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The Luxembourg Rail Protocol's relevance for domestic transactions

The Luxembourg Protocol to the Cape Town Convention on International Interests in Mobile Equipment is a ground breaking global treaty that makes it easier and cheaper for the private sector to finance new or used railway rolling stock by reducing creditor risk and costs. It provides a new system of rights for creditors whose interests may be registered, and searchable 24/7, at an international registry to be based in Luxembourg. The Protocol applies to railway rolling stock worldwide (from conventional passenger and freight wagons and locomotives, to "yellow" rail equipment, metro and light rail trains, trams and cable cars). It will lower the barriers to entry for operators and lead to a more competitive and dynamic rail industry worldwide – bringing important social, environmental, developmental and economic advantages as well as new business opportunities.

There is a common perception that the Luxembourg Protocol applies, or only is relevant, where financed rolling stock crosses borders. The Cape Town Convention is focused on an "international interest" and the three initial protocols to the Convention, Aviation, Rail and Space Property, were certainly prioritised because in each case there is a possibility that financed equipment could cross jurisdictional boundaries. So clearly here establishing a common international system in relation to creditor rights makes particular sense. But, especially in the rail industry, the Convention brings some tremendous benefits even where the financed equipment, such as trams or metro trains, is not crossing borders as part of daily operations. There are two key reasons for this.

Is it really a domestic transaction?
A lessor and a lessee may be in the same jurisdiction but this does not automatically mean that the rolling stock is in the same country. Even if it is, it has the *potential* to move into other jurisdictions, either during or after the current financing, whereby the security system afforded by the Protocol will be highly valuable. But there may also be other international factors that are not immediately apparent:

- Either the lessor or the lessee may subsequently assign its rights and obligations to a foreign party

- the lessor may finance the lease under a secured credit agreement with a bank, or a syndicate of banks, located in different jurisdiction(s)
- the lessee or debtor could sublease equipment on a short or long term basis to a user with its principal place of business in a different country
- the rolling stock may be manufactured in another jurisdiction with the security interest created before the equipment is imported into the country of operation.
- whether directly on rails or transported otherwise, rolling stock may be moved during its lifetime to another state

noting in each case that the Protocol applies if the *debtor* is located in a contracting state (not the equipment). So what could appear to be a domestic transaction may be nothing of the sort.

Significant domestic legal and operational benefits
Unlike the aviation sector, there are generally no national registries for registering ownership or security interests in rolling stock. There is not even a common system for identifying rolling stock in unique way across the world. The Luxembourg Rail Protocol for the first time introduces a public registry available worldwide, which both provides and records, for domestic as well as international transactions, parties' claims to specific rolling stock and a universal system for identifying that rolling stock. The latter will also bring additional benefits through facilitating real time monitoring of the location of assets and enabling life time tracking of rolling stock, particularly helpful for maintenance and insurance purposes.

In many countries however domestic law is not clear on the rights of creditors in relation to providing leasing or secured credit finance for railway equipment in many countries a legacy of rail transport being provided exclusively by state owned operators. The Luxembourg Protocol delivers for the first time a consistent coherent system establishing clear creditor rights, during the term of the financing and on termination due to default, insolvency or otherwise. The public registry also publishes a clear system of priorities for rival creditor or owner claims and then also it creates a consistent system across different countries dealing with public policy issues such as recognising the public service aspect of various aspects of rail transportation.

So although the Luxembourg Rail Protocol will be essential in the future to secure financings on rolling stock crossing borders, it will also be highly relevant for secured credit or lease deals for rolling stock used domestically, bringing some direct and important benefits even if all the parties involved, as well as the rolling stock are located in one jurisdiction. Moreover this is not just because of the new creditor rights and protections applicable domestically. The Protocol, by creating a much more synchronised regime for financing railway equipment worldwide, will attract additional, more varied, and cheaper finance from the global financial community for railway rolling stock, supporting new procurement and more efficient operations, facilitating a more commercial and competitive rail industry in the coming years.

For more on the Luxembourg Rail Protocol, visit www.railworkinggroup.org. Keep up to date with all the latest developments via the Rail Working Group's LinkedIn group page.