organisation shall have the same rights and obligations as a Contracting State, to the extent that the organisation is competent in matters governed by the Convention. A corresponding provision is found in Article XXII of the Railways Protocol. The reason why regional organisations should be able to accede to the Convention and the Rail Protocol is that they may have taken over the competence of their member states to conclude international agreements in certain areas. If the regional organisation does not accede to a convention governing these areas, the member states will be prevented from acceding on their own.

The Council Decision (2014/888/EU) approving the Railway Protocol states that the EU has exclusive competence in certain areas covered by the Protocol. The Protocol affects the Brussels I Regulation (Regulation (EU) No 2015/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and the Insolvency Regulation (Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings) and the Rome I Regulation. In addition, there is Union legislation in areas also regulated by the Rail Protocol, such as the Interoperability Directive.

#### **6.4.2 Declarations made by the EU**

Regional economic integration organisations acceding to the Cape Town Convention and the Rail Protocol are required, under Articles 48(2) and XXII(2) respectively, to make declarations specifying the areas covered by the Convention and the Protocol respectively in which the regional organisation has exclusive competence, i.e. where the competence of the member states has been transferred to the organisation.

Upon accession to the Cape Town Convention and the Aircraft Protocol in 2009 and the Rail Protocol in 2014, the EU submitted a general declaration specifying the areas of the Cape Town Convention and the Rail Protocol in which the EU has taken over the competence of the Member States. It also states that Member States have delegated their competence to the Union in certain areas relating to the Brussels I Regulation

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<sup>7</sup> For further details, see section 3.5.

the Insolvency Regulation and the Rome I Regulation. The general declaration also states that Member States retain their competence with regard to substantive insolvency law provisions. Apart from the aforementioned declaration, the EU has only made one other declaration to the Convention and, apart from Article XXII, no other declarations to the Protocol.

In its declaration on Article 55 of the Cape Town Convention, the EU has stated that in cases where the debtor is domiciled in a Member State and that Member State is bound by the Brussels I Regulation, Articles 13 and 43 of the Convention on the granting of provisional measures shall apply in accordance with Article 31 of the 2000 Brussels I Regulation (Article 35 of the 2012 Brussels I Regulation).

The Annex to Council Decision (2014/888/EU) approving the Rail Protocol refers to the European numbering system for railway vehicles within the EU.<sup>8</sup> It states that the Council considers that the European numbering system is suitable for the identification of railway rolling stock in accordance with Article XIV of the Rail Protocol.

It should be noted that Denmark, due to its special agreement with the EU, is not covered by the EU's declarations if it chooses to accede to the protocol.

### **6.4.3 Restrictions on the ability of EU Member States to make declarations**

Since the Rail Protocol is a so-called mixed agreement, Member States acceding to the Protocol must take EU law into account when deciding which declarations to make. Member States are therefore not permitted to make declarations in areas that fall within the competence of the EU. At a meeting held by Unidroit after the EU's accession to the Cape Town Convention and the Aircraft Protocol, representatives of a number of Member States (including Sweden) agreed that Member States are prevented from making

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<sup>8</sup> See Commission Decision 2006/920/EC of 11 August 2006 concerning the technical specification for interoperability relating to the operation and traffic management subsystem of the trans-European conventional rail system (OJ L 359, 18.12.2006, p. 1), as amended by Commission Decision 2012/757/EU of 14 November 2012 concerning a technical specification for interoperability relating to the 'operation and traffic management' subsystem of the rail system in the European Union and amending Decision 2007/756/EC (OJ L 345, 15.12.2012, p. 1).

Explanations to Articles VIII, X and XI of the Aviation Protocol. In the opinion of the inquiry, it can be assumed that the reasoning is transferable to the corresponding provisions in the Rail Protocol (Articles VI, VII and IX).

## Article VI

**Proposal:** The inquiry proposes that Sweden should *not* submit any declaration on the application of Article VI.

Article VI establishes the parties' freedom to choose the applicable law, a provision that is also found in the Rome I Regulation. Since the matter is regulated by EU law, it falls within the exclusive competence of the EU, and Sweden, like other Member States, is prevented from making a declaration to apply the article. Since EU law has the same content as the Protocol in this respect, it is also not necessary for Member States to amend their national legislation.

## Article VIII

**Proposal:** The inquiry proposes that Sweden should *not* submit a declaration on the application of Article VIII.

Article VIII contains provisions on amending the provisional provisions of the Convention, as described in section 5.4.4. Article VIII is only applicable if the Contracting State has made a declaration under Article XXVII.2 to apply it. For Sweden and other EU Member States, issues concerning jurisdiction and enforcement are also regulated in the Brussels I Regulation. In view of the EU's competence in these matters, the participating Member States agreed at the aforementioned Unidroit meeting that Member States should be prevented from making a declaration to apply the provisional measures in the Convention. As explained in more detail in section 5.4.3 and in Figure 5.1, this requires both a court decision and recognition of that decision in the contracting state. Recognition of court decisions is regulated in the Brussels I Regulation, which means that the issue is covered by EU

competence. However, it was considered that there was no obstacle to amending national legislation so that the result would be the same as if a declaration had been made.

A declaration to apply Article VIII therefore means that the processing time for both national courts and registration authorities is regulated. It is difficult, if not impossible, to predict what this requirement would mean for Swedish courts. There is therefore reason to question whether there is any need to be able to turn to the courts.

## Article IX

**Proposal:** The inquiry proposes that Sweden, which, like other EU Member States, is prevented from making a declaration to apply Article IX, should adapt its national legislation to comply with the provisions of Article IX, alternative A, and set the maximum waiting period for the application of Article IX at 60 days. The form that the adaptation of national legislation will take depends on how the Protocol is incorporated into Swedish law, which is discussed in Chapter 9 of the report.

Article IX, which deals with measures in the event of insolvency, is central to the Railway Protocol. Member States that choose to make a declaration to apply Article IX shall also indicate which of the three options A, B or C shall apply.

The Insolvency Regulation contains various rules relating to insolvency proceedings. The Regulation establishes common rules on which court has jurisdiction to open insolvency proceedings, which law is applicable and how decisions are recognised. The purpose of the Regulation is to prevent debtors from transferring their assets or jurisdiction from one country to another in order to obtain a more favourable legal position.

With regard to insolvency law provisions, the participating Member States at the Unidroit meeting also considered that EU regulations prevent Member States from declaring that they will apply Article XI of the Aviation Protocol, corresponding to Article IX of the Rail Protocol. However, there is nothing to prevent Sweden from amending its national legislation so that

its application leads to the same result as if a declaration to apply one of the three alternatives had been made; compare with what applies to Article VIII.

The question then is which alternative Sweden should adapt its legislation to. In connection with Sweden's accession to the Aviation Protocol, Swedish legislation was adapted to correspond to the conditions in Article XI, Alternative A of the Aviation Protocol. The reasons behind this decision were partly that it was a requirement for inclusion on the OECD Cape Town List and partly that alternative A allows the secured party to quickly recover its security without hindrance from national law.

Unlike the aviation sector, rolling stock is largely financed by public guarantees and other public commitments. This is because railways, including tramways and underground railways, are important parts of society's overall infrastructure and guarantee necessary transport capacity. If we amend our legislation in accordance with Article IX, we should consider whether the chosen option entails a risk of increased disruption to society in the event of economic difficulties for operators in this sector. If an important operator were to go bankrupt, this could mean that essential equipment (locomotives, carriages, etc.) could be repossessed by the creditor without regard to society's need for means of transport.

Under Article XXV, a Contracting State may, by declaration, limit the exercise of measures under Chapter III of the Convention and Articles VII to IX of the Protocol in respect of railway rolling stock used for public purposes in order to avoid disruption of services of general interest. A declaration under Article XXV may be made only if the State concerned has specific rules that exclude, prevent or regulate the implementation of any of the measures set out in Chapter III of the Convention and Articles VII to IX of the Protocol, see section 6.5.5. This article was one of the most controversial during the diplomatic conference in Luxembourg. The outcome of the discussions was a compromise between the interest of States in avoiding disruption to public communications and the interest of citizens in maintaining the economic value of their investments.

Under current law, there are no specific restrictions on the repossession of railway equipment in cases where repossession could cause disruption to important social functions. This may, of course,

There is debate as to whether there should be special handling, but the investigation assesses that the risk of social disruption is not particularly high. For example, underground trains are unlikely to be removed from the underground system in the event of the debtor's bankruptcy. The creditor will instead ensure that the vehicles remain in place and that traffic continues to be operated temporarily by a bankruptcy administrator and subsequently by a new operator. Compared to aeroplanes, railway vehicles are not easy to move and are often adapted to the specific traffic for which they were purchased. A creditor who, in such a situation, wants to move the vehicle to another location to operate other traffic there faces high transaction costs. If the original debtor becomes insolvent, it would probably be easier for the creditor to allow a new operator to continue the traffic. Against this background, the inquiry considers that the risk of social disruption will not be greater as a result of an adaptation to Article IX, whichever alternative the inquiry chooses.

Under option A, the contracting state must specify a waiting period in its declaration. After this period – or at an earlier point in time when the creditor would have access to the object under applicable law – the insolvency administrator or the debtor must, under option A, choose between the following.

- to hand over the rolling stock to the creditor, or
- to remedy all previous breaches of contract and undertake to fulfil all future obligations under the contract; however, the breach of contract that led to insolvency proceedings cannot be remedied.

Unlike option A, repossession under option B is subject to national court proceedings. In accordance with the applicable national law, the court may require the debtor to take additional measures or provide additional security. Furthermore, option B does not set a deadline by which the debtor must surrender the rolling stock.

Option C lacks a clear time limit for both the debtor and the creditor during which they can negotiate whether the property should be returned or remain with the debtor. This option lacks the security for the creditor that the Protocol can provide in order to contribute to increased opportunities for railway undertakings with poorer finances – but with potential – to obtain financing and the opportunity to develop their

operations. For a more detailed description of the various options in Article IX, see section 5.4.5.

The inquiry shares the Government's assessment in Prop. 2015/16:12 that option A offers the most favourable option for creditors, as they can be sure that in the event of insolvency proceedings they will quickly get their property back or be compensated by the debtor or the insolvency administrator. The debtor also has a duty of care with regard to the object during the waiting period, which reduces the risk of loss of value.

The regulation entails certain limited differences in relation to what applies under Swedish law in insolvency proceedings. A bankruptcy estate includes only the debtor's property. With regard to property not owned by the debtor, Swedish law already provides for a right of separation in bankruptcy, i.e. a right for the owner to retrieve their property without competition from other creditors. Under Swedish law, creditors with a right of pledge also have a position in bankruptcy that largely corresponds to that specified in the Protocol. The difference is mainly evident in the unconditional right to assert one's rights within a certain period of time – 60 calendar days.

The difference between Swedish law and the provisions of the Railway Protocol becomes greater in the case of a corporate restructuring. Under the Railway Protocol, the creditor is then given the same right as in bankruptcy to remove their property from the debtor's estate.

Neither the Bankruptcy Act nor the Company Reorganisation Act contains any equivalent to the Protocol's explicit provision that the debtor must both remedy a breach of contract and undertake to fulfil all future obligations under the contract (Article IX, alternative A, p. 7, cf. Chapter 2, Section 20 of the Corporate Reorganisation Act).

In the case of a corporate restructuring, the application of Article IX, Alternative A, also means that property that is of crucial importance to the company's operations may be removed from the estate, something that is otherwise not possible under the Corporate Restructuring Act (cf. Chapter 2, Section 15, first paragraph, item 3).

In Government Bill 2014/2015:12, the Government has stated that insolvency proceedings under the Cape Town Convention and the Aviation Protocol cover both bankruptcy proceedings and corporate reorganisations. Insolvency proceedings have exactly the same meaning under the Railway Protocol. In a corporate reorganisation, this means that security holders or

lessors can recover their security after a decision to initiate reorganisation. The conditions for continuing to operate the company are then, of course, impaired, and it is also questionable whether corporate reorganisations in railway companies are possible at all. The Government stated in Prop. 2014/2015:12 that the risk of such a provision, Article XI, Alternative A of the Aviation Protocol (corresponding to Article IX, Alternative A of the Railway Protocol) hindering reconstructions was limited.

## 6.5 Other explanations to the railway protocol

### 6.5.1 Article X

**Proposal:** The inquiry proposes that Sweden submit a declaration to apply Article X.

Article X concerns cooperation between the courts of different states in insolvency proceedings. Article X.2 requires the courts of a Contracting State where the rolling stock is located to cooperate, in accordance with the law of that Contracting State, as far as possible, with foreign courts and insolvency administrators in the application of the provisions of Article IX. This provision on cooperation shall apply only if the Contracting State has made a declaration to that effect.

In Contracting States that have made a declaration to apply Article X of the Rail Protocol, national courts shall, as far as possible and in accordance with national law, cooperate with foreign courts and insolvency practitioners (or equivalent competent persons) in the application of the Protocol's insolvency law provisions.

In the opinion of the Committee, it is important for the achievement of an effective and legally secure procedure that national courts cooperate across national borders and also with insolvency administrators. The Committee therefore considers that Sweden, in line with its position on the ratification of the Aircraft Protocol, should make a declaration that Article X shall be applicable.

### **6.5.2 Article XIII**

Under Article XIII, a Contracting State may, at any time, by means of a declaration, designate one or more bodies within its territory as contact points (entry points) whose task shall be to transmit information to the International Registry for registration.

A more detailed account of the provisions of the Convention and the Protocol concerning the International Registry is provided in Chapter 7. In light of this, and given that the committee directives specifically state that the inquiry should take a position on whether Sweden should have so-called entry points, the inquiry intends to return to the question of whether Sweden should submit a declaration to Article XIII in that chapter.

### **6.5.3 Article XIV**

According to Article XIV.1, for the purposes of Article 18.1a of the Convention (which concerns conditions and criteria for registration), the regulatory framework shall include conditions for the assignment by the Registrar of identification numbers that enable the unique identification of railway rolling stock. Article XIV.1 provides three possible options for unique identification. This identification number shall

- a) be affixed to the relevant part of the rolling stock,
- b) be linked in the international register to the name of the manufacturer and the identification number of the part concerned, or
- c) be linked in the international register to a national or regional identification number for the part concerned.

The first option is for cases where there is no identifier for specific railway rolling stock, the second is for cases where there is an identification number from the manufacturer, and the third is for cases where there is a national or regional identification number, with or without a manufacturer's identification number.

If an object has a manufacturer's identification number, it is this number that will be sent to the international registry by the person wishing to register a security right.

In cases where the object is not linked to any manufacturer's name and identification number (except where option C applies), it shall

international registry assign a number to be affixed to the object.<sup>9</sup> In this case too, the person wishing to register the security right must provide the international registry with the manufacturer's name and identification number. The internal number at the international registry is then linked to the manufacturer's name and identification number at the time of registration.

Under the third option, the registrar is provided with a national or regional identification number for the object, which in turn assigns the object a number linked to the national or regional number. There is nothing to prevent the use of alphanumeric numbers; a key objective will be to ensure that all identification numbers are and remain unique and cannot be reused.

Under Article XIV.2, a Contracting State may, in applying Article XIV.1, make a declaration specifying the system of national or regional identification numbers to be applied to parts of railway rolling stock subject to an international interest. Such a national or regional identification system shall enable the unique identification of each part of the rolling stock covered by the system.<sup>10</sup> In other words, a declaration shall only be made if there is a national or regional identification system that enables the unique identification of the security interest that Sweden wishes to use for this purpose.

As mentioned earlier in section 6.4.2, the Council Decision approving the Protocol refers to the vehicle numbering system established within the Union by Commission Decision 2006/920/EC (amended on 14 November 2012, 2012/757/EU). It states that the European numbering system (found in the so-called national vehicle register) is suitable for identifying railway rolling stock in accordance with Article XIV of the Railway Protocol.

The numbering system created within the EU, which also applies in Sweden, was established for purposes other than security rights; see section 3.5.1. The system does not enable unique identification of the security right, partly because the numbers can be changed. This occurs, for example, every time a carriage is upgraded. The number obtained from the national vehicle register is not always attached to the security in question.

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<sup>9</sup> According to RWG, work is underway to develop a 20-digit chip system for this purpose.

<sup>10</sup> Goode, *op. cit.* p. 186 ff.

Furthermore, the national vehicle register can only be used if the debtor is located in the relevant Contracting State at the time when the international interest arises. Nor does the European numbering system apply to all railway rolling stock covered by the Protocol.<sup>11</sup> Due to these circumstances, the European numbering system will not meet the requirements of Article XIV(2).

The International Registry and the system of unique identification numbers can be considered the core of the Rail Protocol. Most European countries do not have a comprehensive identification system for railway rolling stock that creditors can use for security rights in railway rolling stock. If Member States were to make an *opt-in* declaration under Article XIV.2 and thus use the European numbering system, the whole purpose of the Protocol could be undermined due to the shortcomings described above. Sweden should therefore not make a declaration under Article XIV.2.

#### 6.5.4 Article XXIV

**Proposal:** The inquiry proposes that Sweden should *not* submit any declaration on Article XXIV.

Article XXIV of the Protocol applies in relation to territorial areas. Only those States are affected that consist of different territorial areas with different legal systems in relation to the areas regulated by the Convention and the Protocol. As Sweden has no such territorial areas, we cannot make any declaration under Article XXIV.

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<sup>11</sup> Rail Working Group, Declaration Matrix and Economically-Based Recommendations, 28 May 2015.

### 6.5.5 Article XXV

**Proposal:** The inquiry proposes that Sweden should *not* submit any declaration under Article XXV.

Article XXV contains exceptions to Chapter III of the Convention and Articles VII–IX of the Protocol. The purpose is to be able to maintain current legislation that restricts measures relating to railway vehicles used for public purposes in order to avoid disruption to services of general interest, see also section 6.4.3.

Pursuant to Article XXV.1, a Contracting State may at any time declare that, in accordance with the terms of its declaration, it will continue to apply existing national legislation which excludes, prevents or regulates the implementation of any of the measures set out in Chapter III of the Convention and Articles VII to IX of the Protocol in its territory in relation to rolling stock for public use. "Existing national legislation" means the national legislation of the declaring State. What constitutes "applicable legislation" is determined by the laws of the declaring State and may include administrative rules and procedures as well as statutory provisions and judicial decisions. The Contracting State may only invoke legislation that was in force at the time the State made the declaration.

In Sweden, there is no national legislation that excludes, prevents or regulates the implementation of any of the measures specified in Chapter III of the Convention and Articles VII–IX of the Protocol. We are therefore unable to submit any declaration in respect of Article XXV.

However, there is nothing to prevent a State from introducing new legislation and subsequently making a declaration covering the new legislation. But a declaration can never adversely affect the rights and security interests of creditors under an agreement entered into before the date on which the depositary received the declaration (Article XXV.5). Creditors are therefore protected against the retroactive effects of new legislation.



# 7

## The International Registry for Security Interests in Rolling Stock

### 7.1 Introduction

The possibility of registering international security rights in a common international register is crucial to the application of the Cape Town Convention and the various protocols. As previously stated, there are currently three protocols linked to the Cape Town Convention, and discussions are ongoing regarding the addition of further protocols. Each protocol regulates a type of property and has its own register. The use of the international register is regulated both in the Convention and in the relevant protocol. For a more detailed description of the Convention's rules on the international register, see Government Bill 2015/16:12.

The International Rail Registry for property covered by the Rail Protocol will be located in Luxembourg and managed by Regulis SA, a subsidiary of SITA, which was established in Luxembourg in 2014 for the sole purpose of developing and operating the International Registry. The assignment will run for ten years. Work is currently underway to build a registration system that is stable, reliable and secure, and ready for use when the Protocol enters into force. The International Registry for Aircraft Objects, operated by Aviareto Ltd in Ireland, serves as a model for the International Registry for Rolling Stock.

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<sup>1</sup> The International Rail Registry and The Luxembourg Rail Protocol to The Cape Town Convention – Global Registration of Mobile Assets, Elizabeth Hirst and Nicolas Gavage.

The international registry will be fully automated and accessible 24 hours a day. Both private individuals and national authorities will be able to access information relating to a registration in the international registry.

The purpose of registration in the international registry is to provide information that a particular object is subject to an international security interest and to determine the priority between competing interests in certain property.

The international registry will be supervised by a supervisory authority. The registry will be self-financing and the fees for various services will be set to cover the costs.

According to the Convention, it is not possible to register ordinary sales in the register. However, the Railway Protocol allows for such registration, but only for information purposes, see section 5.3.3.

The activities of the international register will be governed by a number of rules and regulations compiled and approved by the supervisory authority. The RWG has been involved in compiling a draft of these regulations, which have not yet been published. As long as the regulations for the register are not finalised, this can only be described in broad terms in the ; the details will be found in the regulations.

## **7.2 The international register (Convention Chapters IV–VII and Protocol Chapter III)**

### **7.2.1 Tasks of the supervisory authority**

Under the Convention, the international registry is to be established by a supervisory authority appointed in accordance with the Protocol.<sup>2</sup> The Supervisory Authority shall be established through representatives, some of whom shall be appointed by States that are parties to the Convention and others by States designated by Unidroit and OTIF.<sup>3</sup> OTIF shall act as the secretariat and assist the Supervisory Authority in the performance of its functions.<sup>4</sup> The Supervisory Authority

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<sup>2</sup> Convention Article 17.1 and 2a.

<sup>3</sup> See Protocol, Article XII.1. Each State party to the Convention shall appoint one representative. In addition, Unidroit and OTIF shall appoint a maximum of three other States, which shall each appoint one representative.

(<sup>4</sup>)

The Authority shall appoint and supervise a Registrar to ensure the efficient operation of the Registry.

The supervisory authority for the international registry has a variety of responsibilities, as set out in Article 17.2 of the Convention. One of the tasks of the supervisory authority is to appoint and dismiss the registrar. Thereafter, the registrar's term of office shall be extended or a new registrar appointed for a term of office not exceeding ten years.<sup>6</sup>

The Supervisory Authority shall continuously supervise the activities of the Registrar and the operation of the International Registry. It shall also act as an additional support to the Registrar to a certain extent. The Supervisory Authority shall also determine and regularly review the fee structure for the services of the Registry, which shall be financed by the fees charged for registration and search. According to Article XVI.2, the fees shall be set so as to cover the reasonable costs of establishing, operating and maintaining the registry and the reasonable costs of the secretariat's activities. The registrar may operate its activities with a reasonable profit.

The Supervisory Authority thus has overall responsibility for ensuring that the international registry functions as intended. However, the Authority cannot decide on issues and disputes relating to a specific registration in the registry; such issues can only be decided by a court of law. The supervisory authority's tasks have been delegated to a preparatory commission consisting of one representative from Finland and one representative from the United States.

### **7.2.2 Privileges of the supervisory authority**

Article 27.2 of the Convention stipulates that the supervisory authority shall enjoy immunity from legal and administrative proceedings as specified in the provisions of the relevant protocol. The Rail Protocol does not contain any provisions on this matter. Despite the absence of provisions in the Protocol, the supervisory authority's immunity under international law is based on its status as an organisation established in accordance with an international convention by representatives of sovereign states.

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<sup>5</sup> Convention Article 17.2b, 2f and 5.

<sup>6</sup> Article XII.11.

and thus has the status of an international legal person under Article 27.1 of the Convention.

## **7.3 How does the International Registry for rolling stock security interests work?**

### **7.3.1 Purpose**

The main purpose of registration in the register is to determine the priority between competing interests in rolling stock. The starting point is that the security right that is registered first also has the highest priority. Only the priority between registered security rights and between registered and unregistered security rights can be determined using the register; the priority between unregistered security rights is not regulated.

The international register is "notice-based" and not "documentary", which means that it must provide information that a particular object is encumbered with an international security right. However, the register does not indicate the category of international security rights to which a registration relates, i.e. whether it is a pledge agreement, a sale with retention of title or a leasing agreement.

The information available in the register is limited to a minimum. Instead, it is up to the person searching the register to conduct further investigations with the parties themselves in order to obtain more information about the nature of the security right. Nor does the registration information indicate the extent to which the security right encumbers the object in question. In order to find out how much certain rolling stock is mortgaged for, the user must contact the parties.

It is important to note that registration in the international registry is not necessary to create an international security interest or to prove that such an interest exists. Nor is the registration of an international security interest a guarantee that the security interest is valid; the mere fact that a registration exists does not mean

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<sup>7</sup> Goode, R. – Official Commentary on the Convention on International Interests in Mobile Equipment (Cape Town, 2001) and Protocol thereto on Matters specific to Railway Rolling Stock (Luxembourg, 2007). (Second Edition), p. 428.

<sup>8</sup> The International Rail Registry, Steven L. Harris, Rev. Dr. Unif. 2007, p. 533 f.

it does not necessarily follow that the international security right continues to exist. If the buyer in a contract with retention of title pays off his debt, the seller's security right in the property ceases to exist, and it is then irrelevant whether the international security right held by the seller has been deregistered in the international register or not. The priority between security rights is also not always determined by registration in the international registry. This is the case, for example, with legal rights and security rights covered by a declaration under Article 39, which retain the priority they have under national law.<sup>9</sup> Sweden has made a declaration under Article 39(1) and (4). Sweden has not made a declaration under Article 60(3), which means that existing rights and security rights will retain their priority, regardless of whether they could have been registered in the international register or not.

### **7.3.2 What can be registered in the international register?**

The system of registrations in the international register is based on the fact that security rights can be linked to a specific identifiable object. The register is therefore not based on the name of the debtor or creditor. The register is primarily intended for international security rights that fall under the provisions of the Convention, but other rights and security rights may also be entered.

Article 16 of the Convention states that the following information may be registered in the international registry

1. international security rights, prospective international security rights and registrable legal rights and security rights,
2. transfers and future transfers of international security rights,
3. acquisitions of international interests by operation of law or by agreement,
4. notices of national rights and interests, and

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<sup>9</sup> Goode, *op. cit.*, p. 541.

5. subordination<sup>10</sup> of security rights referred to in any of the above paragraphs.

If a State has made a declaration under Article 60(3) (the wording of which has been modified by Article XXVI with regard to railway rolling stock), existing rights and security interests must also be registered in the registry. The priority ranking between non-registrable security rights covered by Article 29(1) may also be registered. In the case of property covered by the Railway Protocol, notices of sale may also be registered (Article XVII of the Protocol).

Article 16(2) also states that separate international registries may be established for the different categories of objects and related rights, such as the international registry for security rights in railway rolling stock for security rights in railway rolling stock.

### 7.3.3 Contact points

**Proposal:** The inquiry proposes that Sweden *not* submit an explanation to Article XIII on contact points.

Article 18.5 of the Convention provides for the possibility for a Contracting State to designate one or more bodies within its territory as contact points (entry points), whose task is to transmit the information required for registration to the International Registry for rolling stock security rights. A Contracting State that designates an entry point may specify the conditions that must be met before the information is transmitted to the International Registry. The rules for contact points in the Rail Protocol are set out in Article XIII. It also states that the registration of notices of national security rights or notices of rights or security rights under Article 40 based on the law of another State is not covered by

<sup>10</sup> Holders of competing security rights or rights have the option of agreeing on a different order of priority than that described above (Article 29(5)). Such an agreement on subordination, i.e. that a security right shall have lower priority than that prescribed in Article 29, must be registered in the international registry in order to be binding on an acquirer of the subordinated security right (cf. Article 16.1e).

the tasks of the contact points. When appointing a contact point, it is permissible, but not mandatory, to appoint one or more contact points for tasks relating to the registration of notices of sale.

Upon accession to the Aircraft Protocol, Sweden chose not to adopt the system of contact points. The government stated that one reason for this was that it was not clear what tasks the national contact points would have, but that it was unlikely that they would be responsible for checking the information that would then be forwarded to the registry. Furthermore, the government stated that the international registry for aviation objects is intended to be used by individuals once they have registered and become approved users, and that all measures related to registration are carried out electronically via the internet.

The inquiry concurs with the Government's statement regarding the need for contact points and considers that the same arguments are relevant in relation to the international register for property covered by the Railway Protocol. The users of the international register for security rights in railway rolling stock are likely to be persons who, in their work, often have reason to use the international register for registrations or searches, such as lawyers at law firms. According to the investigation, there is no need for national coordination of registrations at a national authority or other body. To the extent that Swedish authorities wish to obtain information about a registration, they can, like everyone else, search the register. If a registration must be made through a national contact point, the advantages of the register's 24-hour availability will not be fully utilised.

In light of the above, it is the inquiry's opinion that Sweden should not have a system of national contact points in this context either. No explanation should therefore be provided in this regard.

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<sup>11</sup> Prop. 2015/16:12 p. 54.

### 7.3.4 Registration

The International Registry for Security Rights in Rolling Stock has two main functions, namely the registration of a security right or interest in rolling stock and the search for rolling stock. Searches can be conducted to obtain information on whether there are any existing security rights encumbering the object and to determine the priority of the security rights.

Who can register will be regulated in the regulations, which are not yet finalised. However, the working versions reviewed by the inquiry indicate that the intention is to follow the same rules as the international register for aircraft objects; natural and legal persons who wish to register security rights in the international register must first apply to become approved users (approved administrator user). Applications are processed by the international registry. There, checks are made to ensure that the person who has submitted an application is indeed authorised to represent a particular entity, e.g. a company, and that the entity actually exists. Anyone can search the international registry's website after registering as a user. Only persons who fail to comply with the conditions set out in Chapter V of the Convention may be denied access to the registry's registration or search services (Article 26).

Registration requires that both parties to the transaction giving rise to the security interest consent to the registration (Article 20). This is also done electronically. Once a security interest has been registered, it can be retrieved by searching the register.

Anyone may request a certificate from the international register showing all the information registered in respect of a particular object or that no information is registered at all (Article 22). Provided that the certificate meets the requirements of the rules governing the International Registry for Security Rights in Rolling Stock, it constitutes proof of the information contained in the registry, including the date and time of registration of the information (Article 24).

### **7.3.5 Responsibility of the registrar**

The Registrar has a certain responsibility for inaccuracies in the information contained in the International Register of Security Rights in Rolling Stock. Article 28 states that the Registrar shall compensate any person for damage suffered as a direct result of any error or omission on the part of the Registrar, its management or employees. The registrar is also liable for deficiencies in the International Registry, unless these are the result of an unavoidable event that cannot be protected against and could not have been prevented by the best generally applied practices. According to Article 28.1, the Registrar shall compensate for the damage up to an amount corresponding to the value of the rolling stock. However, this liability is limited in Article XV.5 of the Protocol to a maximum of 5 million Special Drawing Rights (SDRs) per year or to such higher amount as the Supervisory Authority may determine. This can be compared with the International Registry for aircraft objects, where liability is unlimited. However, the limitation laid down in Article XV.5 does not apply to damage caused by the gross negligence or wilful misconduct of the Registrar's employees (Article XV.6).

As previously stated, the registrar shall not be liable for factual errors in the registration details received. Nor shall the Registrar be liable for measures or circumstances that neither it, its management nor its employees have caused and that existed before the information on registration in the International Register of Security Rights in Rolling Stock was received.<sup>12</sup>

### **7.3.6 Errors in the International Registry**

The International Registry is fully automated and open 24 hours a day (Article XV.4). The information provided at the time of registration is not checked; instead, it is the parties who, by giving their consent, verify that the information is correct. One consequence of this is that the International Registry can never guarantee that the information in the registry is correct. According to the official

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<sup>12</sup> Goode, *op. cit.*, pp. 80 and 190.

comment<sup>13</sup> it is not uncommon for persons to register rights and security interests that are not covered by either the Convention or the Protocol "for safety's sake". If the parties agree, there is no obstacle to this. However, it is important that users of the registry are aware that all registered security rights must be verified in order to ensure that they actually exist. The international registry does not provide any assistance in this regard, nor does it provide legal advice or mediation between parties who disagree on information in the registry.

Certain inaccuracies in a registration may be acceptable and do not necessarily invalidate the registration. The validity of a registration may be determined on a case-by-case basis depending on the seriousness of the inaccuracy.<sup>14</sup> Inaccuracies may also be corrected if both parties agree to this (Article 20(1)). In the case of fundamental errors, such as the agreement on which the security right is based not having been properly concluded or consent not having been given, the party concerned may request in writing that the other party deregister or amend the registration (Article 25(4)). If such a request is not complied with, the person concerned may apply to the competent court to order the counterparty to deregister the security interest.<sup>15</sup> If the counterparty fails to take steps to deregister the security interest, all measures for non-compliance with the court that are available in that court may be taken. For example, it should be possible to order the counterparty to deregister, subject to a penalty payment. The party concerned may also apply, directly or through the national court, to a court within the jurisdiction of the registrar (i.e. a competent court in Luxembourg) to order the registrar to remove the registration (Article 44(3)).

### **7.3.7 Cancellation of registration**

A registration is valid until it is cancelled or the period of validity specified in the registration expires (Article 21). According to Article 25, a registration shall be cancelled when the obligations secured by the security right have been fulfilled. The same applies when

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<sup>13</sup> A a p. 79.

<sup>14</sup> Ibid. p. 80.

<sup>15</sup> Ibid. p. 80.

the conditions for the transfer of ownership under an agreement with ownership rights have been fulfilled. The holder of the security right shall, at the written request of the debtor, take steps to cancel the registration without delay. A future security interest or transfer, as well as a national right or security interest, shall also be cancelled in accordance with Article XV.2, which modifies Article 25.2. Under Article XV.2, a future security interest or transfer, as well as a national right or security interest, shall be cancelled, under the circumstances specified in Article 25.2, no later than ten calendar days from the receipt of a request under Article 25.2.

If a subordination agreement has been registered and the debtor has fulfilled its obligations to the beneficiary, the beneficiary shall, within ten calendar days of a written request under Article XV.3, take steps to cancel the registration.



# 8

## Should Sweden accede to the Rail Protocol?

### 8.1 Introduction

Based on the analysis of the provisions of the Railway Protocol, the inquiry shall take a position on whether Sweden should accede to the instrument or not. This chapter presents an analysis of what accession would mean for Sweden and for various Swedish actors, primarily within the railway sector. The inquiry's proposal on whether Sweden should accede to the Protocol or not presupposes that, upon accession, Sweden will submit the declarations proposed by the inquiry in previous chapters. In May 2016, Luxembourg and the EU had acceded to the Railway Protocol. Gabon, Italy, Switzerland, the United Kingdom and Germany have signed the Protocol.<sup>1</sup> In the United Kingdom, among other countries, a process of accession is underway. The issue of accession has also been raised in Finland.

In this chapter, we also report on the contacts the inquiry has had with the British ministry investigating the issue of the United Kingdom's accession. The inquiry has been in contact with the Ministry of Justice in Denmark, which has stated that it has no plans to accede to the Protocol at this stage. Finland, which has planned a major review of its insolvency legislation, has announced that work on acceding to the Rail Protocol will also begin in connection with this.

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<sup>1</sup> For the current status of the Convention and Protocol, see the Unidroit website <http://www.unidroit.org>

## 8.2 The United Kingdom and the Rail Protocol

The United Kingdom acceded to the Cape Town Convention and the Aircraft Protocol in July 2015. There has been considerable interest in the Rail Protocol in the United Kingdom, which signed the Protocol on 26 February 2016. The inquiry has been in regular contact with the responsible official at the British Department for Transport in order to follow the United Kingdom's process towards ratification.

The ratification process for the United Kingdom is expected to take 1–1½ years. Since the protocol was signed, a consultation has been underway to gather and compile views from the industry and other relevant ministries. The consultation is expected to be completed by the end of July 2016.

The question of what declarations the United Kingdom should make upon accession has not yet been investigated by the Ministry. Upon accession to the Cape Town Convention and the Aircraft Protocol, Sweden and the United Kingdom had a common view on the issue of declarations and submitted largely the same declarations to both instruments. Among other things, Sweden and the United Kingdom shared the view that there is uncertainty regarding the limits of the EU's competence in insolvency law. Like Sweden, the United Kingdom therefore chose not to submit any declaration to Article XI of the Aviation Protocol, which regulates what should happen in the event of insolvency. Instead, it adapted its national legislation to bring it into line with the provisions of the Aviation Protocol. The aforementioned article in the Aviation Protocol has served as a model for the insolvency provision in the Rail Protocol (Article IX). There is therefore reason to assume that the United Kingdom will not submit a declaration on Article IX of the Rail Protocol either.

As stated in section 6.5.5, Article XXV gives states the option of exempting railway vehicles used for public purposes from the insolvency provisions of the Railway Protocol; the state then submits a declaration to Article XXV. The purpose of such a declaration is to avoid disruption to services of public interest. In the United Kingdom, unlike in Sweden, the State has the option of stepping in and taking over operations if a company operating trains used for public purposes goes bankrupt. It is likely that the United Kingdom wishes to retain this option, and there are therefore good reasons for

It is assumed that the United Kingdom will submit a declaration under Article XXV.

## **8.3 Economic arguments for accession**

### **8.3.1 Introduction**

In the railway sector, infrastructure, access to rolling stock and financing are factors that influence market entry. The availability and price of rolling stock is a problem for new and smaller companies wishing to enter the market, and also affects companies wishing to expand their activities. In order to operate at all, companies need access to infrastructure and rolling stock.<sup>2</sup> This is a capital-intensive activity with significant investment requirements. The need for substantial financial resources before starting operations has been one of the obstacles to effective competition in the railway sector. Improved access to private capital can help to overcome some of these difficulties.

### **8.3.2 Improved access to private capital**

Operators should be able to turn to lenders who provide funds on the private capital market, which would generate sound market-based financing without government guarantees or support. This is often only possible if lenders have security rights in the assets financed by the loans. In the aviation industry, leasing and other mainly private financing solutions have led to significantly increased investment over the past 20 years. One explanation for this is that lenders are secured through the registration of their security rights or mortgages. A comparison can be made with the railway sector, where investment has stagnated. Here, there are no national public registers where lenders can register their security rights in financed assets.

As mentioned earlier, the costs of acquiring rolling stock are significant. For lenders, the provisions of the Convention and the Protocol provide greater security by means of security rights.

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<sup>2</sup> Transport Agency, report, ref. no. TSJ 2013-2417, September 2014, p. 9 ff.

rights in rolling stock will be able to be registered, with the opportunities this entails for the creditor's security interest.

The Convention and the Railway Protocol create conditions for increased private financing by making it easier for lenders to monitor their investments. This creates conditions for a balance between public and private financing, which will benefit all parties.

The Railway Protocol harmonises and internationalises rules on security rights used in the financing of rolling stock. This makes it easier and less risky for banks and other financiers, including lessors, to provide financing. The regulatory framework is designed to increase predictability and to enable the security holder – the creditor – to effectively exercise their rights in the event of the debtor's breach of contract and insolvency. It is the opinion of the inquiry that a simplified and uniform system for security rights in the financing of rolling stock is positive for the entire railway sector and thus economically advantageous for railway companies.

The European Commission noted in its proposal for a Council decision on accession to the Rail Protocol<sup>4</sup> that regulation is likely to be of considerable benefit to the EU rail industry, but also to banks and public authorities; it would encourage capital investment in the rail sector and contribute to the establishment of a genuine leasing market. This, in turn, will improve companies' ability to provide better service to customers and is an important instrument for regaining market share from the road and air sectors in freight and passenger transport.

In order for Swedish railway companies to be able to compete on equal terms with their foreign counterparts, it is important that they have access to the most cost-effective financing models. Another important advantage is that Sweden will become a "Cape Town country", with a well-known and predictable legal system for transactions relating to security rights in rolling stock. The significance of this should not be

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<sup>3</sup> In SOU 2008:92 p. 148 f.

<sup>4</sup> Proposal for a Council Decision on the approval, on behalf of the European Union, of the Luxembourg Protocol on specific issues relating to railway rolling stock to the Convention on International Interests in Mobile Equipment, adopted in Luxembourg on 23 February 2007, Brussels, 11 June 2013, COM(2013) 349 final.

underestimated, as financing in a "Cape Town country" will be considered less risky by international investors.

### 8.3.3 Benefits for railway operators

For private operators, access to the capital market, either directly or through banks and leasing companies, is crucial for their entry into the railway sector, and this in turn is likely to be a key factor in the expansion of the railway network and access to new and well-maintained rolling stock.

According to representatives of the railway sector, there is interest from foreign banks and finance/leasing companies in financing railway rolling stock, which generally has a long economic life and a high value. Access to the Railway Protocol and an international register listing security rights in rolling stock improves the possibilities of taking security in such property. This would be particularly beneficial to smaller and private companies, as it would make it easier for them to access financing, which is conducive to competition between different railway operators.

The more capital available from the private sector and the lower the risks financiers are expected to take, the cheaper the capital will be. A recent study by RWG on Western Europe shows, for example, that access to the Protocol should reduce the cost of borrowing by up to 0.35 per cent on the interest rate, which is a discount of over 3 per cent on the sale price for typical 10-year financing.

Even for state-owned railway operators, access will bring significant benefits by increasing the sources of capital available for investment in new rolling stock without the need for direct state aid, indirect aid or guarantees.

The Protocol will promote the development of both financial and operational leasing (due to the new protection for the lessor) and a secondary market, significantly reducing the capital commitments that would otherwise be required from the operator.

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<sup>5</sup> Published on 27 January 2016 by Roland Berger for the Rail Working Group. Roland Berger is a Swiss organisation working on the ratification of the Rail Protocol.

Financing rolling stock currently involves extensive documentation, particularly with regard to security rights issues, as well as extensive legal opinions and continued legal uncertainty for all parties. By significantly reducing uncertainty and developing a universal system to cover assets used in different jurisdictions, the Protocol should also result in much simpler documentation. We can also expect a limited need for various forms of legal opinions. In addition, there will be significantly lower transaction costs.

## **8.4 The possibility of registering security rights in rolling stock**

Unlike the aviation sector, there are generally no comprehensive national registers for the registration of ownership or security interests in rolling stock. There is not even a common system for the unique identification of such equipment.

In Sweden, protection under property law through registration under the Movable Property Purchase Act is the option available in cases where tradition does not apply. This Act provides relatively detailed provisions, which are both cumbersome and outdated. For this reason, virtually no registration takes place. According to the Swedish Enforcement Authority, approximately ten purchases of rolling stock have been registered in the last five years. Due to the rules on public notification-registration under the Movable Property Purchase Act is also not applicable in cases where the seller is based abroad.

Admittedly, the Transport Agency provides a national vehicle register for railway vehicles. However, as described in sections 3.5.1 and 6.5.3, this register is neither comprehensive nor useful for registering security rights in rolling stock or enabling unique identification of this property.

Sale and lease back of rolling stock is already used today by Swedish railway undertakings. However, such transactions are associated with certain risks, as the owner does not obtain any protection of property rights unless tradition or registration in accordance with

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<sup>6</sup> The requirement that the purchase must be announced within one week in a local newspaper in the seller's place of residence, which is not possible with a seller based abroad.

the Movable Property Purchase Act has taken place. Unlike the Aviation Protocol, the Railway Protocol does not allow for the registration of ordinary sales, except for information purposes. A leasing agreement registered in the international register constitutes in itself an international security right. However, an undesirable situation and legal losses may arise if the lessor's acquisition of the property from the lessee (the first link in the transaction) has no effect in rem against the lessee's/seller's creditors. In that case, the registration of the lease agreement may be ineffective. The inquiry has therefore proposed a new provision in the Act on International Security Rights in Movable Property (Section 9) to resolve this problem. The provision means that a person who acquires rolling stock receives protection in rem against the transferor's creditors if, in connection with the purchase, an application is made for registration of a security right in the object in the international register. The protection of property rights for the acquirer is linked to the registration and takes effect from the date on which the registration is granted. The provision thus means that the protection of the purchaser's rights in rem is not dependent on the purchaser having taken possession of the rolling stock or on compliance with the provisions of the Movable Property Purchase Act. The purchaser is protected even if the rolling stock remains in the possession of the transferor.

The Railway Protocol will introduce, for the first time, a public international register applicable to both domestic and international transactions and a universal system for the identification of railway rolling stock. It will also have positive side effects, such as facilitating real-time monitoring of rolling stock and enabling its tracking, which is particularly useful in connection with maintenance and insurance issues.

## **8.5 Other arguments in favour of access**

### **8.5.1 Introduction**

In addition to the economic arguments set out above, the inquiry has identified a number of other reasons why Sweden should accede to the Rail Protocol.

### **8.5.2 Clearer regulation of security rights**

As noted earlier in the report, Swedish regulations governing security rights in movable property are unclear in many respects and, to some extent, obsolete. The Railway Protocol sets out clear and modern rules based on the current state of the international financial market and how this type of property is financed. The insolvency provisions in Article IX of the Protocol make it predictable and clear what rights a security holder has when rolling stock becomes subject to insolvency proceedings. In the opinion of the inquiry, clear and unambiguous regulation in this area is desirable.

The Railway Protocol is one of three protocols related to the Cape Town Convention of Unidroit on uniform rules for security rights in movable assets. On 1 April 2016, Sweden acceded to the Convention and the Aircraft Protocol. Sweden's accession means that the regulations for the railway sector will also be modernised. In the opinion of the inquiry, the fact that the railway sector will also have a comprehensive international register is a positive development in Swedish law.

### **8.5.3 Sweden's role in international cooperation**

The development of the Rail Protocol is an ambitious example of how international cooperation can simplify and improve conditions for a specific sector. An international market, such as the financial market, requires internationally harmonised rules. According to the inquiry, all forms of cooperation that benefit Swedish companies' opportunities to compete in the international market should be promoted. The inquiry therefore considers it important for Sweden to be part of the work in the international financial market and for us to be able to contribute to and influence international cooperation.

Early Swedish accession could have a positive impact on other countries' ambitions in this area.

## 8.6 Is there anything that speaks against accession?

The investigation has pointed out a number of advantages of Sweden acceding to the Rail Protocol. The question is then whether there are any arguments against it, whether there are any disadvantages or problems with accession.

The most important reason against incorporating the Railway Protocol is that, unlike aviation, both railway tracks (infrastructure) and rolling stock are largely financed with the support of public guarantees and other public commitments. This is because railways, including trams and underground railways, are important parts of the overall infrastructure of society, which must guarantee the necessary transport capacity. If this were to be largely privately financed, a particular question arises as to whether this could increase the risk of disruption to society in the event of financial difficulties for operators in this sector.

Under current law, there are no specific restrictions on the repossession of railway equipment in cases where this could cause disruption to important social functions. It is, of course, debatable whether there should be special provisions in this regard, but the inquiry considers that the risk of social disruption is not particularly high. For example, underground trains are unlikely to be removed from the underground system in the event of the debtor's bankruptcy. The creditor will instead ensure that the vehicles remain in place and that traffic continues to run, temporarily by a bankruptcy administrator and subsequently by a new operator. Compared to aeroplanes, railway vehicles are not easy to move, and they are often adapted to the specific traffic for which they were purchased. A creditor who, in such a situation, wants to take possession of the vehicles and move them to another location to operate other traffic there, faces significant transaction costs. If the original debtor becomes insolvent, it would probably be easier for the creditor to take possession of the vehicles and allow a new operator to continue the traffic. Against this background, the inquiry considers that the risk of social disruption will not be greater as a result of an adaptation to Article IX, alternative A, of the Protocol.

It has previously been established in the report that insolvency proceedings under the Cape Town Convention and the Rail Protocol cover both bankruptcy proceedings and corporate restructuring. In a corporate restructuring

This means that, following a decision to initiate reconstruction, the security holders or lessors can repossess their security. The conditions for continuing to operate the company are then naturally impaired, and it is also questionable whether corporate reconstructions in railway companies are possible at all. This issue was addressed in Government Bill 2015/16:12, in which the Government stated that the risk that a provision corresponding to Article XI, Alternative A, of the Aviation Protocol, corresponding to Article IX, Alternative A, of the Railway Protocol, would hinder reconstructions was considered to be limited. The Government further noted that the creditor's ability to quickly repossess the security could encourage lenders to grant credit, or extend existing credit, even to companies experiencing temporary financial difficulties. This, in turn, could result in bankruptcy being avoided. The security created for lenders could make it easier for companies with temporary financial difficulties – but with potential – to obtain financing and thus be given the opportunity to develop their business.<sup>7</sup>

In chapters 5 and 6, the inquiry has described the individual provisions of the Protocol and, where applicable, compared them with existing Swedish law and relevant EU law. The Railway Protocol has been designed to function in different legal systems, including civil law, common law and Islamic law systems. As far as the report has been able to ascertain, there are no obstacles in Swedish law to applying a system of international security rights in rolling stock.

Of course, it is not possible to predict with certainty what impact the provisions of the Convention and the Protocol will have on Swedish railway undertakings. However, the inquiry concludes that the changes that accession in accordance with the inquiry's proposal would entail for the railway sector are positive and that there are no compelling reasons for Sweden to delay accession.

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<sup>7</sup> Prop. 2015/16:12, p. 59 f.

## 8.7 Sweden should accede to the Railway Protocol

**Proposal:** Sweden should accede to the Rail Protocol and submit the declarations proposed by the inquiry.

The Railway Protocol was created to make financing rolling stock easier and safer through uniform substantive rules. This benefits both financiers and railway companies. The system for registering international security rights created by the Convention has proven to be very successful in the aviation industry. An international register is particularly important for the railway sector, as Sweden does not have a comprehensive register. In its analysis, the inquiry has not been able to identify any decisive disadvantages to Sweden's accession. Instead, it can be stated that there are strong economic reasons for Sweden to accede to the Protocol.

By acceding, Swedish railway companies would gain:

- access to a broader financial market,
- the opportunity to register rights and security interests in rolling stock.

In summary, it is the opinion of the inquiry that Sweden should accede to the Railway Protocol. In order to achieve the economic benefits outlined above, the declaration proposed by the inquiry should be submitted and Swedish legislation should be adapted so that the result is the same as if a declaration to apply Article IX, alternative A, with a maximum waiting period of 60 calendar days had been chosen.

## 8.8 Summary of declarations that Sweden should submit or refrain from submitting

### 8.8.1 Introduction

Below is a chronological summary of the declarations that the inquiry proposes Sweden should make or refrain from making upon accession.

### **8.8.2      Declarations to the Rail Protocol**

#### **Declarations that Sweden should make**

A declaration to Article XXVII.1 that Article X shall apply.

#### **Declarations that Sweden should *not* make**

The inquiry proposes that Sweden should not make any declarations to Article XXVII regarding Articles VI, VIII and Articles XIII, XIV, XXIV and XXV.

Sweden should also not submit a declaration under Article XXVII.3 concerning Article IX, but instead amend national law so that the result is the same as if Sweden had submitted the said declaration and chosen option A with a maximum waiting period of 60 calendar days.

## 9 Incorporation of the Railway Protocol

### 9.1 Method for incorporating the Railway Protocol into Swedish law

**Proposal:** The Railway Protocol should be incorporated into Swedish law through incorporation.

#### 9.1.1 The different methods of incorporation<sup>1</sup>

Provisions in international agreements that concern the actions of authorities or individuals must be incorporated into the Swedish legal system in order to apply here. There are two different methods for incorporating international agreements: transformation or incorporation. Transformation means that the provisions of an agreement are converted into Swedish law, while incorporation means that the agreement itself is made directly applicable through a special provision. The choice of method depends, among other things, on how the agreement to be incorporated is formulated and may be based on what is appropriate in the individual case.

Transformation is the most common way of incorporating international agreements into Swedish law. One advantage of this method is that the provisions of the agreement can be transferred into Swedish constitutional language, which normally makes them easier to apply. However, there is a risk that the meaning of the agreement will be lost to some extent in translation. The more comprehensive and detailed

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<sup>1</sup> This section is mainly based on Government Bill 2014/15:12.

the provisions of the agreement, the greater the risk of this happening.

For more detailed agreements, whose provisions are intended to be applied directly by courts and other authorities, incorporation is therefore often preferable. The authentic text of the agreement then becomes applicable as Swedish law and is appended to the law. If there is no authentic Swedish version of the agreement, a Swedish translation is usually published alongside the original text. The Swedish text then becomes merely an aid to the reader and does not have the status of law. If there are alternative solutions in the agreement, the incorporation law may also specify which choices are made.

Incorporation is relatively common in transport law. When Sweden acceded to the Cape Town Convention and the Aircraft Protocol, incorporation was chosen as the method of transposition. Both instruments were incorporated through the Act on International Security Rights in Movable Property. The 1999 Montreal Convention was incorporated through the Act (2010:510) on Air Transport. This method has also been common when Sweden has acceded to international railway treaties.

### **9.1.2 The relevant parts of the Railway Protocol should apply as Swedish law.**

The Rail Protocol is intended to be read in conjunction with the Cape Town Convention, and both instruments should be interpreted in light of each other. The starting point should therefore be that the Rail Protocol should be incorporated into Swedish law in the same way as the Cape Town Convention and the Aviation Protocol, i.e. through incorporation. Choosing different methods for incorporating two protocols belonging to the same convention should only be an option if there are strong reasons for doing so. According to the investigation, no such reasons have been identified. On the other hand, there are several reasons for choosing incorporation as the method for incorporating the Railway Protocol. Just like the Cape Town Convention and the Aviation Protocol, it contains comprehensive and detailed provisions that also affect a number of areas of law. There is a significant risk that something in the Rail Protocol will be lost in the process of transformation.

In summary, the inquiry proposes that the Railway Protocol be incorporated into Swedish law.

It remains to be decided to what extent the Protocol should be incorporated into Swedish law. The starting point is that the provisions aimed at courts and other authorities and at individuals should be made into Swedish law, while the provisions aimed at states or international bodies should not be incorporated.

The final provisions of the Protocol concern, *inter alia*, the procedure for ratification and termination of the Agreement and the submission of declarations, and are addressed to the Contracting States (Articles XXI–XXXIV of the Protocol). With one exception, there is no reason to incorporate these provisions into law.

The Protocol contains, among other things, an article concerning the tasks and responsibilities of the registration authority and the supervisory authority (Article XII of the Protocol); this does not need to be incorporated. However, some of the articles contain provisions that, in addition to the registration body, concern individuals and Swedish authorities. Partial incorporation of these articles would make the regulation difficult to understand. It is therefore more appropriate to incorporate these articles in their entirety.

Other provisions in the Protocol should apply as Swedish law, insofar as Sweden does not refrain from applying them. As stated in section 6.4.3, it is considered that Sweden, as a member of the EU, is prevented from making declarations on Articles VI, VIII and IX of the Railway Protocol. These articles should therefore not be incorporated. Article XIII gives the contracting state the opportunity to appoint special contact points to convey the necessary information for registration in the international register. In view of the fact that the inquiry proposes that Sweden should not make use of this opportunity, this article should not be incorporated either.

In summary, the inquiry proposes that Articles I–V, VII, X and XI, and XIV–XX of the Rail Protocol should apply as Swedish law. This should be done through amendments to the Act on International Security Rights in Movable Property.

The Railway Protocol should be appended to the text of the Act. The Convention is written in six original languages: Arabic, English, French, Chinese, Russian and Spanish. None of the original texts takes precedence over the others. It is sufficient to append the English text together with a Swedish translation to the Act.

## **9.2 The Stockholm District Court should be the reserve forum for Swedish jurisdiction**

If the parties have agreed that Swedish courts shall have jurisdiction to hear matters based on the provisions of the Protocol but have not designated a specific court, the question of court jurisdiction shall be determined by applying either the Code of Judicial Procedure or, in certain cases, the Brussels I Regulation. To the extent that these provisions do not specify which court has jurisdiction, a provision on a reserve forum is required.

The Stockholm District Court is the reserve forum for the examination of matters relating to the Cape Town Convention and the Aviation Protocol, see the Act on International Security Rights in Movable Property, Section 7. The Committee therefore proposes that the Stockholm District Court should also be the reserve forum for the examination of matters relating to the Railway Protocol.

## **9.3 Constitutional amendments due to Sweden's accession to the Rail Protocol**

### **9.3.1 The insolvency provisions of the Rail Protocol should apply**

Whether the insolvency provisions in the Railway Protocol can be applied is decisive for the economic benefits that accession will bring for railway undertakings.

Article IX alternative A means, in simplified terms, that in insolvency proceedings, the security holder can quickly recover their security without hindrance from national law. The regulation reflects the purpose of the protocol, which is that the same provisions should apply regardless of which country's law is applicable and that the procedure should be predictable.

The regulation entails minor differences in relation to what applies under Swedish law in insolvency proceedings. A bankruptcy estate only includes the debtor's property. With regard to property not owned by the debtor, Swedish law already provides for a right of separation in bankruptcy, i.e. a right for the owner to recover their property without competition from other creditors. Under Swedish law, creditors with a right of pledge also have a position in bankruptcy that largely corresponds to that specified in the Protocol. The difference is mainly evident in the

unconditional right to assert their rights within a certain period of time – 60 calendar days.

The difference between Swedish law and the provisions of the Rail Protocol becomes greater in the case of corporate restructuring. In Government Bill 2014/2015:12, the Government has stated that insolvency proceedings under the Cape Town Convention and the Aviation Protocol cover both bankruptcy proceedings and corporate restructuring. Insolvency proceedings have exactly the same meaning under the Railway Protocol. Under the Railway Protocol, creditors are given the same right as in bankruptcy proceedings to remove their property from the debtor's estate. Furthermore, neither the Bankruptcy Act nor the Company Reorganisation Act contains any provision corresponding to the Protocol's explicit provision that the debtor must both remedy a breach of contract and undertake to fulfil all future obligations under the contract (Article IX, alternative A, p. 7, cf. Chapter 2, Section 20 of the Company Reorganisation Act).

In the case of a corporate restructuring, the application of Article IX, alternative A, also means that property that is of crucial importance to the company's operations may be removed from the estate, something that is otherwise not possible under the Corporate Restructuring Act (cf. Chapter 2, Section 15, first paragraph, 3). This naturally impairs the company's ability to continue its operations, and it is even questionable whether corporate reorganisations of railway companies are possible at all.

This issue was addressed in Government Bill 2015/16:12. The Government noted that there was a limited risk that such a provision, Article XI, alternative A of the Aviation Protocol (corresponding to Article IX, alternative A of the Rail Protocol) would hinder reorganisations.

In the event of Sweden acceding to the Rail Protocol, it is the assessment of the inquiry that Swedish legislation must be adapted to correspond to the conditions in Article IX, Alternative A. It is important that the adaptation is made in such a way that it is clear that the provision specified in the Protocol takes precedence over other Swedish provisions in this area. Section 8 of the Act on International Security Rights in Movable Property contains a similar provision regarding the Aviation Protocol. The aforementioned Act should be supplemented to also apply to Article IX, alternative A, of the Railway Protocol.

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<sup>2</sup> Prop. 2015/16:12, p. 59 f.

### 9.3.2 Information on the precedence of the Protocol

In order for Sweden to fulfil its obligations as a contracting state, it is important that nothing in Swedish law limits the application of the provisions of the Protocol.

Since this is a matter of convention-based legislation, it must take precedence over other legislation in this area. Swedish provisions of general application should therefore be made subsidiary to the provisions of the incorporated protocol. Explicit provisions to this effect should be included in the Swedish statutes governing areas covered by the protocol, provided that there is no general regulation to this effect already in place.

Chapter 1, Section 2 of the Enforcement Code (UB) stipulates that if another law contains a provision that deviates from the Code, that provision shall apply. There is therefore no reason to include any reference to the fact that special provisions exist in the Act on International Security Rights in Movable Property. To the extent that the provisions incorporated into the Protocol do not regulate a particular issue, national law shall apply.

In the Bankruptcy Act, the above-mentioned provision in the UB corresponds to Chapter 1, Section 6. Nor is there any reason to make any reference in the Bankruptcy Act. The insolvency law provisions incorporated into Swedish law and the provision that Article IX, Alternative A shall apply generally take precedence.

A provision was introduced into the Company Reorganisation Act upon accession to the Cape Town Convention and the Aviation Protocol, which states that the Act on International Security Rights in Movable Property takes precedence. This provision thus covers the additions proposed by the inquiry in the Act on International Security Rights in Movable Property.

The Swedish Act (1978:599) on hire purchase between traders and others regulates agreements on purchases with retention of title where at least one instalment is to be paid after the goods have come into the buyer's possession. If these requirements are met, agreements referred to as rental or leasing may also be covered by the Act in cases where the intention is that ownership of the goods shall pass to the renter or lessee. It may also be a question of a pledge agreement. Regardless of how the agreement is classified under Swedish law, it is clear that this type of agreement can form the basis for an international security right under the Convention. Even

The aforementioned Act was supplemented upon accession to the Cape Town Convention and the Aircraft Protocol with a provision stating that the provisions of the latter Act shall apply in cases where the right obtained by the seller under the agreement is covered by the Act on International Security Rights in Movable Property.

The Transport Agency should provide appropriate information about what Sweden's accession to the Railway Protocol means ( ).

### **9.3.3 International security rights in rolling stock should be given special priority.**

The Cape Town Convention stipulates that international security rights registered in the international registry shall have priority over later registered international security rights and unregistered security rights. In Swedish law, creditors' mutual rights to payment in the event of bankruptcy and enforcement are regulated by the Priority Rights Act (1970:979), FRL. In order to ensure the priority of registered international security rights, an addition was made to Section 4 of the FRL in connection with Sweden's accession to the Cape Town Convention and the Aviation Protocol. This means that these rights are given special priority. Upon accession to the Railway Protocol, Section 4 should be amended to include property covered by the Railway Protocol.

The relative priority between registered international security rights follows from the provisions of the Act on International Security Rights in Movable Property, which in turn refers to both the Convention and the various Protocols.

Holders of rights under the Railway Protocol should be treated as other creditors in the event of an enforcement sale. The provisions of the Railway Protocol that the inquiry proposes should apply as Swedish law are so comprehensive that, with a few exceptions, they can be applied without supplementary provisions.

### **9.3.4 Protection of rights in rem when purchasing rolling stock**

In order for the purchaser of movable property (personal property) to be protected against the property being claimed by the transferor's creditors, Swedish law generally requires that possession of the property has been transferred from the seller to the purchaser. Once possession has been transferred

, the buyer is said to have obtained protection under property law or creditor protection.

The purpose of the requirement for transfer of possession in order for a buyer to be protected against the transferor's creditors is primarily to counteract what is usually referred to as sham transfers, i.e. false and fabricated claims that property has been transferred.

In some cases, it is not practically possible to effect a transfer of possession upon purchase, e.g. if the intention is for the property to remain with the seller and continue to be used by the seller, which is the case with sale and lease back. In these and other similar cases, the principle of tradition prevents a buyer from obtaining protection for their acquisition against the seller's creditors. What is then available to a prospective buyer is to apply the Movable Property Purchase Act. However, the provisions of that Act are largely outdated and its application is therefore limited.

Since 1 July 2002, the contract principle has applied to purchases under the Consumer Purchases Act (1990:932). In the legislative process that preceded this amendment, the Government also considered the issue of a general transition to the contract principle for the transfer of movable property, i.e. also for commercial purchases. However, the Government considered at the time that there were no grounds for considering such a reform (Government Bill 2001/02:134, p. 77). This issue has also been investigated by the Movable Property Purchase Committee, which proposes that the Movable Property Purchase Act be repealed and that new rules on registered pledges be introduced (SOU 2015:18). The report has been referred for consultation.

Unlike the aviation protocol, the railway protocol does not allow for the registration of ordinary sales, except for information purposes. For security transfers (and pledge agreements), registration of a pledge or security right in the international register will provide protection in rem against the grantor's creditors – for security transfers without observing the procedure under the Movable Property Purchase Act. The same should apply to the transfer of ownership that takes place in a sale and lease back transaction where the lease agreement is registered in the international register. A lease agreement registered in the international register constitutes in itself an international security right. However, an undesirable situation and legal losses may arise if the lessor's acquisition of the property from the lessee (the first stage of the transaction) has no effect in rem against the lessee's/seller's creditors. In that case, the registration of the lease agreement may be without

effect (since the validity of the acquisition is to be determined by the national legal system).

The inquiry has considered two possible proposals to resolve this issue. One proposal is that the buyer should already obtain protection under property law through the agreement to purchase property covered by the Railway Protocol. However, the committee considers that there has been insufficient analysis of such a proposal. Therefore, the preparatory work on the Movable Property Purchase Committee's proposal in this regard should be postponed.

Instead, the committee proposes that anyone who acquires rolling stock and, in connection with the purchase, applies for registration of a security right in the object in the international register, should receive protection under property law against the transferor's creditors upon registration. The protection of property rights for the acquirer should take effect from the date on which registration is granted. Such a provision means that the protection of property rights for the acquirer is not dependent on the acquirer having taken possession of the rolling stock or on the procedure under the Movable Property Purchase Act having been followed. The acquirer is protected even if the rolling stock remains in the possession of the transferor.

The provision that should be introduced into the Act on International Security Rights in Movable Property should also specify that the property is covered by the Railway Protocol. Furthermore, it is assumed that the seller is listed as the debtor and the buyer as the guarantor in the registration, as these terms are defined in the Cape Town Convention.

With this arrangement, there is no need to determine whether it is a question of a transfer of ownership or a transfer of security.

On the other hand, there is no need for such a provision in the transition to the contractual principle, as proposed by the Movable Property Purchase Committee (SOU 2015:18).

The Movable Property Purchase Act should state that the Act on International Security Rights in Movable Property contains a provision that deviates from the Movable Property Purchase Act and takes precedence over this Act.



## 10 Entry into force

The Railway Protocol will enter into force on the later of the following dates (Article XXIII.1):

- a) the first day of the month following the expiration of three months after the date on which the fourth instrument of ratification, acceptance, approval or accession has been deposited.
- b) The date on which the Secretariat of the depositary deposits a certificate confirming that the International Registry is fully operational.

Luxembourg ratified the Protocol in 2007. For the Protocol to enter into force, three more states must ratify it and the International Registry must be fully operational.

No new Swedish system needs to be established or changed as a result of Sweden's accession.

The legislative amendments are proposed to enter into force on the date determined by the Government.

There is already a transitional provision to the Act on International Security Rights in Movable Property, which states that the provisions of Section 8 shall not apply in insolvency situations that arose prior to the entry into force of the Act. The provision also covers the national provision proposed by the inquiry, in Section 8, second paragraph, of the same Act, that Article IX, Alternative A, of the Rail Protocol shall apply in certain situations. No other transitional provisions have been deemed necessary.

Information about Sweden's forthcoming accession to the Rail Protocol should be provided well in advance of formal accession, preferably through information on the websites of train operators and the Transport Agency.



## 11 Impact assessment

### 11.1 Introduction

In the railway sector, infrastructure, access to rolling stock and financing are factors that affect market entry. The availability and price of rolling stock create problems for new and smaller companies wishing to enter the market, but also for companies wishing to expand their operations. This is a capital-intensive activity with significant investment requirements. The need for large financial resources before operations can begin, combined with limited financing solutions, has been one of the obstacles to effective competition in the railway sector. Improved access to private capital can solve some of these difficulties.

The main ways of financing rolling stock – loans or leasing – involve the creditor obtaining a security interest in the rolling stock. The protection of the security interest in the event of the debtor's bankruptcy or breach of contract varies between different legal systems. This creates uncertainty for creditors. The fact that the objects move across national borders increases the uncertainty. The Railway Protocol has been created to reduce this uncertainty and establish common substantive rules for this type of financing. The main task of the inquiry has been to decide whether Sweden should accede to the Protocol and, if so, how. The main reason for the inquiry's proposal is that there are economic advantages for Swedish railway companies in Sweden acceding to the Protocol. These economic advantages are important for Swedish railway companies to be able to compete internationally. The inquiry has not been able to identify any reasons why Sweden should not accede to the Protocol.

## 11.2 Consequences for companies

The group that will be most affected by Swedish accession is Swedish train operators and banks. It is difficult to determine how many companies will be affected. However, it should be noted that the industry association Tågoperatörerna currently has a total of 35 regular members in the freight and passenger rail transport sector who will be affected by Swedish accession. In addition, there are banks and other companies (including state-owned companies) that are involved in the financing of railway equipment.

The Railway Protocol creates conditions for increased private financing by making it easier for lenders to monitor their investments and by harmonising rules on security rights used in the financing of rolling stock. This makes it easier and less risky for banks and other financiers, including lessors, to provide financing.

Monitoring of security rights will be possible through the international register. This will be a register for both domestic and international transactions and a universal system for identifying rolling stock.

The intention is that this register will also facilitate real-time monitoring of rolling stock and enable its tracking, which is particularly useful in connection with maintenance and insurance matters.

Companies wishing to make entries or searches in the international register are welcome to register as users and thus gain access to the register. The fees for using the register will be modest and will be specified in the regulations governing the register.

Compared with the fees for aircraft, the registration fee is, for example, USD 100 per registration.<sup>1</sup> According to ongoing discussions on the size and structure of fees for rolling stock, the fees for registering this type of property will be lower than for aircraft objects, as there are many more objects to be registered. Accession to the Protocol does not entail any obligations for Swedish railway undertakings. The international register is self-financed through fees, and the registration of an international security interest therein is

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<sup>1</sup><https://www.internationalregistry.aero/ir-web/faq>

also voluntary. It is up to each security holder to assess in each individual case whether registration in the register should be made.

The inquiry assesses that the above circumstances will lead to cheaper and more financing opportunities from the private sector for Swedish train operators. The more capital available from the private sector and the lower the risks financiers need to take, the more favourable the financing will be. According to a recent study by RWG, access to the protocol would reduce borrowing costs in Western Europe by up to 0.35 per cent, which would mean a discount of over three per cent on the sale price for a typical ten-year financing.

### **11.2.1 Consequences for smaller companies**

By giving lenders greater security in taking collateral in the assets being financed and, in addition, registering these security rights, the Protocol will open up more opportunities for smaller companies to invest in rolling stock.

Rolling stock is currently financed largely with the help of public guarantees and other public commitments. This is because railways, including tramways and underground railways, are important parts of society's overall infrastructure and guarantee necessary transport capacity. Due to various obstacles (infrastructure, track capacity, access to vehicles and financing for these), private operators are unable to establish themselves in the market to the extent that is desirable. The difficulties lie in the macro solutions that exist to some extent for state-owned companies, e.g. through the state providing guarantees, etc. Increased financing opportunities from the private sector are likely to reduce the need for these macro solutions. This will in turn lead, in the long term, to more even competition between state-owned companies and private companies.

### **11.3 Consequences for the state**

Accession to the Railway Protocol will not entail any direct costs for Sweden. There is currently no register of rolling stock in this country that could be used for the purposes of the Railway Protocol. The Transport Agency

does maintain a national register of railway vehicles, see Chapter 8, Section 8a of the Railway Act. However, this register is based on Article 33 of the Interoperability Directive and must contain railway vehicles that are approved for use within the territory of the state. The national register of railway vehicles does not fulfil the purposes of the Railway Protocol (see sections 3.5.1 and 6.5.3). Furthermore, the international register will be self-financed through fees, and registration of an international security right is voluntary. Accession to the Protocol therefore does not entail any indirect costs or reduced revenues.

Access to the Rail Protocol affects the Swedish Enforcement Authority in that the authority will need to check the international register when processing rolling stock and register security rights in general cases. The administrative work and registration fees that access may entail for the Swedish Enforcement Authority are so limited that they can be covered by existing appropriations. There may also be some administrative work for the Transport Agency in providing information about the Railway Protocol and the international railway register, but this can be covered by existing appropriations.

If the parties have agreed that Swedish courts shall have jurisdiction to hear cases based on the provisions of the Protocol but have not designated a specific court, the question of court jurisdiction shall be decided in accordance with the provisions of the Code of Judicial Procedure or, in certain cases, the Brussels I Regulation. To the extent that these provisions do not specify which court shall have jurisdiction, the Stockholm District Court shall be the reserve forum. The handling of cases arising from the inquiry's proposal is not expected to lead to any significant increase in the workload of the Stockholm District Court. According to the inquiry's assessment, the proposal will therefore have no financial consequences for Sweden's courts that need to be financed under a special arrangement.

EKN issues state guarantees for Swedish export transactions. These may involve rolling stock from Bombardier for export or deliveries from subcontractors to Bombardier (which in turn exports). Access to the Railway Protocol leads to better conditions for financing such acquisitions. This makes things easier for EKN, which normally takes security in the assets when guarantees are issued to the financier. A strengthened ability to monitor and enforce security in rolling stock is therefore positive not

only for buyers through improved opportunities to finance their transactions, but also for EKN through an improved risk profile on export credit guarantees issued for the benefit of exporters and financiers of export transactions.

It is the assessment of the inquiry that accession to the Protocol will enable both large and small companies operating in Sweden, some of which are owned by the Swedish state/county councils, to make financial savings. This may in turn lead to other socio-economic consequences, such as positive effects on employment. However, in the opinion of the inquiry, it is not possible to predict exactly what these consequences will be and how significant they will be.

## **11.4 Other consequences**

As noted in Chapter 6, the EU has competence in certain areas regulated by the Protocol, including the question of choice of law. This means that Sweden, like the other EU Member States, has been prevented from acceding to the agreements before the EU acceded, which took place in 2009 and 2014 respectively, after which Sweden was free to accede. However, in view of the EU's competence, Sweden cannot make all possible declarations to the Convention and the Protocol. This has been taken into account in the Committee's proposal regarding the declarations that Sweden should make upon accession, and the Committee's proposal is therefore in accordance with EU law.

The types of agreements that can form the basis of an international security interest – pledge agreements, leasing agreements and purchase agreements where the seller has a retention of title – are well known in Swedish law. Accession to the Protocol means that separate provisions will apply to international security interests. The biggest differences in relation to Swedish law will be what applies in an insolvency situation; the Railway Protocol gives the creditor greater opportunity in such a situation to quickly repossess the property in which the security right is held. The security this provides for creditors will benefit railway companies.

Swedish credit security law is somewhat uncertain in terms of content and partly outdated. This means, among other things, that both Swedish and foreign creditors may experience uncertainty regarding the stability of credit security

security in movable property, including rolling stock. Sweden's accession to and implementation of the Cape Town Convention's railway protocol will lead to a clear improvement in credit security law in the areas covered by the protocol. As a creditor with a registered international security interest, the position becomes significantly more predictable and reliable in insolvency proceedings concerning a Swedish debtor, compared with if Sweden does not accede to the Railway Protocol.

The Railway Protocol is one of three related protocols to the Cape Town Convention of Unidroit for uniform rules on security rights in movable property. On 1 April 2016, Sweden acceded to the Convention and the Aircraft Protocol. Swedish accession means that the regulation of financing in the railway sector will also be modernised; in the opinion of the inquiry, the fact that the railway sector will also have a comprehensive international register will lead to positive developments in Swedish law.

Overall, the inquiry's assessment is that accession would bring economic benefits for Swedish railway companies, which is likely to have other positive socio-economic effects.

## **11.5 Alternative solutions**

The Movable Property Purchase Committee has considered, among other things, whether it is appropriate to create some form of registered pledge as a replacement for the current movable property purchase, see SOU 2015:18. The Committee has essentially arrived at the following regulation, which will be included in a law on registered pledges in movable property. The possibility of pledging movable property through registration shall apply to traders, but not to private individuals. Only ships, shipbuilding and aircraft are excluded. Shares in movable property shall also be subject to pledge rights through registration. Once registration has taken place, the registration authority shall ensure that a notice is published in the Swedish Official Gazette, which is published on the Swedish Companies Registration Office's website and is therefore easily accessible to everyone. There are various search options available, and the notice shall remain on the website until the lien is deregistered.

This proposal is still being prepared by the Ministry of Justice.

As mentioned above, accession to the Railway Protocol entails the registration of security rights in railway rolling stock in an international register, which, according to the investigation, cannot be compared to a national register for liens. Furthermore, the Cape Town Convention, together with the Railway Protocol, offers harmonisation and internationalisation of the insolvency law rules that apply to the purchase of railway rolling stock.

The alternative that is theoretically available is for Sweden to carry out a major modernisation of Swedish credit security law and, on its own, introduce a regulatory system that corresponds to and reflects the Railway Protocol, among other things. However, the inquiry considers that such a major legislative reform cannot match the convention-based international regulation of the type offered by the Cape Town system.



## 12 Constitutional commentary

### **12.1 Proposed amendment to the Act (2015:860) on international security rights in movable property**

The main parts of the Railway Protocol are incorporated into Swedish law through amendments to the Act on International Security Rights in Movable Property.

Three types of agreements may give rise to an international security interest: pledge agreements (including security transfers), leasing agreements and purchase agreements where the seller has a retention of title. To be covered by the Cape Town Convention's Railway Protocol, the security interest must be attached to a type of property specified in the Convention, such as railway rolling stock.

The decisive factor for the applicability of the Protocol is whether the debtor (i.e. the pledgor or security provider, lessee or buyer) is domiciled in a state that has acceded to the Cape Town Convention and the Railway Protocol. Sweden acceded to the Cape Town Convention on 1 April 2016.

The Protocol complements the Convention by adapting its provisions to rolling stock. The Convention and the Protocol should be read together and interpreted in the light of each other. If they are incompatible, the Protocol takes precedence.

The Protocol primarily regulates how international security rights are to be treated in different situations, including what measures the creditor may take if the debtor fails to fulfil its obligations under the agreement. There are also provisions on the transfer of international security rights and rights attached to security rights, such as instalment payments and leasing fees. Matters not dealt with in the Protocol are governed by applicable national law.

In applying the provisions of the Protocol, account shall be taken of the declarations made by each Contracting State.

The declarations made by each state and their content are listed on the Unidroit website. Sweden's declarations can also be found in Sweden's agreements with foreign powers.

The Protocol is primarily designed to apply to cross-border transactions, but its provisions are not limited to such cases. For example, a pledge agreement between two parties in the same contracting state may give rise to an international security interest to which the Protocol applies.

Registration in the international registry is crucial for certain issues, including priority, but is not necessary for a security right to be covered by the Protocol. If a security right otherwise meets the requirements of the Protocol, it constitutes an international security right and is effective between the contracting parties regardless of whether it is registered in the international registry or not.

The various types of agreements that can form the basis for an international security interest are established in Swedish law. However, there is currently no Swedish law that jointly regulates the various types of security interests. The provisions of the Protocol relate to different areas of law and broadly correspond to those applicable under Swedish law. One difference between the provisions of the Protocol and purely national law is how different security rights are treated in insolvency proceedings. This mainly affects the applicability of the Enforcement Code, the Bankruptcy Act (1987:672), the Company Reorganisation Act (1996:764) and the Priority Rights Act (1970:979).

Amendments to the Act on International Security Rights in Movable Property introduce special regulations into Swedish law for certain security rights in rolling stock. To the extent that the Act is applicable and regulates the same issues as other laws, it shall be applied in place of the other laws. The Bankruptcy Act and the Enforcement Code contain provisions stating that special regulations in other laws shall take precedence over the provisions of the Bankruptcy Act and the Enforcement Code, respectively (Chapter 1, Section 6 of the Bankruptcy Act and Chapter 1, Section 2 of the Enforcement Code). Provisions informing about the present Act are introduced in other relevant laws.

The Protocol regulates certain matters that are also regulated in EU legal acts, namely the Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings), the Brussels I Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations).

As the EU has acceded to both agreements, parts of the Convention and the Protocol form part of EU law. When applying the provisions of the Convention and the Protocol concerning choice of law, jurisdiction, recognition of court decisions and insolvency law, account must therefore be taken of the EU's declarations in connection with its accession.

**Section 1** This Act applies to security rights and other rights governed by the Convention on International Interests in Mobile Equipment of 16 November 2001 (the Cape Town Convention) and *the Protocols* to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Aircraft Protocol) *and on Matters Specific to Railway Rolling Stock (the Railway Protocol)*.

The Act also applies, to the extent provided for in the Convention, to security rights and other rights that have arisen under other law and that are covered by Sweden's declarations to Articles 39 and 40 of the Convention. The declarations, together with declarations relating to Article 54(2) of the Convention, Articles XII and XIII of *the Aircraft Protocol* and *Article X of the Rail Protocol*, are contained in Sweden's agreements with foreign powers (SÖ).

The addition in the first paragraph is a reference to the Rail Protocol, which means that the Act also applies to international security rights and so-called associated rights regulated in the Rail Protocol.

The addition to the second paragraph refers to the declaration made by Sweden to the Rail Protocol.

**3 §** Articles I–VII, IX, XII–XVI and XX–XXV of the Aviation Protocol *and Articles I–V, VII, X, XI and XIV–XX of the Railway Protocol* shall apply as law in this country in the wording of the original texts.

The original English texts *of the protocols*, together with a Swedish translation, are included as Annexes 2 *and* 3 to this Act. The texts

in the other original languages – Arabic, French, Chinese, Russian and Spanish – are available in SÖ. The original texts have the same validity.

The amendment in the first paragraph incorporates the main part of the provisions of the Railway Protocol. The considerations are set out in Chapter 9. The first paragraph specifies which articles of the Railway Protocol shall apply as Swedish law.

Articles I–V contain definitions and specify when the Protocol applies.

Article VII supplements the provisions of the Convention on measures that a creditor may take in the event of a debtor's breach of contract. This article makes it clear that the Railway Protocol is a special regulation in relation to the Convention and is specifically adapted to apply to the railway sector. Article VII.3 states that Article 8.3 of the Convention, concerning the measures that a creditor may take, shall not apply; instead, the provisions of the Protocol shall apply in this regard.

Articles X and XI contain provisions on assistance in the event of insolvency and provisions concerning the debtor.

Articles XIV–XX, which are also incorporated, contain provisions on the identification of railway rolling stock for registration purposes, the international register of security rights in railway rolling stock, immunity and the relationship to other conventions.

Articles VI, VIII and IX apply only if the contracting state has made a declaration to apply them. The inquiry's proposal is that Sweden should not make any such declarations, and the articles should therefore not apply as Swedish law. Article XII deals with the tasks of the registration agency and the supervisory authority and, according to the inquiry, should not apply as Swedish law. Nor will Article XIII, which concerns contact points, be incorporated. Articles XXI–XXXIV are final provisions concerning the ratification procedure and the deposit of documents and should also not be incorporated into Swedish law.

The original text of the Railway Protocol is available in Arabic, English, French, Chinese, Russian and Spanish. Through incorporation, these language versions become applicable as Swedish law. According to the addition in the second paragraph, the English language version and a Swedish translation are included as an appendix to the Act. The Swedish translation is included solely as an aid to reading and has no legal significance. None of the original texts takes precedence over the others.

**7 §** If there is Swedish jurisdiction under any of the provisions of the Cape Town Convention, the Aviation Protocol *or the Rail Protocol* referred to in Sections 2 and 3 and no other competent court exists, the Stockholm District Court shall have jurisdiction.

If the parties have agreed that Swedish courts shall have jurisdiction to hear cases based on the provisions of the Convention and the Protocols but have not designated a specific court, the question of jurisdiction shall be decided on the basis of either the Code of Judicial Procedure or the Brussels I Regulation.

The section states that Stockholm District Court has jurisdiction when, according to a provision in the Convention or the Protocols that applies as Swedish law, Swedish courts have jurisdiction, but Swedish national forum rules or EU law do not designate any competent court. The addition means that Stockholm District Court also becomes the reserve forum in cases of Swedish jurisdiction under the provisions of the Rail Protocol. The considerations are set out in Chapter 9.

**8 §** In an insolvency situation pursuant to Article I.2m of the Aviation Protocol, if the debtor has its centre of main interests in Sweden as specified in Article I.2n, Article XI alternative A *of the Aviation Protocol* shall apply. In the application, the waiting period specified in the article may not exceed 60 calendar days.

*In an insolvency situation under Article I.2c of the Rail Protocol, if the debtor has its centre of main interests in Sweden as specified in Article I.2d, Article IX alternative A of the Rail Protocol, the waiting period specified in the article shall not exceed 60 calendar days.*

The contracting parties may, by written agreement, decide that the first *or second* paragraph shall not apply.

The addition in the second paragraph regulates the applicability of the insolvency law provisions in Article IX of the Railway Protocol. The considerations are set out in Chapters 6 and 9. The addition in the first paragraph concerning the Aviation Protocol is made to clarify which provision is referred to.

The insolvency provisions in Article IX of the Rail Protocol are central to agreements based on the Cape Town Convention and the Protocol. According to the article, its provisions are only applicable

if a contracting state submits a declaration to apply the article. When the Aircraft Protocol was to be ratified, Sweden did not submit such a declaration due to the uncertainty surrounding the division of competence between the EU and its member states in matters of insolvency law. The inquiry has reached the same conclusion. Article IX is therefore not incorporated into Swedish law (cf. Section 3).

However, there is nothing to prevent Swedish law from being adapted to correspond to the application of the article, which is done through this section. The result is therefore the same as if Sweden had made a declaration. Even though this is a purely national provision, the intention is that it should be interpreted and applied in the light of the Convention and the Protocol. It follows that the comments on Article IX in the official commentary on the Convention and the Protocol may be taken into account.

Chapter 1, Section 6 of the Bankruptcy Act (1987:672) contains a general provision stating that if any other law contains a provision that deviates from the Bankruptcy Act, that provision shall apply. In the event of bankruptcy where the estate includes property encumbered by an international security interest or other right covered by the Convention and the Protocol, the provisions of this section shall therefore take precedence over the provisions of the Bankruptcy Act. The provisions also take precedence over the provisions of the Enforcement Code (UB) and the Act (1996:764) on Corporate Reorganisation. However, when applying this section, applicable EU law must be taken into account.

According to the first sentence of the second paragraph, the section refers to a case as specified in Article I.2c of the Rail Protocol. The article defines an insolvency situation. This refers to the commencement of insolvency proceedings. According to the Cape Town Convention, insolvency proceedings refer to bankruptcy, liquidation and other legal or administrative proceedings in which the debtor's assets and business are controlled or supervised by a court for the purpose of reconstruction or liquidation (Article 1.1 of the Convention). Reconstructions under the Companies Reconstruction Act fall within the definition. Interim proceedings are also covered. A creditor cannot take action under this section in cases other than insolvency proceedings, e.g. in the case of enforcement measures under the Enforcement Code.

However, not all insolvency situations are covered by this section. It only applies to insolvency situations where the debtor, in accordance with

Article I.2d has its main interests in Sweden. It is therefore applicable if the debtor is only registered in Sweden or, in the absence of a registered office, the company is only formed in Sweden but otherwise has no interests in this country.

In an insolvency situation where the bankruptcy estate or similar contains rolling stock that is encumbered with an international security right or other right covered by the Convention and the Protocol, the provisions of Article IX, Alternative A, shall apply.

The article imposes certain obligations on the debtor or the person otherwise competent in the insolvency proceedings, i.e. a bankruptcy administrator or the reconstructor in a corporate reconstruction. Within a certain waiting period from the commencement of the insolvency proceedings, Article IX requires one of two things to happen: either all breaches of contract must be remedied and the debtor (or whoever is otherwise competent) must undertake to fulfil all future obligations under the contract, or the creditor must regain possession of the rolling stock. For example, any outstanding instalments or lease payments must be paid. In addition, the debtor (or whoever is otherwise authorised) must undertake to fulfil all future obligations under the contract.

If the debtor fails to do so, the creditor may apply to the court to regain possession of the rolling stock. The court shall then promptly notify such decision and shall not grant any extension beyond the time limits specified in Article IX, Alternative A.

Pending the creditor's taking possession of the rolling stock, the debtor (or the person otherwise entitled) shall take measures to preserve the object and maintain its value in accordance with the agreement. During this period, the creditor shall be entitled to apply for other interim measures available under applicable law. In the application of Article IX, the second sentence of *the second paragraph* states that the waiting period specified in the article may not exceed 60 calendar days. The purpose of the provision is to give the creditor certain unconditional rights and not to impair the rights of the creditor under other law. Property that does not belong to the debtor is not included in the debtor's bankruptcy estate, and the owner has a right of separation to the property. For example, lessors may therefore be able to recover their property even before the expiry of the 60-day period. After the 60 calendar days

During this period, the rolling stock must be made available to the creditor.

According to *the third paragraph*, the contracting parties may agree to exclude the application of the first paragraph. The addition means that the new second paragraph is also covered by the third paragraph. The provision is a direct counterpart to Article III of the Protocol, according to which the parties may agree in writing to exclude the application of Article IX. The original English text uses the word "exclude" to clarify that the parties must either agree to exclude the application of Article IX in its entirety or fully apply the option chosen by the Contracting State. The intention is that the provision in the second paragraph should be applied in the same way. If the parties agree to exclude the application of the first paragraph and thus Article IX, Alternative A, or if the creditor for any reason chooses not to make use of the possibilities available under the provisions of the first paragraph, the security right will be treated under the Insolvency Act or the Company Reorganisation Act during the insolvency proceedings.

*Effects of registration in the International Registry for Security Rights in Rolling Stock*

**Section 9** *The purchase of rolling stock is valid against the seller's creditors upon conclusion of the agreement, provided that a security right in the object of purchase is registered in the international register in connection with the purchase. This requires that the seller be specified as the debtor and the buyer as the creditor in the registration.*

This section, which is new, deals with the so-called creditor protection in the transfer of rolling stock. The considerations are set out in Chapter 9.

Unlike the aviation protocol, the railway protocol does not allow for the registration of ordinary sales, except for information purposes. For security transfers (and pledge agreements), registration of a pledge or security right in the international register will provide protection in rem against the grantor's creditors without the need to comply with the provisions of the Movable Property Purchase Act. The same should apply to the transfer of ownership that takes place in a sale and leaseback transaction where the lease agreement is registered in the international register. Otherwise, an undesirable situation and legal losses could arise, where the lease agreement registered in the international register in itself gives rise to an international security right. The

would in principle enjoy recognition but would be ineffective to the extent that the lessor's acquisition of the property from the lessee (the first stage of the transaction) would have no effect in rem against the lessee's/seller's creditors (which is to be determined by the national legal system).

This section means that anyone who acquires rolling railway stock receives protection under property law against the transferor's creditors if, in connection with the purchase, an application is made for registration of a security right in the object in the international register. The protection of property rights for the acquirer is linked to the registration and takes effect from the date on which registration is granted. The provision thus means that the protection of property rights for the acquirer is not dependent on the acquirer having taken possession of the rolling stock or on the application of the Movable Property Purchase Act. The acquirer is protected even if the rolling stock remains in the possession of the transferor. Conversely, this means that as long as registration has not been made for an acquisition, the principle of tradition and the Movable Property Purchase Act apply as usual.

order.

The provision also specifies that the property is limited to property covered by the Railway Protocol. However, this presupposes that the seller is specified as the debtor and the buyer as the creditor in the registration, as these terms are defined in the Cape Town Convention.

With this arrangement, there is no need to take a position on whether a transaction actually involves a transfer of ownership or whether it is a transfer of security that is intended.

It should be noted that the provision is not necessary in the event of a transition to the contractual principle in accordance with the report of the Committee on the Sale of Goods (SOU 2015:18).

## 12.2 Proposed amendment to the Priority Rights Act (1970:979)

### Section 4 Priority rights accompany

1. maritime liens and air liens,
2. international security rights in aircraft, aircraft engines *and rolling stock* registered under the Act (2015:860) on international security rights in movable property,

3. lien and right to retain movable property as security for a claim (right of retention), lien due to registration or notification under the Act (1998:1479) on Central Securities Depositories and Accounting for Financial Instruments, and lien due to registration under the Act (2011:1200) on Electricity Certificates,

4. lien due to mortgage in ships or shipbuilding or in aircraft and spare parts for aircraft,

5. registration of boat building advances pursuant to the Act (1975:605) on the Registration of Boat Building Advances.

This section specifies various special preferential rights. The considerations are set out in Chapter 9.

The second paragraph has been supplemented with international security rights in rolling stock, which means that international security rights in rolling stock are given special priority if they have been registered in the international register of security rights in rolling stock in accordance with the Act on International Security Rights in Movable Property.

The addition to the second paragraph ensures the priority of international security rights in rolling stock under Article 29 of the Cape Town Convention, which applies as Swedish law (Section 2 of the Act on International Security Rights in Movable Property). The article stipulates that a registered international security right takes precedence over an unregistered security right.

A security right is considered to be registered if it is registered in the International Registry for Security Rights in Rolling Stock. Priority therefore only applies to international security rights that are registered in the International Registry.

Legal security rights covered by a State's declaration under Article 40 and registered in the International Registry are also covered by the second paragraph. Once registered, they shall be treated as international security rights. This means that even a security right arising from a seizure order may be given special priority regardless of the State in which the order was issued. However, this presupposes that the security right is covered by the State's declaration under Article 40 and that it has also been registered in the International Registry for security rights in rolling stock.

Security rights that are international security rights in themselves but are not registered in the International Registry

for security rights in rolling stock are not covered by the special priority right. Creditors' mutual rights to payment for such unregistered security rights in rolling stock may be assessed in accordance with other provisions.

### **12.3 Proposed amendment to the Act (1845:50 p. 1) on trade in movable property that the buyer leaves in the seller's care**

*Section 5 The Act (2015:860) on international security rights in movable property contains provisions that deviate from this Act and take precedence over it.*

This new section states that the Act on International Security Rights in Movable Property contains a provision that deviates from the Movable Property Purchase Act and takes precedence over this Act. The considerations are set out in section 9.



# Committee Directive 2015:66

## Access to the Railway Protocol

Decision at the Government meeting on 17 June 2015

### Summary

Sweden is facing major investments in the railway sector. The upgrading and expansion of the railway network, including announced investments in new main lines for high-speed trains, will be a high priority in the coming years. A strengthened and expanded railway sector also entails increased investment in new trains for railway companies. Against this background, it will be investigated whether Sweden should accede to an international instrument, the Railway Protocol, which has been developed with the aim of making it easier and cheaper to finance the acquisition of new railway vehicles.

The Railway Protocol is linked to the Convention on International Interests in Mobile Equipment (the Cape Town Convention). The Protocol and the Convention have introduced a system for international security rights in transfers and leases of railway vehicles, which is intended to increase predictability and reduce risks for financiers. This creates the conditions for lower financing costs when acquiring such property.

A previous inquiry (the Cape Town Inquiry) proposes that Sweden accede to the convention and a corresponding protocol in the field of aviation as soon as possible.

A special investigator will analyse and decide whether Sweden should also accede to the railway protocol, propose the constitutional amendments that are necessary or otherwise deemed appropriate for accession, and decide which declarations to the protocol Sweden should make in such a case.

The assignment shall be reported by 20 June 2016 at the latest.

### **The Railway Protocol to the Cape Town Convention**

Railway vehicles represent very high economic values. Such property can be financed in various ways, e.g. through conventional loans or through various forms of leasing agreements or purchases with retention of title. A prerequisite is usually that the guarantor obtains a security interest in the property. However, the legal regulation of security interests, their priority and protection against third parties, e.g. in the event of the debtor's bankruptcy, varies from country to country. This leads to uncertainty among financiers and thus higher financing costs. When financing rolling stock through leasing, the provisions of the Act (1845:50 p. 1) on the sale of movable property, which the buyer leaves in the seller's care (the Movable Property Purchase Act), are often applied. In order to achieve a right of separation of property for the creditor, the Act requires publication in a local newspaper and registration with the Enforcement Authority. The scheme appears cumbersome and also has a strong national character, which may be a deterrent, particularly for foreign financiers. The Movable Property Purchase Committee proposes that the Movable Property Purchase Act be repealed and that new rules on registered pledges be introduced (SOU 2015:18).

The Cape Town Convention was established with the aim of providing greater predictability and security for financiers, which in turn should lead to lower financing costs when acquiring valuable movable property. The Convention was negotiated within the intergovernmental private law institute Unidroit (International Institute for the Unification of Private Law). The rules laid down in the Convention apply to three types of movable property: aircraft equipment, railway rolling stock and space assets. There is a corresponding protocol for each type of property. The Convention and the respective protocols should be read as a single instrument. The Convention and the Aircraft Protocol were adopted in 2001 and the EU acceded to them in 2009.

The Railway Protocol was adopted in Luxembourg in 2007. Its structure and content are largely consistent with the Aircraft Protocol. Like the Aircraft Protocol, the Railway Protocol contains rules on leasing, security interests and retention of title, but with

with regard to rolling stock, i.e. railway vehicles such as locomotives and carriages with associated equipment. The Protocol also contains priority rules and rules on the rights and obligations of creditors and debtors, including in the event of delay or other default.

In addition to substantive provisions on security rights, e.g. how they are to be treated in the event of the debtor's insolvency, the protocol contains provisions on an international register in which security rights can be registered. The provisions also regulate how rolling stock encumbered by security rights is to be identified in the register. The international register will be located in Luxembourg.

The Railway Protocol has not yet entered into force but will do so once four countries have approved or ratified it. To date, only Luxembourg has ratified the Protocol. The EU signed the Protocol in 2009 and on 4 December 2014 decided to accede to it (Council Decision on the approval, on behalf of the European Union, of the Protocol on specific matters relating to railway rolling stock to the Convention on the International Interest in Mobile Equipment, adopted in Luxembourg on 23 February 2007). The EU has exclusive competence in certain areas regulated by the Protocol (issues of court jurisdiction, cross-border insolvency proceedings within the Union and choice of law in certain cases), while Member States have competence in others (including substantive insolvency law).

In addition to the EU's accession, Sweden's accession to the Protocol requires that Sweden also accede to the Cape Town Convention.

### **The Cape Town Inquiry**

A special investigator has been tasked with investigating whether Sweden should accede to the Cape Town Convention and the Aircraft Protocol (the Cape Town Investigation – International Interests in Aircraft, etc., Ju2013:16). The investigation submitted its report International Interests in Aircraft, etc. – The Cape Town Convention and the Aircraft Protocol (SOU 2014:79) on 3 December 2014. The report proposes that Sweden accede to both instruments as soon as possible, primarily in view of the economic advantages of financing new aircraft.

ships and aircraft engines that are available to Swedish air transport companies. It is also proposed that the instruments be incorporated into Swedish law through a law on international interests in mobile movable property and that certain constitutional amendments be made to, among other things, the Bankruptcy Act (1987:672) and the Enforcement Code.

### **The investigation assignment**

#### *Should Sweden accede to the Railway Protocol?*

As with the Cape Town Convention and the Aircraft Protocol, there is much to suggest that there are economic advantages to Sweden acceding to the Railway Protocol. In the aviation and shipping sectors, for example, financing is largely provided through the pledging of the means of transport. The Rail Protocol creates the legal basis for such pledge-based financing in the rail sector as well. When the question of adopting the Rail Protocol was referred for consultation, consultation bodies within the rail sector, such as SJ AB, the train operators and the then Railway Board, were positive about international regulation of credit security in rolling stock. It was pointed out, among other things, that the deregulation of the European railway market and the establishment of new private operators place increased demands on a modern international regulatory framework for credit securities. It was considered that stronger creditor protection through a harmonised regulatory framework could lead to lower credit costs and, in the long term, lower ticket prices for passengers.

According to reports, leasing is a common form of financing in the railway sector. In Sweden, there is no register for security interests in railway equipment corresponding to that which exists for aircraft, for example. A creditor cannot therefore obtain protection under property law for a security interest in such property through registration. In many cases, the creditor's right of separation in leasing is achieved by the parties applying the formal requirements of the Movable Property Purchase Act regarding publication in a local newspaper and registration with the Enforcement Authority. The Railway Protocol contains a more developed and adapted system for protection under property law in railway vehicles. This, in turn, should stimulate forms of financing using these as collateral. The increased predictability that international regulation brings should also attract foreign financiers, which is important at a time when

when Sweden is facing major investments in the railway sector, including the first stages of new main lines for high-speed trains. The advantages of accession to the

Railway Protocol must be weighed against the fact that the far-reaching creditor protection that the Protocol is intended to provide may be disadvantageous to both debtors and the general public in a situation of insolvency or in a dispute between a company and a financier. Another important question is what position the financier is given in relation to other creditors in a situation of insolvency.

in relation to other creditors in an insolvency situation.

The investigator shall therefore analyse the provisions of the Railway Protocol and compare the regulations with applicable Swedish law, taking into account applicable EU law. The analysis shall take into account that Sweden has already transferred competence to the EU with regard to some of the issues dealt with in the Protocol. On the basis of the analysis, the investigator shall describe the consequences of Swedish accession, both advantages and disadvantages.

The assignment also includes clarifying what the international register system means for different users.

Based on the results of the analysis, the investigator shall take a position on whether Sweden should accede to the Railway Protocol.

#### *What declarations should Sweden make?*

Similar to the Cape Town Convention and the Aviation Protocol, the Rail Protocol allows contracting states to limit or extend the applicability of certain provisions by making declarations on individual articles (see, for example, Articles XIII, XXIV and XXV). A declaration may mean that a certain provision, which would otherwise not be applicable, shall be applied in whole or in part, or that it allows the contracting state to refrain, in whole or in part, from applying a certain provision that would otherwise apply.

The investigator shall therefore analyse the meaning of all possible declarations and, on the basis of this analysis, propose which declarations Sweden should make or refrain from making upon accession to the Railway Protocol.

According to the Council Decision on the EU's accession, the EU has exclusive competence with regard to declarations covered by Article XXVII. The EU intends to refrain from making these declarations, which means that

current articles shall not apply to the EU or its Member States. The decision emphasises that Member States retain their competence with regard to substantive insolvency law. However, the EU will make a declaration that it has adopted a numbering system suitable for identifying rolling stock in accordance with Article XIV.

The investigator's proposals on the declarations Sweden should make shall be formulated in such a way that they do not conflict with Sweden's commitments to the EU and do not encroach on the EU's exclusive competence. In its position, the investigator shall also seek proposals that are in line with the proposals for declarations submitted in the Cape Town investigation report or, if the Government has decided on a referral to the Council on Legislation or a bill based on the investigation's proposals, the proposals for declarations submitted in those products.

#### *How should the Railway Protocol be incorporated into Swedish law?*

In order for the Railway Protocol to have legal validity in Sweden, it must be incorporated into Swedish law. Incorporation can take place either through transformation (which means that the Protocol is reworked into Swedish constitutional text to the extent that new provisions are required) or through incorporation (which means that it is stipulated in law that the provisions of the Protocol shall apply as law in Sweden).

The investigator must therefore decide which of these methods should be used to incorporate the Protocol into Swedish law. The assessment must take into account that the Protocol falls under shared competence.

The starting point shall be to use the same method of incorporation as proposed by the Cape Town Inquiry, i.e. incorporation. However, the investigator is free to propose a transformation if this is deemed more appropriate.

#### *Is there a need for contact points?*

Upon accession to the Railway Protocol, Sweden has the option of appointing one or more bodies as contact points with the task of transferring the information required for registration to the international register (see Article XIII of the Protocol).

The investigator shall therefore analyse and decide whether, upon accession, there is a need to designate one or more contact points and, if so, propose which organisation or organisations should be assigned this task. In the analysis, the investigator shall take into account that the Cape Town Investigation considers that there is no such need in relation to the Cape Town Convention and the Aircraft Protocol.

### *Constitutional amendments*

Regardless of his position on whether Sweden should accede to the Rail Protocol, the investigator shall propose the constitutional amendments required for Swedish accession or otherwise deemed appropriate for the full application of the provisions of the Protocol. Since the railway and aviation protocols are largely consistent and therefore raise essentially the same issues, the investigator shall base his work on the proposals in the Cape Town investigation report and seek solutions that are in line with these, unless there are compelling reasons to the contrary. If the Government has decided to refer the Cape Town Inquiry's proposals to the Council on Legislation or to submit a bill, the investigator shall instead base his work on the proposals in those documents.

The investigator shall also take into account the reforms that are about to be implemented in civil law legislation for rail transport. Certain changes have recently been decided (see Government Bill 2014/15:58, Committee Report 2014/15:CU15, Parliamentary Communication 2014/15:185). The Ministry of Justice is currently working on the final report of the Railway Transport Inquiry (SOU 2015:9). The investigator shall also take into account the ongoing work within the Ministry of Justice on the report of the Movable Property Purchase Committee insofar as it may be relevant to the investigator's considerations.

### **Conduct of the work and reporting on the assignment**

The investigator shall obtain views from relevant industries, authorities and organisations to the extent that the investigator deems appropriate. If possible and deemed appropriate, the investigator shall examine the solutions that other states have chosen or intend to choose when acceding to the Railway Protocol.

The investigator shall report on the economic consequences and other effects of their proposals for both companies and the general public in accordance with Sections 14–15a of the Committee Ordinance (1998:1474). In the impact analysis, the investigator shall obtain views from the Swedish Business Regulation Board (NNR). If the proposals can be expected to lead to revenue reductions or cost increases for the public sector, the investigator shall propose how these should be financed.

The assignment shall be reported by 20 June 2016 at the latest.

(Ministry of Justice)

## Convention on International Interests in Mobile Equipment

### THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

### THE STATES PARTIES TO THIS CONVENTION,

AWARE that the acquisition and use of movable equipment of high value or particular economic significance should be financed in an efficient manner,

RECOGNISING the advantages of leasing and financing against security in the assets concerned and desiring to facilitate these types of transactions by establishing clear rules for them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

CONVINCED that it is necessary for the rules to take into account the principles underlying leasing and financing with the relevant assets as security, and that the principle of party autonomy is respected,

AWARE that a specific legal framework should be established for international interests in such movable assets and that an international registration system should be created to protect these interests,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,	the objectives and principles of existing Conventions relating to such equipment,
HAVE AGREED upon the following provisions:	AGREED upon the following provisions:
<b>Chapter I</b>	<b>Chapter I</b>
<b>Scope of application and general provisions</b>	<b>Scope and general provisions</b>
<b>Article 1 Definitions</b>	<b>Article 1 Definitions</b>
In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:	Unless the context otherwise requires, in this Convention (the Convention) the following terms have the meanings set out below:
1. "agreement" means a security agreement, a title reservation agreement or a leasing agreement;	a) agreement: a security agreement, a title reservation agreement or a leasing agreement;
2. "assignment" means a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest;	b) assignment: an agreement whereby the assignee, either as security for an obligation or otherwise, obtains associated rights, with or without a transfer of the related international interest;
3. "associated rights" means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object;	c) associated rights: rights to payment or other performance by a debtor under an agreement secured by or associated with the object;
4. "commencement of the insolvency proceedings" means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;	d) commencement of insolvency proceedings: the time at which insolvency proceedings are deemed to commence under the applicable insolvency law;

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| 5. “conditional buyer” means a buyer under a title reservation agreement;   | e) conditional buyer: a buyer under a title reservation agreement;   |
| 6. “conditional seller” means a seller under a title reservation agreement;   | f) conditional seller: seller under a title reservation agreement;   |
| 7. “contract of sale” means a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above;  | g) contract of sale: any agreement for the sale of an object by a seller to a buyer other than an agreement as defined in (a) above;   |
| 8. “court” means a court of law or an administrative or arbitral tribunal established by a Contracting State;   | h) court: a court of law or an administrative or arbitral tribunal established by a Contracting State;   |
| 9. “creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;   | i) “debtor” means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-chargeable agreement;     |
| 10. “debtor” means a chargee under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest; | j) debtor: a security provider under a security agreement, a buyer under a title reservation agreement, a lessee under a leasing agreement, or a person whose right to a specific object is encumbered by a registrable legal right or security right; |
| 11. “insolvency administrator” means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;                  | k) insolvency administrator: a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;                     |
| 12. “insolvency proceedings” means bankruptcy, liquidation or other collective judicial or  | l) insolvency proceedings: bankruptcy, liquidation or other judicial or administrative   |

- administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;
13. “interested persons” means:
- (i) the debtor;
  - (ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;
  - (iii) any other person having rights in or over the object;
- proceedings, *i n c l u d i n g* interim proceedings, whereby the debtor's assets and business are controlled or supervised by a court for the purposes of reorganisation or liquidation;
- m) persons concerned:
- (i) the debtor;
  - (ii) any person who, in order to ensure the proper performance of an obligation towards the creditor, has guaranteed, provided or caused to be issued a guarantee, a *letter of credit* or any other form of credit insurance;
  - (iii) any other person with any form of right in the object;
14. “internal transaction” means a transaction of a type listed in Article 2(2)(a) to (c) where the centre of the main interests of all parties to such transaction is situated, and the relevant object located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the contract and where the interest created by the transaction has been registered in a national registry in that Contracting State which has made a declaration under Article 50(1);
- n) internal transaction: a transaction of the type referred to in Article 2(2)(a) to (c), provided that the centre of the main interests of all parties to the transaction is situated in the same Contracting State at the time of the conclusion of the contract, and that the object (which shall be deemed to be located in the State specified in the Protocol) is also located in that State at that time, and the security interest created by the transaction has been registered in a national registry in that State, and that State has made a declaration under Article 50(1);
15. “international interest” means an interest held by a creditor to which Article 2 applies;
- o) international interest: an interest covered by Article 2 and held by a creditor;

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| 16. "International Registry" means the international registration facilities established for the purposes of this Convention or the Protocol;   | p) international registry: the international registry established for the purposes of this Convention or the Protocol;  |
| 17. "leasing agreement" means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;  | q) leasing agreement: an agreement whereby one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;   |
| 18. "national interest" means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1);  | r) national security interest: a security interest in respect of the object, created by an internal transaction covered by a declaration under Article 50(1);   |
| 19. "non-consensual right or interest" means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation; | s) legal right or security interest: a right or security interest arising directly from the law of a Contracting State that has made a declaration under Article 39, securing the proper performance of an obligation, including obligations to a State, a governmental agency or an intergovernmental or private organisation; |
| 20. "notice of a national interest" means notice registered or to be registered in the International Registry that a national interest has been created;  | t) notice of a national security interest: notice that a national security interest has been created, which has been registered or is to be registered in the International Registry;   |
| 21. "object" means an object of a category to which Article 2 applies;  | u) object: an object belonging to one of the categories covered by the provisions of Article 2;   |
| 22. "pre-existing right or interest" means a right or interest of any kind in or over an object   | v) pre-existing right or interest: a right or interest of any kind in or over an object   |

- created or arising before the effective date of this Convention as defined by Article 60(2)(a);
- the object created or arising before the effective date of this Convention as defined by Article 60(2)(a);
23. “proceeds” means money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition;
- W) compensation: compensation in the form of money, or in another form, for a specific object, as a result of its total or partial loss or destruction, total or partial confiscation, seizure or expropriation;
24. “prospective assignment” means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;
- X) future assignment: assignment to be made only after a certain action has been taken or a certain event has occurred, regardless of whether it is certain that the action will be taken or the event will occur;
25. “prospective international interest” means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor’s acquisition of an interest in the object), whether or not the occurrence of the event is certain;
- Y) future international interest: an international interest that is to be created in a particular object only after a particular action has been taken or a particular event has occurred (which may include the acquisition of the object by a creditor), regardless of whether it is clear that the action will be taken or the event will occur;
26. “prospective sale” means a sale which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;
- Z) future sale: a sale that is to be made only after a measure has been taken or a certain event has occurred, regardless of whether it is certain that the measure will be taken or the event will occur;
- Å) protocol: the protocol for the respective category of assets and associated rights covered by the Convention;
- â) “Protocol” means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;

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| <p>ä) "registered" means registered in the International Registry pursuant to Chapter V;</p>   | <p>ä) registered: registered in the International Registry pursuant to Chapter V;</p>  |
| <p>ö) "registered interest" means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V;</p>  | <p>ö) registered security interest: an international security interest, a registrable legal right or security interest or a national security interest specified in a notice of a national security interest and registered pursuant to Chapter V;</p>                               |
| <p>aa) "registrable non-consensual right or interest" means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40;</p>   | <p>aa) registrable legal right or security interest: a legal right or security interest that may be registered pursuant to a declaration deposited under Article 40;</p>   |
| <p>bb) "Registrar" means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);</p>  | <p>bb) registrar: in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);</p>  |
| <p>cc) "regulations" means regulations made or approved by the Supervisory Authority pursuant to the Protocol;</p>   | <p>cc) regulations: the regulations established or approved by the Supervisory Authority pursuant to the respective protocol;</p>  |
| <p>dd) "sale" means a transfer of ownership of an object pursuant to a contract of sale;</p>   | <p>dd) sale: transfer of ownership of the object pursuant to a contract of sale;</p>   |
| <p>ee) "secured obligation" means an obligation secured by a security interest;</p>  | <p>ee) secured obligation: obligation for which a security interest has been granted;</p>  |
| <p>ii) "security agreement" means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;</p> | <p>ii) security agreement: an agreement by which a debtor grants or undertakes to grant a right (including ownership) in or over a specific object to a creditor in order to secure the proper performance of the debtor's, or another person's, existing or future obligations;</p> |

- gg) "security interest" means an interest created by a security agreement;
- hh) "Supervisory Authority" means, in respect of the Protocol, the Supervisory Authority referred to in Article 17(1);
- ii) "title reservation agreement" means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;
- jj) "unregistered interest" means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and
- kk) "writing" means a record of information (including information communicated by tele-transmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.
- gg) panträtt: a security right created by a security agreement;
- hh) Supervisory Authority: in respect of the Protocol, the Supervisory Authority referred to in Article 17(1);
- ii) agreement with retention of title: a contract of sale relating to a specific object which provides that title will not pass until the terms of the contract have been fulfilled;
- (mm) unregistered security interest: a conventional security interest or legal right or security interest (other than a security interest or right referred to in Article 39) which has not been registered, whether or not this is possible under the Convention; and
- kk) in writing: information (including information communicated by tele-transmission) presented in written form or in another form that can be converted into written form at a later date, which reasonably indicates that a person has approved the information.

**Article 2**  
**The international interest**

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

**Article 2**  
**The international security interest**

1. The Convention establishes a regime for the creation of an international security interest in certain categories of movable property and associated rights, and regulates the legal effects of these security interests.

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| <p>2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:</p> <ul style="list-style-type: none"> <li>a) granted by the chargor under a security agreement;</li> <li>b) vested in a person who is the conditional seller under a title reservation agreement; or</li> <li>c) vested in a person who is the lessor under a leasing agreement.</li> </ul> <p>An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c)</p> | <p>2. For the purposes of the Convention, an international interest in movable property means an interest created under Article 7 in a specific identifiable asset of the type referred to in paragraph 3 and covered by this Protocol, provided that the interest:</p> <ul style="list-style-type: none"> <li>a) granted by the chargor under a security agreement;</li> <li>b) held by a person who is the conditional seller under a title reservation agreement; or</li> <li>c) held by a person who is the lessor under a leasing agreement.</li> </ul> <p>A security interest falling within sub-paragraph (a) of this paragraph cannot simultaneously fall within sub-paragraph (b) or (c).</p> |
| <p>3. The categories referred to in the preceding paragraphs are:</p> <ul style="list-style-type: none"> <li>a) airframes, aircraft engines and helicopters;</li> <li>b) railway rolling stock; and</li> <li>c) space assets.</li> </ul>  | <p>3. The categories referred to in the preceding paragraphs are:</p> <ul style="list-style-type: none"> <li>a) aircraft hulls, aircraft engines and helicopters;</li> <li>and railway rolling stock;</li> <li>c) space assets.</li> </ul>   |
| <p>4. The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.</p>   | <p>4. The question whether an interest under paragraph 2 falls within subparagraph (a), (b) or (c) shall be determined according to the applicable law.</p>  |
| <p>5. An international interest in an object extends to proceeds of that object.</p>  | <p>5. An international interest in the object also extends to proceeds of that object.</p>   |

**Article 3****Scope of application**

1. This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.
2. The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

**Article 4****Where debtor is situated**

1. For the purposes of Article 3(1), the debtor is situated in any Contracting State:
  - a) under the law of which it is incorporated or formed;
  - b) where it has its registered office or statutory seat;
  - c) where it has its centre of administration; or
  - d) where it has its place of business.
2. A reference in sub-paragraph (d) of the preceding paragraph to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

**Article 5****Interpretation and applicable law**

1. In the interpretation of this

**Article 3 Scope**

1. The Convention applies when the debtor is in a Contracting State at the time of the conclusion of the agreement giving rise to the international interest.
2. The Convention applies even if the creditor is situated in a non-Contracting State.

**Article 4****The debtor's place of residence**

1. For the purposes of Article 3(1), the debtor shall be deemed to be situated in the Contracting State
  - a) in which the debtor has been formed,
  - b) in which the debtor has its registered address or seat,
  - c) in which the debtor's head office is located, or
  - d) where the debtor's place of business is located.
2. A place of business under sub-paragraph (d) of the preceding paragraph shall, if the debtor has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

**Article 5****Interpretation and applicable law**

- In interpreting the Convention

Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

Consideration shall be given to its purposes as expressed in the preamble, its international character and the need to promote uniformity and predictability in its application.

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| <p>2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.</p> <p>3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.</p> <p>4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.</p> | <p>2. Questions within the scope of the Convention which are not expressly settled in the text shall be settled in accordance with the general principles on which the Convention is based or, failing that, in accordance with the applicable law.</p> <p>3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.</p> <p>4. If a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State shall apply to determine which territorial unit's rules shall govern.<br/>If there are no such rules, the law of the territorial unit with which the case is most closely connected shall apply.</p> |
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**Article 6**  
**Relationship between the Convention and the Protocol**

**Article 6**  
**Relationship between the Convention and the Protocol**

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| <p>1. This Convention and the Protocol shall be read and interpreted together as a single instrument.</p> | <p>1. The Convention and the Protocol shall be read and interpreted as a single instrument.</p> |
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2. To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

2. In cases where the Convention and the Protocol are mutually inconsistent, the Protocol shall prevail.

## Chapter II

### Constitution of an international interest

#### Article 7 Formal requirements

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:

- a) is in writing;
- b) relates to an object of which the chargor, conditional seller or lessor has power to dispose;
- c) enables the object to be identified in conformity with the Protocol; and
- d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

## Chapter II

### The Nature of international security rights

#### Article 7 Formal requirements

A security interest constitutes an international security interest under this Convention where the agreement from which the security interest arises, or in which the security interest is provided for,

- b) relates to an object over which the chargor, conditional seller or lessor has power to dispose;
- c) identifies the object in accordance with the provisions of the Protocol; and
- d) if the agreement is a security agreement, enables the secured obligations to be determined, but without the need to state a specific amount or maximum amount secured.

## Chapter III Default

### remedies

#### Article Remedies of chargee

1. In the event of default as provided in Article 11, the

## Chapter III

### Remedies for default

#### Article Remedies available to the chargee

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

- a) take possession or control of any object charged to it;
- b) take possession or control of any object charged to it;
- c) collect or receive any income or profits arising from the management or use of any such object.

- 2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.
- 3. Any remedy set out in subparagraph (a), (b) or (c) of paragraph 1 or by Article 13 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 security agreement except where such a provision is manifestly unreasonable.
- 4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:

subject to the consent of the chargor and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

- a) take possession or control of any object charged to it;
- b) sell or lease such object;
- c) collect or receive any income or profits arising from the management or use of any such object.

- 2. Alternatively, the chargee may request that a court authorise or order any of the measures referred to in the preceding paragraph.
- 3. All measures provided for in paragraph 1 (a) (b) and (c) or in Article 13 shall be taken 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 security agreement, except where such a provision is manifestly unreasonable.
- 4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:

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| <p>a) interested persons specified in Article 1(m)(i) and (ii); and</p> <p>b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.</p> | <p>a) interested persons specified in Article 1(m)(i) and (ii); and</p> <p>b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.</p> |
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| <p>5. Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.</p> <p>6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.</p> | <p>5. Any sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 shall be applied towards the discharge of the secured obligations.</p> <p>6. If the amounts received by the chargee as a result of any remedy set out in paragraphs 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, and unless the court otherwise orders, the chargee shall distribute the surplus in order of priority among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, has been notified of, and pay any remainder to the security provider.</p> |
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**Article 9****Vesting of object in satisfaction; redemption**

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the

**Article 9****Transfer of ownership as satisfaction; redemption**

1. The chargee and all interested persons may, at any time after the occurrence of an event of default under Article 11, agree that ownership of the object covered by the security interest (or any other interest of the chargor in the object)

chargee in or towards satisfaction of the secured obligations.

shall pass to the chargee as satisfaction, in whole or in part, of the secured obligations.

2. The court may, on the application of the chargee, order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.
2. The court may, upon application by the chargee, order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.
3. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.
3. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons. application under the preceding paragraph only if the amount of the secured obligations is commensurate with the value of the object, taking into account any payment to be made by the chargee to any of the interested persons.
4. At any time after default as provided in Article 11 and before sale of the charged object or the making of an order under paragraph 2, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee under Article 8(1)(b) or ordered under Article 8(2). Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee.
4. The chargor and any interested person shall be entitled, at any time after the occurrence of a default under Article 11 but before the sale of the charged asset and before a decision under paragraph 2 has been made, to discharge the security interest by paying the secured amounts. This does not apply where the chargee has entered into a leasing agreement under Article 8(1)(b), or where a court has decided on the chargee's right to lease the object under Article 8(2). If a person other than the chargee pays the secured amount in full after the breach of contract, that person shall be subrogated to the rights of the chargee.

5. Ownership or any other interest of the chargor passing on a sale under Article 8(1)(b) or passing under paragraph 1 or 2 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 29.

5. Ownership rights or other rights or security rights that the guarantor has by way of sale under Article 8(1)(b) or in accordance with paragraphs 1 or 2 of this Article shall not be encumbered by any rights or security interests other than those to which the security holder's security interest had priority under the provisions of Article 29.

**Article 10**  
**Remedies of conditional seller or lessor**

1. In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:
- a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or
  - b) apply for a court order authorising or directing either of these acts.

**Article 10**  
**Remedies of conditional seller or lessor**

1. In the event of a breach of contract under Article 11 concerning a title reservation agreement or a leasing agreement, the conditional seller or the lessor, as the case may be, may:
- a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of the object; or
  - b) request that a court authorise or order either of the above measures.

**Article 11 Meaning of default**

1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

**Article 11**  
**The concept of default**

1. The creditor and the debtor may at any time agree in writing on circumstances that constitute a breach of contract or other circumstances that give rise to the rights and remedies specified in Articles 8 to 10 and 13. and

Articles 8 to 10 and Article 13 shall apply.

2. Where the debtor and the creditor have not so agreed, "default" for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

#### **Article 12 Additional remedies**

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

#### **Article 13 Relief pending final determination**

1. Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:
  - a) preservation of the object and its value;

2. In the absence of such an agreement, the term "breach of contract" in Articles 8 to 10 and Article 13 shall mean a breach of contract which deprives the creditor to a material extent of what the creditor can lawfully expect the contract to give him.

#### **Article 12 Other available remedies**

Other remedies permitted by the applicable law, including remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

#### **Article 13 Interim measures**

1. Subject to any declarations that may be made under Article 55, each Contracting State shall ensure that a creditor who can prove that the debtor has failed to fulfil its obligations may, pending final determination of the creditor's claim and provided that the debtor has at any time given its consent, promptly obtain from a court an order for one or more of the following measures, if requested by the creditor:
  - a) measures intended to preserve the object and its value;

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| <p>b) possession, control or custody of the object;</p>   | <p>b) right of the creditor to take possession of the object, or to take control of, or to have custody of the object;</p>  |
| <p>c) immobilisation of the object; and</p>   | <p>c) retention of the object;</p>  |
| <p>d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.</p> | <p>d) leasing or, except in the cases referred to in subparagraphs (a) to (c) above, take control of the administration of, together with the income and proceeds from, the object.</p> |
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| <p>2. In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:</p> | <p>2. When making an order under the preceding paragraph, the court may also impose such terms as it considers necessary to protect the interested persons in the event that the creditor:</p> |
| <p>a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or</p>                                | <p>a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or</p>                                      |
| <p>b) fails to establish its claim, wholly or in part, on the final determination of that claim.</p>   | <p>b) fails to establish its claim, wholly or in part, on the final determination of that claim.</p>   |
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| <p>3. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.</p> | <p>3. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.</p> |
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| <p>4. Nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.</p> | <p>4. The provisions of this Article shall not affect the application of Article 8(3) or limit the court's power to order interim measures other than those set out in paragraph 1.</p> |
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**Article 14**  
**Procedural requirements**

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

**Article 14 Procedural requirements**

Subject to Article 54(2), the measures provided for in this Chapter shall be taken in accordance with the procedural rules applicable under the law of the place where the measures are to be taken.

**Article 15**  
**Derogation**

In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

**Article 15 Derogation**

Two or more parties affected by the provisions of this Chapter may at any time agree in writing to derogate from any of the preceding provisions or to vary the effect of those provisions, except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

**Chapter IV**

**The international registration system**

**Article 16**  
**The International Registry**

1. An International Registry shall be established for registrations of:
  - a) international interests, prospective international interests and registrable non-consensual rights and interests;
  - b) assignments and prospective assignments of international interests;
  - c) acquisitions of international interests by legal or contractual subrogations under the applicable law;

**Chapter IV**

**The international registration system**

**Article 16**  
**The International Registry**

1. An International Registry shall be established for registrations of:
  - a) international security interests, prospective international security interests and registrable legal rights
  - b) assignments and prospective assignments of international interests;
  - c) acquisitions of international security interests as a result of legal or contractual subrogation under applicable law;

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| <p>d) notices of national interests; and</p> <p>e) subordinations of interests referred to in any of the preceding sub-paragraphs.</p> | <p>d) notices of national security interests; and</p> <p>e) subordination of such security rights as referred to above.</p> |
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| <p>2. Different international registries may be established for different categories of object and associated rights.</p>  | <p>2. Separate international registries may be established for the different categories of objects and associated rights.</p>  |
| <p>3. For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration.</p> | <p>3. For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration, depending on the context.</p> |

**Article 17**  
**The Supervisory Authority and the Registrar**

1. There shall be a Supervisory Authority as provided by the Protocol.
2. The Supervisory Authority shall:
  - a) establish or provide for the establishment of the International Registry;
  - b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;
  - c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;
  - d) after consultation with the Contracting States,

**Article 17**  
**The Supervisory Authority and the Registrar**

1. A Supervisory Authority shall be appointed in accordance with the Protocol.
2. The supervisory authority shall:
  - a) establish, or provide for the establishment of, the International Registry;
  - b) subject to the provisions of the Protocol, appoint and dismiss the Registrar;
  - c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;
  - d) after consultation with the Contracting States make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;

make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;

and, in accordance with the Protocol, draw up or approve regulations concerning the operation of the International Registry and ensure that the regulations are published;

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| <p>e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;</p>               | <p>e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;</p>   |
| <p>f) supervise the Registrar and the operation of the International Registry;</p>  | <p>f) supervise the Registrar and the operation of the International Registry;</p>  |
| <p>g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;</p>  | <p>g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;</p>  |
| <p>h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;</p>  | <p>h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;</p>  |
| <p>i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and</p> | <p>i) take all necessary measures to ensure that an efficient electronic system for the registration of security rights exists to implement the objectives of this Convention and the Protocol; and<br/>the Protocol; and</p> |
| <p>j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.</p>   | <p>j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.</p>   |

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| <p>3. The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 27(3).</p>                    | <p>3. The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 27(3).</p>                        |
| <p>4. The Supervisory Authority shall own all proprietary rights in the databases and archives of the International Registry.</p>   | <p>4. The Supervisory Authority shall have full ownership rights to the databases and archives of the International Registry.</p>   |
| <p>5. The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations.</p> | <p>5. The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to the Authority by the Convention, the Protocol and the Rules.</p> |

#### Chapter V

#### Chapter V

#### Other matters relating to registration

#### Other matters relating to registration

#### Article 18 Registration requirements

#### Article 18 Conditions for registration

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| <p>1. The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:</p> <p>a) effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article;</p> <p>b) for making searches and issuing search certificates, and, subject thereto;</p> <p>c) for ensuring the confidentiality of information and documents of the International Registry</p> | <p>1. The Protocol and regulations shall contain conditions, including the criteria for identifying the object, for:</p> <p>a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);</p> <p>b) searches and issuing search certificates; and,</p> <p>c) to ensure the confidentiality of information and documents in the International Registry, other than information and documents relating to a registration.</p> |
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other than information and documents relating to a registration.

The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.

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| <p>2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.</p> <p>3. Where an interest registered as a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.</p> <p>4. The Registrar shall arrange for registrations to be entered into the International Registry database and made searchable in chronological order of receipt, and the file shall record the date and time of receipt.</p> <p>5. The Protocol may provide that a Contracting State may designate an entity or entities in its territory as the entry point or entry points through which the information required for registration shall or may be transmitted to the International Registry. A Contracting State making such a designation may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.</p> | <p>2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.</p> <p>3. Where a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.</p> <p>4. The Registrar shall ensure that registrations are entered into the databases of the International Registry and are searchable in chronological order upon receipt, and that the date and time of receipt are entered into the file.</p> <p>5. The Protocol may provide that a Contracting State may designate one or more entities in its territory as contact points responsible for transmitting the information required for registration to the International Registry. A Contracting State that designates a contact point may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.</p> |
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**Article 19**  
**Validity and time of registration**

1. A registration shall be valid only if made in conformity

**Article 19**  
**Validity and time of registration**

1. For a registration to be valid, it must be made

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| <p>with Article 20.</p> <p>2. A registration, if valid, shall be complete upon entry of the required information into the International Registry database so as to be searchable.</p> <p>3. A registration shall be searchable for the purposes of the preceding paragraph at the time when:</p> <p style="margin-left: 20px;">a) the International Registry has assigned to it a sequentially ordered file number; and</p> <p style="margin-left: 20px;">b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.</p> <p>4. If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 7.</p> <p>5. The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.</p> | <p>in accordance with the provisions of Article 20.</p> <p>2. A registration, provided that it is valid, shall be complete upon entry of the required information into the International Registry database so as to be searchable.</p> <p>3. A registration shall be searchable for the purposes of the preceding paragraph at the time when:</p> <p style="margin-left: 20px;">a) the registration has been assigned a file number in the International Registry; and</p> <p style="margin-left: 20px;">b) the information that has been registered, including the file number, has been stored in a durable form and is accessible in the International Registry.</p> <p>4. If a security right that was first registered as a prospective international security right becomes an international security right, that international security right shall be treated as registered from the time of registration of the prospective international security right, provided that the registration was still current immediately before the international security right was constituted as provided by Article 7.</p> <p style="margin-left: 20px;">international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest.</p> <p style="margin-left: 20px;">the future international security interest, provided that the registration was still current immediately before the international interest was created in accordance with Article 7.</p> <p>5. The preceding paragraph shall apply, with the necessary modifications, to the registration of a prospective assignment of an international interest.</p> |
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6. A registration shall be searchable in the International Registry database according to the criteria prescribed by the Protocol.

**Article 20**  
**Consent to registration**

1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.
2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.
3. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.
4. The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.
5. A registrable non-consensual right or interest may be registered by the holder thereof.
6. A notice of a national interest may be registered by the holder thereof.

6. A registration shall be searchable in the International Registry database in accordance with the criteria prescribed by the Protocol.

**Article 20**  
**Consent to registration**

1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration may be amended or extended prior to its expiry, by either party with the consent in writing of the other.
2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.
3. A registration may be discharged by the person in whose favour the registration was made, or with that person's written consent.
4. The acquisition of an international security interest by legal or contractual subrogation may be registered by the subrogee.
5. A registrable legal right or security interest may be registered by the holder thereof.
6. A notice of a national interest may be registered by the holder thereof. the holder Article 21

**Article 21**  
**Duration of registration**

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

**Article 22**  
**Searches**

1. Any person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry by electronic means concerning interests or prospective international interests registered therein.
2. Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate by electronic means with respect to any object:
  - a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or
  - b) stating that there is no information in the International Registry relating thereto.
3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether

**Article 21**  
**Duration of registration**

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

**Article 22 Searches**

1. Any person may, in the manner prescribed by the Protocol and regulations, search or request a search of the International Registry concerning security interests or prospective international security interests registered therein.
2. Upon receipt of a request for a search in respect of an object, the Registrar shall, in accordance with the detailed provisions of the Protocol and regulations, issue a registry search certificate by electronic means;
  - a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or
  - b) stating that there is no information in the International Registry relating thereto.
3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate

what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.

whether the registration relates to an international interest or a prospective international interest, even if this can be determined from the relevant registration information.

#### **Article 23**

##### **List of declarations and declared non-consensual rights or interests**

The Registrar shall maintain a list of declarations, withdrawals of declaration and of the categories of nonconsensual right or interest communicated to the Registrar by the Depositary as having been declared by Contracting States in conformity with Articles 39 and 40 and the date of each such declaration or withdrawal of declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.

#### **Article 23**

##### **List of declarations and legal rights or interests**

The Registrar shall maintain a list of declarations, withdrawals of declarations and of the categories of legal rights or interests communicated to the Registrar by the Depositary as having been declared by Contracting States in conformity with Articles 39 and 40, with the date of each such declaration or withdrawal of declaration. This list shall be registered and made searchable by the name of the State that made the declaration, and shall be made available upon request, in accordance with the detailed rules set out in the Protocol and the Regulations, to any person who requests it.

#### **Article 24**

##### **Evidentiary value of certificates**

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is prima facie proof:

- a) that it has been so issued; and
- b) of the facts recited in it, including the date and time of a registration.

#### **Article 24 Evidentiary**

##### **value of certificates**

A document that meets the formal requirements of the regulations and purports to be a certificate issued by the International Registry is evidence:

- a) that it has been so issued; and
- b) for the information stated therein, including the date and time of registration.

**Article 25**  
**Discharge of registration**

1. Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.
2. Where a re- prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignee delivered national interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.
3. Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

**Article 25**  
**Discharge of registration**

1. When the obligations secured by a registered security right or the obligations giving rise to a registered legal right or security right have been fulfilled, or when the conditions for transfer of ownership under an agreement with retention of title have been met, the holder shall of the security right shall, without delay, take steps to cancel the registration at the written request of the debtor submitted to or received at the address specified in the registration.
2. Where a prospective international security right or a prospective transfer of an international security right has been registered, the prospective creditor or transferee shall, without delay, take steps to cancel the registration upon the written request of the prospective debtor or transferor submitted to or received at the address specified in the registration, if such request is made before the prospective creditor or transferee has released the subject matter of the security or has undertaken to do so.
3. Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration upon written demand by the debtor delivered to or received at its address stated in the registration.

delivered to or received at its address stated in the registration.

4. Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration.
4. Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, take steps to discharge or amend the registration upon written request by the debtor delivered to or received at the address stated in the registration.

**Article 26**  
**Access to the international registration facilities**

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

**Article 26**  
**Access to the international registry**

No person shall be denied access to the registration or search services of the International Registry unless that person has failed to comply with the conditions set out in this Chapter.

**Chapter VI**

**Privileges and immunities of the Supervisory Authority and the Registrar**

**Article 27**  
**Legal personality; immunity**

1. The Supervisory Authority shall have international legal personality where it does not already possess such personality.
2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as is specified in the Protocol.
3. a) The Supervisory Authority shall enjoy exemption from

**Chapter VI**

**Privileges and immunities of the Supervisory Authority and the Registrar**

**Article 27**  
**Legal personality and immunity**

1. The Supervisory Authority shall enjoy international legal personality where it does not already possess such personality.
2. The Supervisory Authority, its management and employees shall enjoy the immunity from legal and administrative proceedings specified in the Protocol.
3. a) The Supervisory Authority shall enjoy tax exemption and

taxes and such other privileges as may be provided by agreement with the host State.

b) For the purposes of this paragraph, "host State" means the State in which the Supervisory Authority is situated.

4. The assets, documents, databases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.

5. For the purposes of any claim against the Registrar under Article 28(1) or Article 44, the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.

6. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

## Chapter VII

### Liability of the Registrar

#### Article 28

##### Liability and financial assurances

1. The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system except where the malfunction is caused by an event of an

other such privileges as may be provided by agreement with the host State.

b) For the purposes of this paragraph, "host State" means the State in which the Supervisory Authority is situated.

4. The assets, documents, databases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.

5. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

6. The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

## Chapter VII Liability of the

### Registrar

#### Article 28

##### Liability and financial assurances

1. The Registrar shall be liable to pay compensation for damage suffered by a person if the damage is a direct result of an error or omission on the part of the Registrar, its officers or employees, or of a malfunction of the international registration system, unless the malfunction was caused by an event of an

inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and networking.

The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible.

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| <p>2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.</p> | <p>2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information. Nor shall the Registrar be liable for acts or circumstances for which neither it, its officers nor its employees are responsible and which arose prior to receipt of registration information in the International Registry.</p> |
| <p>3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.</p>   | <p>3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.</p>  |
| <p>4. The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.</p>   | <p>4. The Registrar shall take out insurance or provide a guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.</p>   |

## Chapter VIII

Effects of an international  
interest as against third parties

## Article 29

## Priority of competing interests

1. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.
2. The priority of the first-mentioned interest under the preceding paragraph applies:
  - a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and
  - b) even as regards value given by the holder of the first-mentioned interest with such knowledge.
3. The buyer of an object acquires its interest in it:
  - a) subject to an interest registered at the time of its acquisition of that interest; and
  - b) free from an unregistered interest even if it has actual knowledge of such an interest.
4. The conditional buyer or lessee acquires its interest in or right over that object:

## Chapter VIII

The effect of international  
security law  
à-vis third parties effect vis-

## Article 29

## Priority of competing security interests

1. A registered security interest has priority over any subsequently registered security interest and any unregistered security interest.
2. The priority of the first-mentioned security interest in the preceding paragraph applies:
  - a) even if the security interest was acquired or registered with actual knowledge of the other interest; and other security interest;
  - b) even as regards value given by the holder of the first-mentioned interest with such knowledge. registered security interest, with knowledge of the second security interest.
3. The buyer of an object acquires its interest in it:
  - a) encumbered by the security right that was registered when the object was acquired, and
  - b) free from any unregistered security interest, even if the buyer has knowledge of such security interest.
4. The buyer of an object subject to a retention of title or the lessee acquires its interest in or right over that object:

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| <p>a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and</p> <p>b) free from an interest not so registered at that time even if it has actual knowledge of that interest.</p> | <p>a) charged with the security right that was registered prior to the registration of the international security interest which the seller with the seller's retention of title and the lessor's leasehold, respectively; and</p> <p>b) free from any security interest that was not registered at the time of acquisition, even if the buyer or lessee was aware of such security interest.</p> |
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| <p>5. The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.</p> <p>6. Any priority given by this Article to an interest in an object extends to proceeds.</p> <p>7. This Convention:</p> <p>a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and</p> <p>b) does not prevent the creation of rights in an item,</p> | <p>5. The priority between competing security interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.</p> <p>6. Priority under this Article shall also apply to proceeds from the object.</p> <p>a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and</p> <p>b) does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created.</p> |
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other than an object, which has previously been installed on an object where under the applicable law those rights are created.

other than an object, which has previously been installed on an object, provided that the right has arisen under applicable law.

**Article 30**  
**Effects of insolvency**

1. In insolvency proceedings against the debtor, an international interest is effective if, prior to the commencement of the insolvency proceedings, that interest was registered in conformity with this Convention.
2. Nothing in this Article affects the effectiveness of an international interest in insolvency proceedings where that interest is effective under the applicable law.
3. Nothing in this Article affects:
  - a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
  - b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

**Article 30**  
**Effect of insolvency**

1. In insolvency proceedings against the debtor, an international interest shall have priority or separation rights if the interest was registered in accordance with this Convention prior to the commencement of the insolvency proceedings.
2. Nothing in this Article shall affect the priority or separation rights of an international security interest in insolvency proceedings where such rights are granted under the applicable law.
- Nothing in this Article shall affect: 3. affect:
  - a) the application of insolvency law provisions on recovery in bankruptcy; or
  - b) the application of procedural provisions relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

## Chapter IX

## Assignments of associated rights and international interests; rights of subrogation

## Article 31

## Effects of assignment

1. Unless otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:
  - a) the related international interest; and
  - b) all the interests and priorities of the assignor under this Convention.
2. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment, the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph, but not so as to adversely affect the debtor without its consent.
3. Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.
4. The debtor may at any time by agreement in writing waive all or any of the defences and

## Chapter IX

## Assignments of associated rights and international interests; rights of subrogation

## Article 31

## Effects of assignment

1. Unless otherwise agreed by the parties, an assignment of associated rights made in accordance with Article 32 shall also transfer to the assignee:
  - a) the related international security law; and
  - b) all security rights and priorities that the assignor has under the Convention.
2. Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment, the assignor and assignee are free to agree on their respective rights to the international interest assigned under the preceding paragraph, but not in such a way as to adversely affect the debtor without its consent. position is impaired without its consent.
3. Subject to paragraph 4, the debtor's defences and rights of set-off against the assignee shall be determined by the applicable law.
4. The debtor may at any time, in writing, waive all or any of the defences and

rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.

This does not apply, however, to defences based on fraudulent acts on the part of the assignee. In the case of an assignment by way of security, the assigned associated rights revert in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.

5. In the case of an assignment by way of security, the assigned associated rights revert in the assignor, to the extent that they are still subsisting, when the obligations secured by the assignment have been discharged.

5. If the associated rights have been assigned as security for an obligation, they revert to the assignor, to the extent that they still subsist, when the obligations secured by the assignment have been discharged.

**Article 32**  
**Formal requirements of assignment**

1. An assignment of associated rights transfers the related international interest only if it:
  - a) is in writing;
  - b) enables the associated rights to be identified under the contract from which they arise; and
  - c) in the case of an assignment by way of security, enables the obligations secured by the assignment to be determined in accordance with the Protocol but without the need to state a sum or maximum sum secured.
2. An assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights are also assigned.

**Article 32**  
**Formal requirements of assignment**

1. An assignment of associated rights transfers the related international interest only if:
  - a) the assignment is in writing;
  - b) enables the associated rights to be identified under the contract from which they arise; and
  - c) in the case of an assignment for security of an obligation, it is possible to determine the obligations secured by the assignment in accordance with the Protocol, without having to specify an amount or a maximum amount secured.
2. An assignment of an international interest created or provided for by a security agreement is not valid unless some or all related associated rights are also assigned.

3. This Convention does not apply to an assignment of associated rights which is not effective to transfer the related international interest.

**Article 33**  
**Article 33**

1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if:
  - a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor; and
  - b) the notice identifies the associated rights.
2. Irrespective of any other ground on which payment or performance by the debtor discharges the latter from liability, payment or performance shall be effective for this purpose if made in accordance with the preceding paragraph.
3. Nothing in this Article shall affect the priority of competing assignments.

3. This Convention does not apply to an assignment of associated rights unless the assignment also transfers the relevant international interest. international interest is also transferred.

**Article 33**  
**The debtor's obligations to the assignee**

1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor is bound by the assignment and shall perform the secured obligations to the assignee, if and only if:
  - a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor; and
  - b) the associated rights are identified in the notice.
2. Irrespective of other grounds on which payment or performance by the debtor may be effective for discharging liability, the debtor shall be able to discharge the secured obligations with discharging effect if this is done in accordance with the preceding paragraph.
3. Nothing in this Article shall affect the priority of competing assignments.

**Article 34****Default remedies in respect of assignment by way of security**

In the event of default by the assignor under the assignment of associated rights and the related international interest made by way of security, Articles 8, 9 and 11 to 14 apply in the relations between the assignor and the assignee (and, in relation to associated rights, apply in so far as those provisions are capable of application to intangible property) as if references:

- a) to the secured obligation and the security interest were references to the obligation secured by the assignment of the associated rights and the related international interest and the security interest created by that assignment;
- b) to the chargee or creditor and chargor or debtor were references to the assignee and assignor;
- c) to the holder of the international interest were references to the assignee; and
- d) to the object were references to the assigned associated rights and the related international interest.

**Article 34****Remedies in the event of default in connection with assignment by way of security**

If the transferor fails to perform its obligations under a transfer of associated rights and the relevant international security right, and the transfer has been made as security for an obligation, Articles 8,

9 and 11 to 14 shall apply to the relationship between the assignor and the assignee (and, in the case of associated rights, shall apply to the extent that these Articles are applicable to intangible objects) as if the references:

- a) to the secured obligation and the security interest referred to the obligation secured by the assignment of the associated rights and the international interest and the security interest created by that assignment;
- b) to the chargee or creditor and to the chargor or debtor referred to the assignee and assignor;
- c) to the holder of the international interest the assignee; and
- d) to the object referred to the associated rights and the relevant international interest.

**Article 35**  
**Priority of competing assignments**

1. Where there are competing assignments of associated rights and at least one of the assignments includes the related international interest and is registered, the provisions of Article 29 apply as if the references to a registered interest were references to an assignment of the associated rights and the related registered interest and as if references to a registered or unregistered interest were references to a registered or unregistered assignment.
2. Article 30 applies to an assignment of associated rights as if the references to an international interest were references to an assignment of the associated rights and the related international interest.

**Article 36 – Assignee's priority**  
**with respect to associated rights**

1. The assignee of associated rights and the related international interest whose assignment has been registered only has priority under Article 35(1) over another assignee of the associated rights:

**Article 35**  
**Priority between competing security transfers**

1. Where there are competing assignments of associated rights and at least one of the assignments includes the relevant international interest and is registered, the provisions of Article 29 shall apply as if references to a registered interest were references to an assignment of the associated rights and the related registered interest and as if references to a registered or unregistered interest were references to a registered or unregistered assignment. and as if the reference to a registered or unregistered interest were a reference to a registered or unregistered assignment.
2. Article 30 applies to a transfer of associated rights as if a reference to an international security interest were a reference to a transfer of the associated rights and the relevant international interest.

**Article 36 – Assignee's priority with respect to associated rights**

1. The assignee of associated rights and the relevant international security rights, whose acquisition has been registered, only has priority under Article 35(1) over another assignee of the associated rights:

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| <p>a) if the contract under which the associated rights arise states that they are secured by or associated with the object; and</p> <p>b) to the extent that the associated rights are related to an object.</p> <p>2. For the purposes of sub-paragraph (b) of the preceding paragraph, associated rights are related to an object only to the extent that they consist of rights to payment or performance that relate to:</p> <p>a) a sum advanced and utilised for the purchase of the object;</p> <p>b) a sum advanced and utilised for the purchase of another object in which the assignor held another international interest if the assignor transferred that interest to the assignee and the assignment has been registered;</p> <p>c) the price payable for the object;</p> <p>d) the rentals payable in respect of the object; or</p> <p>e) other obligations arising from a transaction referred to in any of the preceding subparagraphs.</p> <p>3. In all other cases, the priority of the competing assignments of the associated rights shall be determined by the applicable law.</p> | <p>a) if the contract under which the associated rights arise states that they are secured by or associated with the object; and</p> <p>b) if the associated rights relate to a specific object.</p> <p>2. For the purposes of sub-paragraph (b) of the preceding paragraph, associated rights shall be considered to relate to a specific object only to the extent that they relate to rights to payment or performance that relate to:</p> <p>a) a sum advanced and utilised for the purchase of the object;</p> <p>b) an amount that has been paid out and used for the acquisition of another object in which the transferor had another international security right, if the transferor transferred that security interest to the acquirer and the transfer has been registered;</p> <p>c) the purchase price of the object;</p> <p>d) the rent for the object; or</p> <p>e) other obligations arising from a transaction referred to in any of the preceding subparagraphs.</p> <p>3. In all other cases, the priority of competing assignments of associated rights shall be determined by the applicable law.</p> |
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**Article 37**  
**Effects of assignor's insolvency**

The provisions of Article 30 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

**Article 38**  
**Subrogation**

1. Subject to paragraph 2, nothing in this Convention affects the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law.
2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

**Chapter X**

**Rights or interests subject to declarations by Contracting States**

**Article 39**  
**Rights having priority without registration**

1. A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare,

**Article 37**  
**Effects of assignor's insolvency**

The provisions of Article 30 apply to insolvency proceedings against the assignor as if references to the debtor were references to the assignor.

**Article 38 Subrogation**

1. Subject to paragraph 2, nothing in this Convention affects the acquisition of associated rights and the related international interest by legal or contractual subrogation under the applicable law. international security interest by legal or contractual subrogation.
2. The priority between a security interest covered by the preceding paragraph and a competing security interest may be changed by written agreement between the holders of the respective security interests. respective security rights, but an acquirer of a subordinate security right is not bound by an agreement on subordination unless the subordination was registered at the time of the transfer.

**Chapter X**

**Rights or interests subject to declarations by Contracting States**

**Article**  
**Rights having priority without registration**

1. A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol, declare, generally or specifically, that

generally or specifically:

- a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and

- b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.
3. A non-consensual right or interest has priority over an international interest if and only if

or specifically:

- a) the categories of legal rights or security interests (except for rights or security interests to which Article 40 applies) which, under the law of the State, have priority over a security interest in an object equivalent to the security interest of a holder of a registered international security interest, and which shall have priority over a registered international security right, whether is a insolvency proceedings or not; and

- b) that nothing in this Convention shall affect the right of a State, State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider, if the debt is directly attributable to the services provided in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.
3. A legal right or security interest has priority over an

if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

security interest if and only if the legal right or security interest belongs to a category covered by a declaration deposited prior to the registration of the international security interest.

4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under subparagraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.
4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under paragraph 1 (a) shall have priority over an international interest registered prior to the date of such ratification, acceptance or accession.

**Article 40**  
**Registrable**  
**or interests**

**non-consensual rights**

A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.

**Article 40**

**Legal rights or interests that may be registered**

A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of legal rights or security interests in all categories of objects that shall be registrable under this Convention as if those rights or interests were international interests and shall be treated as such. Such a declaration may be modified from time to time.

**Chapter XI****Application of the Convention to sales****Article 41****Sale and prospective sale**

This Convention shall apply to the sale or prospective sale of an object as provided for in the Protocol with any modifications therein.

**Chapter XII****Jurisdiction****Article 42 Choice of forum**

1. Subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.
2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.

**Article 43****Jurisdiction under Article 13**

1. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory

**Chapter XI****Application of the Convention to sales****Article 41****Sale and prospective sale**

This Convention shall apply to the sale or prospective sale of an object as provided for in the Protocol, with any modifications therein.

**Chapter XII Jurisdiction****Article 42 Choice of forum**

1. Subject to Articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction shall have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.
2. Agreements on the jurisdiction of a court shall be in writing or otherwise comply with the formal requirements of the law of the State in which the chosen court is located.

**Article 43****Jurisdiction under Article 13**

1. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory

of which the object is situated shall have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.

object is located shall have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.

2. Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised either:
  - a) by the courts chosen by the parties; or
  - b) by the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.
2. Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised either:
  - a) the courts chosen by the parties; or
  - b) the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.
3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another Contracting State or by arbitration.
3. A court shall have jurisdiction under the preceding paragraphs even if the final determination of a claim referred to in Article 13(1) will or may be made by a court of another Contracting State or by arbitration.

**Article 44**  
**Jurisdiction to make orders against the Registrar**

**Article 44**  
**Jurisdiction to make orders against the Registrar**

1. The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.
1. The courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.
2. Where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of being served with a summons, the courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.
2. Where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in the preceding paragraph shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order against it requiring it to procure discharge of the registration.

If a person fails to comply with a request made under Article 25 and that person no longer exists or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration, the courts referred to in the preceding paragraph shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order directed to the Registrar requiring the Registrar to discharge the registration.

Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of the registration, the courts referred to in the preceding paragraph shall have exclusive jurisdiction, on the application of the debtor or intending debtor, to make an order directed to the Registrar requiring the Registrar to discharge the registration.

3. Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts referred to in paragraph 1 may direct the Registrar to take such steps as will give effect to that order.
4. Except as otherwise provided by the preceding paragraphs, no court may make orders or give judgments or rulings against or purporting to bind the Registrar.

**Article 45**  
**Jurisdiction in respect of insolvency proceedings**

The provisions of this Chapter are not applicable to insolvency proceedings.

3. If a person fails to comply with a decision of a court having jurisdiction under this Convention or, in the case of a national security court, a decision of a competent court requiring the person to amend or cancel a registration, the courts referred to in paragraph 1 may order the Registrar to take such measures as are necessary to enforce the decision.
4. Subject to the preceding paragraphs, no court may take action, issue judgments or make rulings against the Registrar.

**Article 45**  
**Jurisdiction in respect of insolvency proceedings**

The provisions of this Chapter are not applicable to insolvency proceedings.

## Chapter XIII

## Relationship with other Conventions

**Article 45 bis**  
**Relationship with the United Nations**  
**Convention on the Assignment of Receivables**  
**in International Trade**

This Convention shall prevail over the *United Nations Convention on the Assignment of Receivables in International Trade*, opened for signature in New York on 12 December 2001, as it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.

**Article 46**  
**Relationship with the**  
**UNIDROIT Convention on International**  
**Financial Leasing**

The Protocol may determine the relationship between this Convention and the *UNIDROIT Convention on International Financial Leasing*, signed at Ottawa on 28 May 1988.

## Chapter XIV

## Final provisions

**Article 47**  
**Signature, ratification, acceptance, approval**  
**or accession**

1. This Convention shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment

## Chapter XIII

## Relationship with other Conventions

**Article 45 bis**  
**Relationship with the United Nations**  
**Convention on the Assignment of Receivables**  
**in International Trade**

The Convention shall prevail over the United Nations Convention on the Assignment of Receivables in International Trade, opened for signature in New York on 12 December 2001, to the extent that it relates to the assignment of receivables which are associated rights related to international interests in aircraft objects, railway rolling stock and space assets.  
 security interests  
 in aircraft objects, railway rolling  
 stock and space objects.

**Article 46**  
**Relationship with the UNIDROIT Convention**  
**on International Financial Leasing**

The Protocol may determine the relationship between this Convention and the UNIDROIT Convention on International Financial Leasing, signed at Ottawa on 28 May 1988.

## Chapter XIV

## Final provisions

**Article 47**  
**Signature, ratification, acceptance, approval**  
**or accession**

1. This Convention shall be open for signature in Cape Town on 16 November 2001 by States participating in the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held at Cape Town from 29 October to xml-ph-0000@deepl.internal

Convention and an Aircraft Protocol held at Cape Town from 29 October to 29 October to 16 November 2001. After 16 November 2001, the Convention 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 49.

16 November 2001 for the adoption of a convention on movable property and an aviation protocol. After 16 November 2001, the Convention shall be open for signature by all States 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 49.

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| <p>2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.</p> <p>3. Any State which does not sign this Convention may accede to it at any time.</p> <p>4. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Depositary.</p> | <p>2. This Convention shall be subject to ratification, acceptance or approval by States which have signed it.</p> <p>3. Any State which does not sign this Convention may accede to it at any time.</p> <p>4. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Depositary.</p> |
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**Article 48**  
**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 Convention may similarly sign, accept, approve or accede to this Convention. 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 Convention. Where the number of Contracting States

**Article 48**  
**Regional organisations for economic integration**

1. A regional economic integration organisation which is constituted by sovereign States and has competence over certain matters governed by the Convention may sign, accept, approve or accede to the Convention. In such cases, the regional economic integration organisation shall have the same rights and obligations as a Contracting State, to the extent that the organisation has competence over matters governed by the Convention. Where the number of Contracting States states shall

is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

counted under the Convention, the regional economic integration organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

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| <p>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 Convention 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.</p> | <p>2. Upon signature, acceptance, approval or accession, the regional economic integration organisation shall submit a declaration to the depositary regarding the matters governed by this Convention 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.</p> |
| <p>3. Any reference to a "Contracting State" or "Contracting States" or "State Party" or "States Parties" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.</p>   | <p>3. References to a Contracting State, Contracting States, State Party or States Parties to the Convention shall apply equally to a Regional Economic Integration Organisation where the context so requires.</p>   |

**Article 49 Entry into force**

**Article 49 Entry into force**

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| <p>1. This Convention shall enter into force on the first day of the month following the expiry of three months after the date of deposit of the third instrument of ratification, acceptance, approval or accession, but only in respect of a category of objects to which a</p> | <p>1. This Convention shall enter into force on the first day of the month following the expiry of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession, but only in respect of a category of objects to which a</p> |
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Protocol applies:	category of objects to which a protocol applies:
a) as from the time of entry into force of that Protocol;	a) from the time of entry into force of that Protocol;
b) subject to the terms of that Protocol; and	b) in accordance with the terms of that Protocol; and
c) as between States Parties to this Convention and that Protocol.	c) between the States Parties to this Convention and that Protocol.
2. For other States, this Convention shall enter into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession, but only in respect of a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of subparagraphs (a), (b) and (c) of the preceding paragraph.	2. For other States, this Convention shall enter into force on the first day of the month following the expiration of three months after the date of deposit of their instrument of ratification, acceptance, approval or accession, but only in respect of a category of objects to which a Protocol applies and, in relation to such Protocol, subject to the requirements of subparagraphs (a), (b) and (c) of the preceding paragraph. in accordance with the conditions set out in subparagraphs (a) to (c) of the preceding paragraph.
<b>Article 50</b> <b>Internal transactions</b>	<b>Article 50</b> <b>Internal transactions</b>
1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.	1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.
2. Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention re to	2. Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

registered interests shall apply to an internal transaction.

security interests shall apply to an internal transaction.

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| 3. | Where notice of a national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law. | 3. | Where notice of a national interest has been registered in the International Registry, the priority of the holder of that security interest under Article 29 shall not be affected by the fact that such security interest has become vested in another person by assignment or subrogation under the applicable law. |
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## Article 51 Future Protocols

## Article 51 Future Protocols

1. The Depositary may create working groups, in cooperation with such relevant non-governmental organisations as the Depositary considers appropriate, to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.
2. The Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and intergovernmental organisations to submit comments on the text to the Depositary. The Depositary shall submit the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and intergovernmental organisations to submit comments on the text to the Depositary. The Depositary shall submit the text of any preliminary draft Protocol relating
1. The Depositary may establish working groups, which, in cooperation with such non-governmental organisations as the Depositary considers appropriate, shall assess the feasibility of extending the application of this Convention, through one or more Protocols, to cover objects in any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.
2. The Depositary shall communicate the text of any preliminary draft Protocol relating to a category of objects prepared by such a working group to all States Parties to this Convention, all member States of the Depositary, member States of the United Nations which are not members of the Depositary and the relevant intergovernmental organisations, and shall invite such States and organisations to all States members of the Depositary, all Member States of the United Nations that are not members of the Depositary, and all relevant intergovernmental organisations, and shall invite such States and organisations to participate in

participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.

intergovernmental negotiations with a view to preparing a draft Protocol on the basis of such a preliminary draft Protocol.

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| <p>3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organisations as the Depositary considers appropriate. Such non-governmental organisations shall be invited promptly to submit comments on the text of the preliminary draft Protocol to the Depositary and to participate as observers in the preparation of a draft Protocol.</p> | <p>3. The Depositary shall also communicate the text of any preliminary draft Protocol prepared by such a working group to such relevant non-governmental organisations as the Depositary considers appropriate. These non-governmental organisations shall be invited to submit their comments on the text to the Depositary without delay and to participate as observers in the preparation of a draft Protocol.</p> |
| <p>4. When the competent bodies of the Depositary adjudge such a draft Protocol ripe for adoption, the Depositary shall convene a diplomatic conference for its adoption.</p>   | <p>4. Once such a draft Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.</p>  |
| <p>5. Once such a Protocol has been adopted, subject to paragraph 6, this Convention shall apply to the category of objects covered thereby.</p>  | <p>5. Subject to paragraph 6, once such a Protocol has been adopted, this Convention shall apply to the category of objects covered thereby.</p>  |
| <p>6. Article 45 <i>bis</i> of this Convention applies to such a Protocol only if specifically provided for in that Protocol.</p>   | <p>6. Article 45 <i>bis</i> of this Convention applies to such a Protocol only if specifically provided for in that Protocol.</p>   |

#### **Article 52 Territorial units**

#### **Article 52 Territorial units**

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| <p>1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the</p> | <p>1. If a Contracting State has territorial units in which different systems of law are applicable in relation to matters governed by</p> |
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matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention 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.

Any such declaration shall state expressly the territorial units to which this Convention applies.

2. Any such declaration shall state expressly the territorial units to which this Convention applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Convention shall apply to all territorial units of that State.
4. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention 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 Convention extends to one or more territorial units of a Contracting State:
  - a) the debtor shall be considered to be situated in a Contracting State only if it is incorporated with , or
2. Any such declaration shall expressly state the territorial units to which this Convention applies.
3. Where a Contracting State extends this Convention to one or more of its territorial units, declarations permitted under this Convention 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.
4. Where a Contracting State extends the application of the Convention to one or more of its territorial units, declarations permitted under this Convention 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. -ial areas, and declarations made in respect of one territorial area may be different from those made in respect of another territorial area.
5. If, by virtue of a declaration made under paragraph 1, this Convention extends to one or more territorial units of a Contracting State:
  - a) the debtor shall be considered to be situated in a Contracting State only if it is incorporated under

under a law in force in a territorial unit to which this Convention applies 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 this Convention applies;

- 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 this Convention applies; 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 this Convention applies.

#### **Article 53 Determination of courts**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant "court" or "courts" for the purposes of Article 1 and Chapter XII of this Convention.

#### **Article 54 Declarations regarding remedies**

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory

the law of a territorial unit to which this Convention applies, or if the debtor has its registered office, head office, place of business or habitual residence in a territorial unit to which this Convention applies;

- b) any reference to the location of the object in a Contracting State shall be construed as referring to the location of the object in a territorial unit to which this Convention applies; 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 this Convention applies.

#### **Article 53 Determination of courts**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant "court" or "courts" for the purposes of Article 1 and Chapter XII of this Convention.

#### **Article 54 Declarations regarding remedies**

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory

the chargee shall not grant a lease of the object in that territory.

territory or controlled from there, may not lease the asset within that territory.

2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this leave of the court.

2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention, the exercise of which does not require a court order, may be exercised only with the consent of the court.

**Article 55**  
**Declarations regarding relief**  
**pending final determination**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.

**Article 55**  
**Declarations regarding interim measures**  
**pending final determination**

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, if it will be applied partly, or otherwise which other forms of interim relief will be applied.

**Article 56**  
**Reservations and declarations**

1. No reservations may be made to this Convention, but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal

**Article 56**  
**Reservations and declarations**

1. No reservation may be made to this Convention, but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.

2. Any declaration, subsequent declaration, or withdrawal or

of a declaration made under this Convention shall be notified in writing to the Depositary.

of a declaration made under this Convention shall be notified in writing to the Depositary.

**Article 57**  
**Subsequent declarations**

1. A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention 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 Convention 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.

**Article 58**  
**Withdrawal of declarations**

1. Any State Party having made a declaration under this Convention, other than a declaration authorised under Article 60, may withdraw it at any time.

**Article 57**  
**Subsequent declarations**

1. A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.
2. Such a subsequent declaration shall take effect on the first day of the month following the expiration of six months from the date of receipt of the notification by the Depositary. If the notification specifies that the declaration shall take effect only after a longer period, the declaration shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.  
received the  
notification.
3. Notwithstanding the preceding paragraphs, this Convention shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

**Article 58**  
**Withdrawal of declarations**

1. Any State Party t h a t has made a declaration under this Convention, other than a declaration authorised under Article 60, may withdraw it at any time by notifying the Depositary. Such withdrawal 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.

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.

Article 60, may withdraw it at any time by notifying the Depositary. Such withdrawal 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.

2. Notwithstanding the previous paragraph, this Convention shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

2. Notwithstanding the previous paragraph, this Convention shall continue to apply, as if no such declaration had been withdrawn, in respect of all rights or interests arising prior to the effective date of any such withdrawal.

#### **Article 59 Denunciations**

1. Any State Party may denounce this Convention 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 twelve months after the date on which notification is received by the Depositary.
3. Notwithstanding the previous paragraphs, this Convention 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 59 Denunciations**

1. Any State Party may denounce this Convention 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 twelve months after the date on which notification is received by the Depositary.
3. Notwithstanding the preceding paragraphs, this Convention 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.  
arising prior to the effective date of any such denunciation.

#### **Article 60 Transitional provisions**

1. Unless otherwise declared by a Contracting State at any time, the Convention does not

#### **Article 60 Transitional provisions**

1. Unless a Contracting State declares otherwise at any time, the Convention does not

apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.

The Convention does not apply to a pre-existing right or security interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.

2. For the purposes of Article 1(v) and of determining priority under this Convention:

- a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is later; and
- b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

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 this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or

2. For the purposes of Article 1(v) and for determining priority under this Convention:

- a) “effective date of this Convention” means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is later; and
- b) the debtor shall be deemed to be situated in a State where it has its head office or, if it has no head office, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

3. A Contracting State may, in a declaration under paragraph 1, specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or security rights arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

formed under an agreement made when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph, but only to the extent and in the manner specified in its declaration.

#### Article 61

##### Review Conferences, amendments and related matters

1. The Depositary 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 this Convention 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 twenty-five per cent of the States Parties, Review Conferences of 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 this Convention and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;

#### Article 61

##### Review Conferences, amendments and related matters

1. The Depositary shall prepare reports addressed to the States Parties on the functioning of the international regime established by the Convention, on an annual basis or at other appropriate intervals. The Depositary shall prepare the reports taking into account the reports of the Supervisory Authority on the operation of the international registration system.
2. At the request of not less than twenty-five per cent of the States Parties, the Depositary shall, in consultation with the Supervisory Authority, convene Review Conferences of States Parties from time to time to consider:
  - a) how the Convention is applied in practice and the extent to which financing against security rights and leasing of objects falling within the scope of the Convention is actually facilitated by the Convention;

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| <p>b) the judicial interpretation given to, and the application made of the terms of this Convention and the regulations;</p> <p>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</p> <p>d) whether any modifications to this Convention or the arrangements relating to the International Registry are desirable.</p> | <p>b) the legal interpretation and application of the Convention and the regulations;</p> <p>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</p> <p>d) whether any modifications to this Convention or the arrangements relating to the International Registry are desirable.</p> |
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| <p>3. Subject to paragraph 4, any amendment to this Convention 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 ratified, accepted, or approved by three States in accordance with the provisions of Article 49 relating to its entry into force.</p> <p>4. Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.</p> | <p>3. Subject to paragraph 4, any amendment to this Convention shall be approved by at least a two-thirds majority of the States Parties participating in the conference referred to in the preceding paragraph, and shall then enter into force in relation to those States which have ratified, accepted or approved it since its ratification, accepted or approved by three States in accordance with the provisions of Article 49 on the entry into force of the Convention.</p> <p>4. Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.</p> |
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**Article 62**  
**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 Convention;
    - (iii) each declaration made in accordance with this Convention, 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 Convention together with the date thereof and the

**Article 62**  
**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), hereinafter referred to as the Depositary.
- The Depositary shall:
  - a) inform all Contracting States of:
    - (i) inform all Contracting States of:
    - (ii) the date of entry into force of this Convention;
    - (iii) each declaration made in accordance with this Convention, together with the date thereof;
    - (iv) the withdrawal or amendment of any declaration, together with the date thereof; and
    - (v) of any notification of denunciation of this Convention, together with the date thereof and the

date on which it takes effect;

date on which it takes effect;

- b) transmit certified true copies of this Convention to all Contracting States;

- b) 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

- 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

- c) provide the Supervisory Authority and the Registrar with copies of all instruments of ratification, acceptance, approval or accession, approval or accession instruments, inform them of the date of deposit thereof, of any declarations, withdrawals and amendments of declarations, and of any notifications 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.

- d) perform the other functions normally incumbent upon depositaries.

IN WITNESS WHEREOF

the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Cape Town, this sixteenth day of November, two thousand and one, in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another.

IN WITNESS WHEREOFxml-ph-0001@deepl.internal WHEREOFxml-ph-0002@deepl.internal

the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Cape Town, this sixteenth day of November, two thousand and one, in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another. Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another. correspondence between these texts.

# Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock

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

THE STATES PARTIES TO THIS  
PROTOCOL

CONSIDERING it necessary to  
implement the Convention on  
International Interests in Mobile  
Equipment (the “Convention”) as it  
relates to railway rolling stock, in the  
light of the purposes set out in the  
preamble to the Convention,

LUXEMBOURG PROTOCOL ON  
SPECIFIC ISSUES RELATING TO  
ROLLING STOCK TO THE  
CONVENTION ON  
INTERNATIONAL INTERESTS IN  
MOBILE EQUIPMENT

THE STATES PARTIES TO THIS  
PROTOCOL,

CONSIDERING that the Convention on  
International Interests in Mobile  
Equipment (the Convention), in the light  
of the purposes set out in the preamble  
to the Convention, should be  
implemented to the extent that it applies  
to railway rolling stock,

MINDFUL

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance,

BEING AWARE OF the need to adapt the Convention to meet the particular requirements of railway rolling stock and the financing of such rolling stock,

HAVE AGREED upon the following provisions relating to railway rolling stock:

HAVE AGREED upon the following provisions concerning railway rolling stock:

## Chapter I

### Scope of application and general provisions

### Sphere of application and general provisions

#### Article I – Defined terms

#### Article I – Definitions

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

1. Unless the context otherwise requires, terms defined in the Convention shall have the same meaning in this Protocol.

2. In this Protocol the following terms are employed with the meanings set out below:

2. In this Protocol, the following terms shall have the meanings set out below:

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

a) guarantee: an agreement whereby a party undertakes to act as guarantor or provides a guarantee

(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,

b) guarantor: a person who, in order to ensure the proper performance of any obligation towards a creditor under a pledge agreement or other agreement, acts as guarantor or provides or

gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

issues a guarantee, letter of credit or any other form of credit insurance,

(c) “insolvency-related event” means:

c) insolvency situation:

(i) the commencement of insolvency proceedings; or

i) the commencement of 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;

ii) notice by the debtor of suspension of payments, or actual suspension of payments in cases where the creditor is prevented from commencing insolvency proceedings against the debtor or is prevented by law or by a government measure from taking action under the Convention,

(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;

d) State with primary jurisdiction over insolvency proceedings: the Contracting State in which the debtor has its centre of main interests, which for this purpose shall be deemed to be the State in which the debtor has its registered office or, failing that, the State in which the company is incorporated, unless otherwise demonstrated

(e) “railway rolling stock” means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies,

e) rolling stock: vehicles that move on fixed railway tracks, or directly on, over or under a guideway, together with propulsion systems, engines, brakes, axles,

pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

bogies, pantographs, accessories and other components, equipment details and parts installed on or incorporated in the vehicles, including all related data, manuals and records.

**Article II – Application of the Convention as regards railway rolling stock**

**Article II – Application of the Convention to railway rolling stock**

1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.

1. The Convention shall apply 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.

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**

**Article III – Derogation**

The parties may, by agreement in writing, exclude the application of Article IX and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article VII(3) and (4).

The parties may, by written agreement, derogate from the application of Article IX and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol, except Article VII(3) and VII(4).

**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.

**Article V – Identification of railway rolling stock in the agreement**

1. For the purposes of Article 7(c) of the Convention and Article XVIII(2) of this Protocol, a description of railway rolling stock is sufficient to identify the railway rolling stock if it contains:

- (a) a description of the railway rolling stock by item;
- (b) a description of the railway rolling stock by type;
- (c) a statement that the agreement covers all present and future railway rolling stock; or

**Article IV – Representative capacities**

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

**Article V – Identification of railway rolling stock in the agreement**

1. For the purposes of Article 7(c) of the Convention and Article XVIII(2) of this Protocol, a description of the rolling stock shall be sufficient to identify that stock, provided that it includes

- a) a description of the constituent parts of the rolling stock,
- b) a description of the rolling stock by type,
- c) a declaration that the agreement covers all existing and future rolling stock, or

(d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.

2. For the purposes of Article 7 of the Convention, an interest in future railway rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer.

#### **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

d) a statement that the agreement covers all present and future railway rolling stock, except for specified items or types.

2. For the purposes of Article 7 of the Convention, an interest in future railway rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer.-road rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer.

#### **Article VI – Choice of applicable law**

1. This Article shall apply only if a Contracting State has made a declaration under Article XXVII.

2. The parties to an agreement, a guarantee contract or a 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

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, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of railway rolling stock from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to railway rolling stock. Any remedy given

## Chapter II

### Measures in the event of breach of contract, priority and assignments

#### Article VII – Modification of the provisions on remedies for breach of contract

1. In addition to the measures specified in Chapter III of the Convention, and provided that the debtor has at some point given his consent, the creditor may, in situations specified in that Chapter, have the rolling stock exported and removed from the territory where it is located.

2. The creditor may not exercise the remedies specified in the preceding paragraph without the prior written consent of the holder of any registered security interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to rolling stock. Any measure which

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.

4. A chargee giving fourteen 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.

5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities expeditiously cooperate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.

provided for in the Convention and relating to rolling stock shall be implemented in a commercially reasonable manner. A measure shall be considered to have been implemented in a commercially reasonable manner when it is implemented in accordance with a provision of the agreement, except in cases where the provision is manifestly unreasonable.

4. A chargee who gives the persons concerned written notice at least fourteen calendar days before the planned sale or lease shall be deemed to have fulfilled the requirement of "reasonable time" in Article 8(4) of the Convention. However, this shall not prevent a chargee and a chargor or guarantor from agreeing that notice shall be given earlier.

5. Subject to the laws and regulations applicable to security, the Contracting States shall ensure that the relevant administrative authorities cooperate promptly with the creditor and provide such assistance as is necessary to enable the creditor to take the measures referred to in paragraph 1.

6. A chargee proposing to procure the export of railway rolling stock under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the export.

6. A chargee proposing to procure the export of railway rolling stock under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:

a) the persons concerned referred to in Article 1(m)(i) and (ii) of the Convention; and

b) the persons referred to in the Convention's Article 1(m)(iii), who have notified the holder of the security of their rights within a reasonable time prior to export.

#### **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. 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

#### **Article VIII – Modification of provisions regarding interim relief**

1. This Article shall apply only if a Contracting State has made a declaration pursuant to Article XXVII and only to the extent stated in such declaration.

2. For the purposes of Article 13(1) of the Convention, the term "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. shall be stated in the declaration of the Contracting State in which the request has been made.

3. 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)".

4. 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.

5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

3. Article 13(1) of the Convention shall apply with the addition of the following provision immediately after paragraph (d):

"(e) the sale and distribution of the proceeds of the sale, if the debtor and the creditor expressly agree to this",

and Article 43(2) shall apply with the addition of "and (e)" after the words "Article 13(1)(d)".

4. Any title or other right held by the debtor and transferred as a result of a sale under the preceding paragraph shall be free from any other security interest over which the creditor's international interest has priority under the provisions of Article 29 of the Convention.

5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

6. With regard to the remedies in Article VII(1):

(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the creditor notifies such authorities that the relief specified in Article VII(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously cooperate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

7. Paragraphs 2 and 6 shall not affect any applicable safety laws and regulations.

#### **Article IX – 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.

6. The measures referred to in Article VII(1):

a) shall be made available by the administrative authorities of a Contracting State within seven calendar days of the date on which the creditor has notified those authorities that the relief referred to in Article VII(1) has been granted or, if the relief has been granted by a foreign court, has been recognised by a court in the Contracting State, and that the creditor is entitled to enforce the measures under the Convention, and

b) the competent authorities shall expeditiously cooperate with the creditor and assist in the taking of the measures in accordance with the laws and regulations applicable to security.

7. Paragraphs 2 and 6 shall not affect the laws and regulations applicable to railway safety.

#### **Article IX – Measures in the event of insolvency**

1. This Article shall apply only if a Contracting State with primary jurisdiction over an insolvency proceeding has made a declaration under Article

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

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

2. References in this Article to the “insolvency administrator” shall be to that person in its official capacity and not in its personal role.

#### *Alternative A*

#### **Alternative A**

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

3. When an insolvency situation arises, the insolvency administrator or, depending on the circumstances, the debtor shall, subject to paragraph 7, deliver the rolling stock to the creditor no later than the first of the following dates:

(a) the end of the waiting period; and

a) At the end of the waiting period.

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

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

4. 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. For the purposes of this Article, “waiting period” means the period specified in a declaration by the Contracting State having primary jurisdiction over the insolvency proceedings.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 3:

5. Unless and as long as the guarantor has not been given the opportunity to take possession of the equipment in accordance with clause 3,

(a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

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

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 3, 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.

a) the insolvency administrator or, as the case may be, the debtor shall preserve and maintain the railway rolling stock and maintain its value in accordance with the agreement; and

b) the creditor shall be entitled to apply for other interim measures available under applicable law.

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

7. The insolvency administrator or, depending on the circumstances, the creditor may retain possession of the rolling stock if, by the date specified in paragraph 3, he has remedied all breaches of contract other than the commencement of insolvency proceedings and has undertaken to fulfil all future obligations under the contract and related documents. No further waiting period shall apply if these future obligations are not fulfilled.

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|--|--|
| <p>8. With regard to the remedies in Article VII(1):</p> <p>(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and</p> <p>(b) the applicable authorities shall expeditiously cooperate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.</p> <p>9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.</p> <p>10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.</p> <p>11. 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.</p> | <p>8. The measures referred to in Article VII(1)</p> <p>a) shall be made available by the competent administrative authorities of a Contracting State within seven calendar days of the date on which the creditor has notified those authorities that the creditor is entitled to take action under the Convention; and</p> <p>b) the competent authorities shall expeditiously cooperate with the creditor and assist in the exercise of the remedies in accordance with the laws and regulations applicable to security.</p> <p>9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.</p> <p>10. None of the debtor's obligations under the agreement may be changed without the creditor's consent.</p> <p>11. The preceding paragraph shall not be construed in a manner that restricts the insolvency administrator's authority, if any, under applicable law to terminate the agreement.</p> |
|--|--|

12. 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.

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

12. No right or security interest, except for non-consensual rights or security 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.

13. 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***

**administrator or the debtor, as applicable, upon the request of the creditor**

**Upon the occurrence of an insolvency-related event, the insolvency**

3. 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

3. When an insolvency situation arises, the insolvency administrator or, depending on the circumstances, the debtor shall, at the request of the creditor, within the time limit specified in a declaration made by a Contracting State under Article XXVII, notify the creditor whether the debtor will

a) cure all breaches of the agreement other than the commencement of insolvency proceedings and undertake to perform all future obligations under the agreement and related documents, or

- (b) give the creditor the opportunity to take possession of the railway rolling stock, in accordance with the applicable law.
4. The applicable law referred to in subparagraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.
5. The creditor shall provide evidence of its claims and proof that its international interest has been registered.
6. If the insolvency administrator or the debtor, as applicable, does not give notice in accordance with paragraph 3, 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.
- b) enable the creditor to take possession of the railway rolling stock in accordance with applicable law.
4. Under the law applicable pursuant to subparagraph (b) of the preceding paragraph, the court may require that additional measures be taken or that additional security be provided.
5. The creditor shall substantiate his claim and prove that the international security interest has been registered.
6. If the insolvency administrator or, as the case may be, the debtor fails to notify the creditor in accordance with paragraph 3, or if the insolvency administrator or debtor has declared that he or she will enable the creditor to take possession of the rolling stock, but fails to do so, the court may allow the creditor to take possession of the rolling stock on such terms as the court may determine and may require additional measures to be taken or further security to be provided.

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

*Alternative C*

3. 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.

4. 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 and ending no later than the expiry of the agreement or any renewal thereof, and on such

7. The railway rolling stock may not be sold until the court has made a decision on the claim and the international security interest.

*Alternative C*

3. When an insolvency situation arises, the insolvency administrator or, as the case may be, the debtor shall, during 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) enable the creditor to take possession of the rolling stock in accordance with applicable law.

4. 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 and ending no later than the expiry of the agreement or any renewal thereof, and on such the debtor may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiry of the agreement or any renewal thereof, and on such

terms as the court considers just (the "suspension period"). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.

5. If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the railway rolling stock pending an order of 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.

6. Unless and until the creditor is given the opportunity to take possession under paragraph 3:

expires, and on terms as the court considers just (the "suspension period"). Such an order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.

5. If an application is submitted to the court in accordance with the preceding paragraph, the creditor shall refrain from taking possession of the rolling stock until the court has made a decision. Unless the application is granted within the number of calendar days from the date of the application for measures specified in a declaration by the Contracting State in which the application was filed, the application shall be deemed to have been withdrawn unless the creditor and the insolvency administrator or, as the case may be, the debtor agree otherwise.

6. Unless and until the creditor is given the opportunity to take possession under paragraph 3,

(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.

7. 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.

8. Where during the cure period or any suspension period the insolvency administrator or the debtor, as applicable, 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, the insolvency administrator or debtor may retain possession of the railway rolling stock and any order made by the court under paragraph 4 shall cease to have effect. A second cure period shall not apply in respect of a default in the performance of

a) the insolvency administrator or, as the case may be, the debtor shall preserve and maintain the railway rolling stock and maintain its value in accordance with the agreement; and

b) the creditor shall be entitled to apply for other interim measures under applicable law.

7. The provisions of subparagraph (a) of the preceding paragraph shall not preclude the use of the rolling stock under contracts entered into for the purpose of preserving and maintaining the stock and preserving its value.

8. If the insolvency administrator or, depending on the circumstances, the debtor during the period of action or any period of respite cures all breaches of contract other than that consisting in the commencement of insolvency proceedings, and undertakes to fulfil all future obligations under the contract and related documents, the insolvency administrator or the debtor may retain possession of the rolling stock, and any decisions taken by the court under paragraph 4 shall cease to have effect. No further period of action shall apply if these future obligations are not

such future obligations.

With regard to the remedies in Article VII(1):

9. With regard to the remedies in Article VII(1):

9. The measures referred to in Article VII(1)

(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

a) shall be made available by the administrative authorities of a Contracting State within seven calendar days from the date on which the creditor has notified those authorities that the creditor is entitled to seek the remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously cooperate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

b) the competent authorities shall cooperate promptly with the creditor and assist in the implementation of the measures in accordance with the laws and regulations applicable to railway safety.

10. Subject to paragraphs 4, 5 and 8, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

10. Subject to paragraphs 4, 5 and 8, none of the measures that may be taken under the Convention may be prevented or delayed after the expiry of the period of action.

11. Subject to paragraphs 4, 5 and 8, no obligations of the debtor under the agreement and related transactions may be modified in insolvency proceedings without the consent of the creditor.

11. Subject to paragraphs 4, 5 and 8, none of the debtor's obligations under the agreement and related transfer documents may be modified without the consent of the creditor in connection with insolvency proceedings.

12. 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.

13. 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.

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

15. 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.

12. The preceding paragraph shall not be construed in a manner that restricts the insolvency administrator's authority, if any, under applicable law to terminate the agreement.

13. No right or security interest, except for non-consensual rights or security 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.

14. The Convention, as amended by Articles VII and XXV of the Protocol, shall apply to the implementation of all measures under this Article.

15. 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.

**Article X – Insolvency assistance**

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

2. The courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, cooperate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX.

**Article XI – 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 railway rolling stock 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

**Article X – Assistance in insolvency**

1. This Article shall apply only if a Contracting State has made a declaration under Article XXVII(1).

2. The courts of a Contracting State in which the railway rolling stock is situated shall, in accordance with the law of the Contracting State, cooperate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX.

**Article XI – Provisions concerning the debtor**

1. As long as there is no breach of contract under Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the railway rolling stock in accordance with the agreement as against:

a) the creditor and the holder of a security right from which the debtor is free under 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.

b) the holder of a security right to which the debtor's right is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent 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.

2. Nothing in the Convention or this Protocol shall affect 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**

#### **Registry provisions relating to international interests in railway rolling stock**

#### **Article XII – The Supervisory Authority and the Registrar**

1. The Supervisory Authority shall be a body established by representatives, one representative to be appointed:

(a) by each State Party;

(b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and

### **Chapter III**

#### **Provisions relating to the registration of international interests in railway rolling stock**

#### **Article XII – The Supervisory Authority and the Registrar**

1. The Supervisory Authority shall be a body composed of representatives, one of whom shall be appointed

a) by each State Party,

b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and

(c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF).

2. In designating the States referred to in subparagraphs (b) and (c) of the preceding paragraph, regard shall be had to the need to ensure broad geographical representation.

3. The term of appointment of the representatives appointed pursuant to subparagraphs (b) and (c) of paragraph 1 shall be that specified by the designating Organisations. The terms of those representatives serving on the date when this Protocol enters into force for the tenth State Party shall expire no later than two years after that date.

4. The representatives referred to in paragraph 1 shall adopt the initial rules of procedure for the Supervisory Authority. Adoption shall require agreement of:

(a) a majority of all the representatives; and

(b) a majority of the representatives appointed pursuant to subparagraph (a) of paragraph 1.

c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF).

2. In selecting the States referred to in subparagraphs (b) and (c) of the preceding paragraph, regard shall be had to the need to ensure broad geographical representation.

3. The term of office of the representatives appointed pursuant to subparagraphs (b) and (c) of paragraph 1 shall be determined by the nominating organisations. The term of office of the representatives who are in office on the date of entry into force of this Protocol for the tenth State Party shall expire no later than two years after that date.

4. The representatives referred to in paragraph 1 shall adopt the provisional rules of procedure of the Supervisory Authority. Adoption shall require the consent of

a) a majority of all representatives, and

b) a majority of the representatives appointed in accordance with paragraph 1(a).

5. The Supervisory Authority may establish a commission of experts consisting of:

(a) persons nominated by Signatory and Contracting States and having the necessary qualifications and experience; and

(b) other experts as necessary and entrust the commission with the task of assisting the Supervisory Authority in the discharge of its functions.

6. A secretariat (the Secretariat) shall assist the Supervisory Authority in the discharge of its functions, as directed by the Supervisory Authority. The Secretariat shall be OTIF.

7. In the event that the Secretariat becomes unable or unwilling to discharge its functions, the Supervisory Authority shall designate another Secretariat.

8. The Secretariat shall, on being satisfied that the International Registry is fully operational, forthwith deposit a certificate to that effect with the Depositary.

5. The Supervisory Authority may establish a commission of experts consisting of

a) persons nominated by the signatory and contracting states who have the necessary qualifications and experience; and

b) other experts as necessary, and shall assign the committee the task of assisting the Supervisory Authority in the performance of its duties.

6. A secretariat (the Secretariat) shall assist the Supervisory Authority in the performance of its tasks in accordance with the instructions of the Supervisory Authority. The secretariat tasks shall be performed by the Intergovernmental Organisation for International Carriage by Rail (OTIF).

7. If the Secretariat is no longer able or willing to perform its duties, the Supervisory Authority shall appoint another Secretariat.

8. The Secretariat shall, after being satisfied that the International Registry is fully operational, forthwith deposit a certificate to that effect with the Depositary.

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

10. A measure taken by the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be taken if such State Party or the majority of the group of States Parties also approve of the measure. A measure 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 approve of the measure.

11. The first Registrar shall be appointed for a period of not less than five or more than ten years. Thereafter, the Registrar shall be appointed or reappointed for successive periods each not exceeding ten years.

9. The Secretariat shall enjoy legal personality, if it does not already have it, and shall enjoy, in respect of its functions under the Convention and the Protocol, the same privileges and immunities as those enjoyed by the Supervisory Authority under Article 27(3) of the Convention and by the International Registry under Article 27(4) of the Convention.

10. A measure by the supervisory authority that only affects the interests of one party or a group of parties may be taken if the party or the majority of the group of parties concerned approves the measure. A measure that could adversely affect the interests of one or more parties or a group of parties may take effect in respect of that party or those parties if the party or the majority of the group of parties concerned approves the measure.

11. The first Registrar shall be appointed for a term of office of not less than five years and not more than ten years. Thereafter, the Registrar's term of office shall be extended or a new Registrar shall be appointed for a term of office of not more than ten years.

**Article XIII – Designated entry points**

1. A Contracting State may at any time designate, by declaration, an entity or entities as the entry point or entry points through which there shall or 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 the laws of another State. The various entry points shall be operated at least during working hours in their respective territories.

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of notices of sale.

**Article XIV – Identification of railway rolling stock for registration purposes**

1. For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe a system for the allocation of

**Article XIII – Designation of contact points**

1. A Contracting State may, at any time, by making a declaration, designate one or more agencies as contact points through which information required for registration shall or may be transmitted to the International Registry, except for the registration of a notice of a national interest or of an interest or security interest under Article 40 of the Convention. The various contact points shall be active at least during the office hours applicable in the respective territory.

2. When designating a contact point in accordance with the preceding paragraph, it is permissible, but not mandatory, to designate one or more contact points for the information required for the registration of notices of sale.

**Article XIV – Identification of railway rolling stock for registration purposes**

1. For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe conditions for the allocation by the Registrar of the identification number to the rolling stock.

identification numbers by the Registrar which enable the unique identification of items of railway rolling stock. The identification number shall be:

(a) affixed to the item of railway rolling stock;

(b) associated in the International Registry with the manufacturer's name and the manufacturer's identification number for the item so affixed; or

(c) associated in the International Registry with a national or regional identification number so affixed.

2. For the purposes of the preceding paragraph, a Contracting State may, by declaration, state the system of national or regional identification numbers that shall be used with respect to items of railway rolling stock subject to an international interest that is created or provided for, or is intended to be created or provided for, by an agreement entered into by a debtor situated in that Contracting State at the time of the conclusion of that agreement. Such a national or regional identification system

enabling unique identification of parts of railway rolling stock. This identification number shall

a) be affixed to the relevant part of the railway rolling stock,

b) in the international register, linked to the manufacturer's name and identification number for the part concerned, or

c) in the international register shall be linked to a national or regional identification number for the part concerned.

2. For the purposes of the preceding paragraph, a Contracting State may, by declaration, specify the system of national or regional identification numbers to be applied to parts of rolling stock covered by an international security interest established or prescribed, or to be established or prescribed, in an agreement concluded by a debtor located in the Contracting State at the time of conclusion of the agreement. Such a national or regional identification system shall,

the system shall, subject to agreement between the Supervisory Authority and the Contracting State making the declaration, ensure the unique identification of each item of railway rolling stock to which the system applies.

3. A declaration by a Contracting State in accordance with the preceding paragraph shall include detailed information on the operation of the national or regional identification system.

4. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 2 has been made shall, in order for the registration to be valid, specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol under Article XXIII(1) and the time during which each number has applied to the item.

#### **Article XV – 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 the regulations.

as agreed between the regulatory authority and the Contracting State making the declaration, enable the unique identification of each part of the rolling stock covered by the system.

3. The declaration that a Contracting Party may make pursuant to the preceding paragraph shall contain detailed information on the operation of the national or regional identification system.

4. When registering rolling stock for which a declaration has been made in accordance with paragraph 2, in order for the registration to be valid, all national or regional identification numbers assigned to the rolling stock since the entry into force of this Protocol in accordance with Article XXIII(1) shall be indicated, as well as the period during which the rolling stock was assigned each number.

#### **Article XV – Additional modifications to Registry provisions**

1. For the purposes of Article 19(6) of the Convention, the search criteria in the International Registry shall be established by the regulations.

2. For the purposes of Article 25(2) of the Convention, and in the circumstances described therein, 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 ten calendar days after receipt of the demand described in that paragraph.
2. In applying Article 25(2) of the Convention and in the circumstances specified therein, the holder of a registered prospective international interest or of a registered prospective assignment of an international interest shall take steps to cancel the registration within ten calendar days of receiving a request under that paragraph.shall take steps to cancel the registration within ten calendar days of receiving a request under that 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 ten calendar days after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
3. Where a subordination agreement has been registered and the obligations of the obligor to the beneficiary have been discharged, the beneficiary shall take steps to cancel the registration within ten calendar days of the date on which a written request from the subordinated party is submitted to or received at the address of the beneficiary specifiedprovided at the time of registration.
4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.
4. The Registrar shall be liable under Article 28 (1) of the Convention for loss caused up to an amount not exceeding the amount of the claim registered.
5. The Registrar shall be liable under Article 28 (1) of the Convention for loss caused up to an amount not exceeding
5. Pursuant to Article 28(1) of the Convention, the registrar shall be liable for damage up to an amount not exceeding the value of

the value of the railway rolling stock to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.

6. The preceding paragraph shall not limit the Registrar's liability for damages for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees.

7. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar.

8. 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.

the rolling stock to which the damage relates. Notwithstanding the preceding sentence, the Registrar's liability shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.

6. The preceding paragraph shall not limit the liability of the Registrar for damage caused by the Registrar, its officers and employees through gross negligence or wilful misconduct.

7. The amount of insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar.

8. Nothing in the Convention shall prevent the Registrar from taking out insurance or obtaining a guarantee covering such damage for which the Registrar is not liable under Article 28 of the Convention.

#### **Article XVI – International Registry fees**

1. The Supervisory Authority shall set and may from time to time amend the fees to be paid in connection with registrations, filings, searches and other services the International Registry may provide, in accordance with its regulations.

2. The fees referred to in the preceding paragraph shall be determined so as to recover, to the extent necessary, the reasonable costs of establishing, implementing and operating the International Registry, as well as the reasonable costs of the Secretariat associated with the performance of its functions. Nothing in this paragraph shall preclude the Registrar from operating for a reasonable profit.

#### **Article XVII – Notices of sale**

The regulations shall authorise the registration in the International Registry of notices of sale of railway rolling stock. The provisions of this Chapter and of Chapter V of the Convention shall, in so far as relevant, apply to these registrations. However, any such registration and any search made

#### **Article XVI – International Registry fees**

1. The Supervisory Authority shall set and may from time to time amend the fees to be paid in connection with registrations, filings, searches and other services the International Registry may provide, in accordance with its regulations.

2. The fees referred to in the preceding paragraph shall be determined at a level that, to the extent necessary, covers the reasonable costs of establishing, implementing and operating the International Registry, as well as the reasonable costs of the Secretariat associated with the performance of its functions. Nothing in this paragraph shall preclude the Registrar from operating for a reasonable profit.

#### **Article XVII – Notices of sale**

Notices of sale of railway rolling stock shall, in accordance with the regulations, be registrable in the International Registry. The provisions of this Chapter and of Chapter V of the Convention shall, in so far as relevant, apply to these registrations. Registrations and searches made or certificates issued

or certificate issued in respect of a notice of sale shall be for the purposes of information only and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.

#### Chapter IV

##### Article XVIII – 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(1) of this Protocol.

However, registrations and searches made in respect of a notice of sale shall be for the purposes of information only and shall not affect the rights of any person or have any other effect under the Convention or this Protocol.

#### Chapter IV

##### Article XVIII – Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of immunity from legal proceedings before the courts referred to in Article 42 or 43 of the Convention<sup>2</sup>. A waiver under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V(1) of this Protocol.

2. A waiver clause under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V(1) of this Protocol.

**Chapter V****Relationship with other Conventions****Article XIX – Relationship with the UNIDROIT Convention on International Financial Leasing**

The Convention shall, to the extent of any inconsistency, prevail over the *UNIDROIT Convention on International Financial Leasing*, signed in Ottawa on 28 May 1988.

**Article XX – Relationship with the Convention concerning International Carriage by Rail (COTIF)**

The Convention shall, to the extent of any inconsistency, prevail over the *Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999*.

**Chapter V****Relationship with other Conventions****Article XIX – Relationship with the UNIDROIT Convention on International Financial Leasing**

If the provisions differ, the Convention shall prevail over the UNIDROIT Convention on International Financial Leasing, signed in Ottawa on 28 May 1988.

**Article XX – Relationship with the Convention concerning International Carriage by Rail (COTIF)**

If the provisions differ, the Convention shall take precedence over the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, in the version of the Protocol of Modification of 3 June 1999.

**Chapter VI****Final provisions****Article XXI – Signature, ratification, acceptance, approval or accession**

1. This Protocol shall be open for signature in Luxembourg on 23 February 2007 by States participating in the diplomatic Conference to adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment held at Luxembourg from 12 to 23 February 2007. After 23 February 2007, this Protocol shall be open to all States for signature at the Headquarters of 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 shall be effected by the deposit of a formal instrument to that effect with

**Chapter VI****Final provisions****Article XXI – Signature, ratification, acceptance, approval or accession**

1. This Protocol shall be open for signature in Luxembourg on 23 February 2007 by the States which participated in the Diplomatic Conference to Adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment, held in Luxembourg from 12 to 23 February 2007. After 23 February 2007, this Protocol shall be open for signature by all States at the seat of Unidroit in Rome until its entry into force in accordance with Article XXIII.

2. This Protocol shall be ratified, accepted or approved by the States which have signed it.

3. A State which does not sign this Protocol may accede to it at any time thereafter.

4. Ratification, acceptance, approval or accession shall be 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,

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 covered by this Protocol may similarly sign, accept, approve or accede to this Protocol. The regional economic integration organisation shall then have the same rights and obligations as a Contracting State, to the extent that the organisation has competence in matters covered by this Protocol. Where the number of Contracting States is relevant in this Protocol, the regional economic integration organisation shall not be counted as a Contracting State in addition to its member States which are Contracting States.

2. Upon signature, acceptance, approval or accession, the Regional Economic Integration Organisation shall

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 between the States which have deposited instruments referred to in subparagraph (a) on the later of:

(a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession, and

integration to the depositary a declaration indicating the areas covered by this Protocol in respect of which its Member States have transferred their competence to the Organisation. The regional organisation shall promptly notify the depositary of any changes to the distribution of competence specified in the declaration made pursuant to this paragraph, including any new competence delegated.

3. References to "Contracting State", "Contracting States", "State Party" or "States Parties" in this Protocol shall apply to a regional economic integration organisation where the context so requires.

#### **Article XXIII – Entry into force**

1. This Protocol shall enter into force between the States which have deposited the instruments referred to in paragraph (a) on the later of the following dates:

(a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession;

(b) the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.

2. For other States, this Protocol shall enter into force on the first day of the month following the later of:

(a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and

(b) the date referred to in subparagraph (b) of the preceding paragraph.

#### **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.

b) The date on which the Secretariat of the Depositary deposits a certificate confirming that the International Registry is fully operational.

2. For other States, this Protocol shall enter into force on the first day of the month following the later of the following dates:

a) Three months after the date on which the instrument of ratification, acceptance, approval or accession of the State was deposited.

b) The date referred to in paragraph (b) of the preceding paragraph.

#### **Article XXIV – Territorial units**

1. If a Contracting State has territorial units in which different legal systems apply to matters covered by this Protocol, it may, at the time of ratification, acceptance, acceptance or accession, declare that this Protocol shall apply to all its territorial units or only to one or more of them, and may modify this declaration at any time by submitting a new declaration.

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|---|---|
| <p>2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.</p>  | <p>2. Any such declaration shall be notified to the Depositary and shall expressly state the territorial units to which this Protocol applies.</p>  |
| <p>3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.</p>  | <p>3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.</p>  |
| <p>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.</p> | <p>4. If a Contracting State extends the application of this Protocol to one or more of its territorial units, the 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.</p> |
| <p>5. If, by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:</p>  | <p>5. If, pursuant to a declaration made under paragraph 1, this Protocol applies to one or more territorial units of a Contracting State,</p>  |
| <p>(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</p>   | <p>a) the debtor shall be 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, head office, place of business or domicile in a</p>  |

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 railway rolling stock in a Contracting State refers to the location of the railway rolling stock 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 railway rolling stock**

1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway

territorial unit to which the Convention and this Protocol apply,

b) any reference to the location of the railway rolling stock in a Contracting State shall be construed as referring to the location of the railway rolling stock in a territorial unit to which the Convention and this Protocol apply; and

c) any reference to administrative authorities in the Contracting State shall be construed as referring to the competent administrative authorities in a territorial unit to which the Convention and this Protocol apply.

**Article XXV – Public service railway rolling stock**

1. A Contracting State may at any time declare that, in accordance with its declaration, it will apply-existing national legislation that excludes, prevents or regulates the implementation of any of the measures specified in Chapter III of the Convention and Articles VII to IX of this Protocol in its territory with regard to

rolling stock habitually used for the purpose of providing a service of public importance ("public service railway rolling stock") as specified in that declaration notified to the Depositary.

Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall be liable to pay compensation to the owner of such rolling stock.

2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor.

2. The person, including a State or other public authority, who, under the law of a Contracting State making a declaration under the preceding paragraph, has the power to take possession of, use or control rolling stock shall preserve and maintain such rolling stock from the time when the power is exercised until the creditor has regained possession of the rolling stock or is able to use or control it.

3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:

3. During the period specified in the preceding paragraph, the person referred to in that paragraph shall also pay or procure payment to the creditor of an amount equal to the greater of:

(a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and

a) the amount that the person is required to pay under the rules of law of the Contracting State making the declaration; and

(b) the market lease rental in respect of such railway rolling stock.

The first such payment shall be made within ten calendar days of the date on which such power is exercised, and subsequent payments shall be made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depositary, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.

b) market rent for such railway rolling stock.

The first of these payments shall be made within ten calendar days of the date on which the power is exercised, and subsequent payments shall be made on the first day of each subsequent month. If the amount due for payment in a given month exceeds the amount owed by the debtor to the creditor, the surplus shall first be paid to the other creditors in accordance with their claims and order of priority, and then to the debtor.

4. A Contracting State whose legislation does not include the obligations set out in paragraphs 2 and 3 may, in accordance with what it has stated in a separate declaration to the depositary, declare that it will not apply these paragraphs to the rolling stock specified in that declaration. Nothing in this paragraph shall prevent a person from agreeing with the creditor to fulfil the obligations set out in paragraphs 2 or 3 or affect the possibility of implementing such an agreement.

5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect the rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.

6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

#### **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 and not later

5. An initial or subsequent declaration made by a Contracting State under this Article shall not adversely affect the rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.

6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

#### **Article XXVI – Transitional provisions**

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

a) In paragraph 2(a), insert the words "at the time the right or interest is created or arises" after "situated".

b) Paragraph 3 shall be replaced by the following:

"3. A Contracting State may, in a declaration under paragraph 1, specify a date not earlier than three years and not later

than ten 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.

after the date on which the declaration takes effect, Articles 29, 35 and 36 of this Convention, as amended by the Protocol, shall apply to pre-existing rights or interests created by an agreement concluded when the debtor was in that State, to the extent and in the manner specified in the declaration. Any priority of a right or interest under the national law of that State shall, where applicable, continue to apply if the right or interest in question is registered in the International Registry before the expiry of the period specified in the declaration, regardless of whether any prior right or interest has been registered.

**Article XXVII – Declarations relating to certain provisions**

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

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, wholly or in part. If it so declares, it shall specify the time period required by Article VIII(2).

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 4 of Alternative A, paragraph 3 of Alternative B or paragraphs 5 and 15 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.

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, wholly or in part. If it so declares, it shall specify the time period required by Article VIII(2).

3. A Contracting State may, at the time of ratification, acceptance or approval of this Protocol or accession thereto, declare that it will apply either alternative A, B or C in Article IX in its entirety and shall, in that case, specify the types of insolvency proceedings, if any, to which it will apply that alternative. A Contracting State making a declaration under this paragraph shall, as the case may be, specify the period of time specified in Article IX(4) for option A, Article IX(3) for option B or Article IX(5) and IX(15) for option C.

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

**Article XXVIII – Reservations and declarations**

1. No reservations may be made to this Protocol, but declarations authorised by Articles XIII, XIV, 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 under the Convention**

1. Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol unless stated otherwise.

2. 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 railway rolling stock is only capable, in its normal

**Article XXVIII – Reservations and declarations**

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

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

**Article XXIX – Declarations under the Convention**

1. Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60 of the Convention, shall also be deemed to have been made under this Protocol, unless otherwise stated.

2. For the purposes of Article 50(1) of the Convention, the term “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 railway rolling stock is only capable, in its normal

course of use, of being operated on a single railway system within the Contracting State concerned, because of track gauge or other elements of the design of such railway rolling stock.

can only be used in a single-track railway system within the Contracting State concerned due to track gauge or other circumstances affecting the design of the rolling stock.

**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

**Article XXX – Subsequent declarations**

1. A State Party may make a subsequent declaration, except for a declaration made under Article XXIX in accordance with Article 60 of the Convention, at any time after the date on which this Protocol enters into force for that State, by notification to the depositary.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months from the date of receipt of the notification by the depositary. If the notification specifies that the declaration shall take effect only after a longer period, the declaration shall take effect when the specified period has elapsed from the date of receipt of the notification by the depositary.

3. Notwithstanding the preceding paragraphs, this Protocol shall continue to apply as if such a

subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

**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 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.

2. Notwithstanding the preceding paragraph, 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.

subsequent declaration had been made in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

**Article XXXI – Withdrawal of declarations**

1. Any State Party that has made a declaration under this Protocol may, except for a declaration made under Article XXIX, withdraw it at any time by notification to the depositary. Such withdrawal 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.

2. Notwithstanding the preceding paragraph, this Protocol shall continue to apply as if no revocation of the declaration had been made in respect of all rights and interests arising prior to the date on which the revocation took effect.

#### **Article XXXII – Denunciations**

1. Any State Party may denounce this Protocol by written notification to the Depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiry of twelve months after the date of receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

#### **Article 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 re-

#### **Article XXXII – Denunciations**

1. Any State Party may denounce this Protocol by written notification to the Depositary.

2. Such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary.

3. Notwithstanding the preceding paragraphs, this Protocol shall continue to apply as if no such termination had taken place in respect of all rights and security interests arising prior to the date on which the termination took effect.

#### **Article XXXIII – Review Conferences, amendments and related matters**

1. The depositary shall, every year or at other appropriate intervals, in consultation with the supervisory authority, prepare reports addressed to the States Parties on the functioning in practice of the international regime established by the Convention, as amended by the Protocol. The depositary shall prepare the reports taking into account

ports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

the reports of the Supervisory Authority on the functioning of the international registration system.

2. At the request of not less than twenty-five 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:

2. At the request of at least twenty-five per cent of the States Parties, the depositary shall, in consultation with the Supervisory Authority, arrange for periodic evaluation conferences to review

(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;

a) the practical operation of the Convention as amended by this Protocol and the extent to which the Convention has actually facilitated the financing of assets and the leasing of property falling within the scope of the Convention;

(b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;

b) the interpretation and application of the provisions of this Protocol and the regulatory framework;

(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

c) the functioning of the International Registry, the activities of the Registrar and the oversight of the Registrar by the Supervisory Authority, on the basis of reports of the Supervisory Authority; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

d) whether this Protocol or the provisions relating to the International Registry should be amended.

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 four States in accordance with the provisions of Article XXIII relating to its entry into force.

3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of the States Parties participating in the conference referred to in the preceding paragraph, and shall then enter into force for those States which have ratified, accepted or approved it since its ratification, accepted or approved by four States in accordance with the provisions of Article XXIII on the entry into force of the Protocol.

#### **Article XXXIV – Depositary and its functions**

#### **Article XXXIV – Depositary and its functions**

1. Instruments of ratification, acceptance, approval or accession shall be deposited with UNIDROIT, which is hereby designated the Depositary.

1. The Depositary shall:

2. The Depositary shall:

2. The Depositary shall

(a) inform all Contracting States of:

a) notify all Contracting States of

(i) each new signature or deposit of an instrument of ratification, acceptance, approval

i) any new signature or any new deposit of instruments of ratification, acceptance, approval or accession

- or accession, together with the date thereof;
- (ii) the date of entry into force of this Protocol;
- (iii) the date of entry into force of this Protocol;
- (iv) each declaration made in accordance with this Protocol, together with the date thereof;
- (v) the withdrawal or amendment of any declaration, together with the date thereof; and
- (vi) 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 a
- instrument of ratification or accession and the date of its signature or deposit,
- ii) the date of deposit of the certificate referred to in in Article XXIII(1)(b),
- iii) the date of entry into force of the Protocol,
- iv) any declaration made under this Protocol and the date thereof,
- v) any withdrawal or modification of declarations, and the date of such withdrawal or modification, and
- vi) any notification of denunciation of this Protocol and the date of such denunciation and the date on which it takes effect,
- b) transmit certified 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 of the instruments, and copies of each declaration, or

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

The undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

DONE at Luxembourg, this twenty-third day of February, two thousand and seven, in a single original in the English, French and German languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

revocation or modification of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is complete and readily available; and

d) perform such other functions as are customary for depositaries.

IN WITNESS WHEREOF

the undersigned plenipotentiaries, duly authorised, have signed this Protocol.

DONE at Luxembourg on 23 February 2007 in a single copy in the English, French and German, all texts being equally authentic, which shall enter into force once the Joint Secretariat of the Conference, under the authority of the President of the Conference, has verified the consistency of the texts within ninety days of the date of this Act.



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