Rail Working Group's Newsletter INSIDE TRACK
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THE 2001 CAPE TOWN CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

RAIL WORKING GROUP

INSIDE TRACK

"Inside Track" keeps RWG members and colleagues up to date on the progress of the Luxembourg Protocol. You can be added onto the mailing list by clicking on "subscribe" at the bottom of the newsletter.

Targeting Ratifications

The Ratifications Task Force met in Brussels on 25th March. This is a joint working group set up by the Preparatory Commission (PrepCom). PrepCom is tasked with the implementation of the Luxembourg Protocol and the joint chairs, Peter Bloch (USA) and Tuire Simonen (Finland) also chair the RTF. OTIF, UNIDROIT, SITA and the Registrar-designate, the Luxembourg government and the RWG were also represented at the March meeting. The principal area covered at the meeting was setting priorities for approaching governments and involving stakeholders in prospective ratifying states.

"Half a loaf" is better than waiting

At its working meeting on 25th March in Brussels the RWG considered again the difficult issue of declarations under article IX of the Protocol, protecting the creditor's position in the case of debtor insolvency. Within the EU, contracting states may only implement such provisions under domestic law and not by declaration to the Protocol. In countries such as the US where domestic law already provides strong creditor protection, no declaration is required.

The RWG's position remains that where domestic law does not afford creditors strong protection in these circumstances, contracting states should make a declaration opting for either alternative A or C. But it recognises that this can be caught up in a more general discussion on domestic insolvency law which can then result, in practice, in considerable delay in ratification if a declaration here is to be made – and a subsequent declaration, possibly as part of a more general reform of local insolvency law, is always possible. Accordingly since the Protocol offers many benefits, especially the ability to register, for the first time, security interests in a public register, and a clear system of creditor rights and priorities, the RWG encourages states to ratify without making a declaration under Article IX if this would otherwise hold up adoption of the Protocol.

Topic of the month: Choice of Law

One of the benefits of the Luxembourg Protocol, which is not often discussed, is the introduction of unrestricted party autonomy in relation to the law applicable to any security agreement created in a jurisdiction adopting the Protocol.

Article VI of the Luxembourg Protocol applies, as long as the contracting state has made the appropriate declaration, to an "agreement", meaning a security agreement, a title reservation agreement or a leasing agreement (Article 1 of the Cape Town Convention) as well as a related guarantee contract or subordination agreement. It states that the parties to such agreements may agree between themselves on the law which is to govern the contractual rights and obligations under the contract. This has a number of significant consequences. In principle it is open to the parties, even if they are located in the same country, to choose a different legal system to apply to the contractual rights and obligations. It could be therefore that parties will choose a suitable legal system and consistent treatment of commercial issues which would give the contracting parties security as to how any contractual disputes will be dealt with. In developing, or former communist countries, there may be little judicial precedent in respect of these types of agreements, so making an agreement subject to the law of such a country could create a

significant area of risk for a creditor. Effectively therefore Article VI overrides both local rules on conflicts of law and choice of law as well as the possible intervention of local law on the basis of the *situs* of the equipment at the time a title interest was created. What Article VI does not do is to dislodge the public law covering issues outside of contractual rights and obligations (for example rights of parties on insolvency). Moreover, some contracting states will be encouraged not to adopt Article VI on the basis that there is existing legislation in place broadly implementing this provision (for example within European Union where there is already an EC regulation on the law applicable in civil and commercial matters (Rome I). Intriguingly also Article VI allows parties to agree on an applicable law either to all or some of the contract or to specific issues that arise under the contract. This creates enormous flexibility for the parties and their legal advisors.

Special Deal for RWG members

Rail Working Group members are entitled to purchase Professor Goode's official commentary on the Luxembourg Protocol at a 15% discount. If you wish to use this facility, please use the official form which you can find here.

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