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### **Declarations Matrix and Economically-Based Recommendations**

#### **Ratification of Luxembourg Protocol to the Cape Town Convention on International Interests In Mobile Equipment On Matters Specific To Railway Rolling Stock (prepared by the Rail Working Group ("R.W.G."))**

#### **Part I – Commentary**

This matrix and the evaluative comments contained therein have been prepared to illustrate the optimal declarations or non-declarations in order to **enhance the economic benefits** to be derived from the Cape Town Convention. In determining their positions on declarations, States may wish to use this matrix in connection with the weighing of economic versus other policy considerations.

References are to the Convention ("C-Art." or "Convention") and the Luxembourg Protocol to the Convention on Matters Specific To Railway Rolling Stock ("P-Art." or "Protocol").

References to Form numbers are to the Explanatory Memorandum prepared by the Secretariat of UNIDROIT, as Depositary (DC10/DEP Doc. 1). Only those forms for provisions where a declaration is contemplated by the Matrix have been included therein.

#### **Explanatory Notes:**

(1) Opt-out provisions are those provisions that apply *unless* a declaration is made. Opt-in provisions are those provisions that *only apply if* a declaration is made. Whether a provision is opt-in or opt-out is noted under column C.

(2) All declarations under the Protocol as relates to railway rolling stock are made at the time of ratification, acceptance, approval of, or accession to the Protocol.

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## Part II – Declarations under the Convention

A.	B.	C.	D.	E.	F.
Form No.	Article 56 of the Convention authorises declarations under Article:	Headings	Declaration	Particulars of Declaration, if applicable	Relates to Article
Nos. 1 and 2	C-Art. 39(1)(a) and 39(4)	Rights having priority without registration ( <u>Opt-in</u> ) (non-consensual rights and interests)	Yes, but limited	(1) Specific and quantifiable list of qualifying categories that, under current law, have priority without national registration;  (2) Limited to customary categories (e.g., repairers)  (3) Limited to claims arising following a declared default	C-Art. 1(s)
No. 6	C-Art. 40	Registrable non-consensual rights or interests ( <u>Opt-in</u> )	Yes	(1) Specific list of qualifying categories (e.g., judgment creditors);  (2) Use of this declaration, rather than C-Art. 39(1)(a) declaration, is <u>strongly preferred</u> – bringing all categories of rail interests within the first-to-file Registry system	C-Art. 1(s)
Nos. 7 and 8	C-Art. 50	Internal transactions ( <u>Opt-out</u> )	No		C-Arts. 1(n), (r)
Nos. 9 and 10	C-Art. 52	Territorial Units ( <u>Opt-in</u> )	See Column E.	(1) Only if required by constitutional principles;  (2) If made, Convention should apply to all territorial units in which railway rolling stock operates	P-Art. XXIV (same topic; thus must be consistent)



No. 11	C-Art. 53	Determination of courts ( <u>Opt-in</u> )	Yes	As specific as possible, preferably listing the courts by name	C-Art. 1(h), Chapter XII
No. 12	C-Art. 54(1)	Preventing lease as remedy ( <u>Opt-out</u> )	No		C-Art. 8(1)(b)
Nos. 13-A and 13-B	C-Art. 54(2)	Remedy – Leave of Court ( <u>mandatory declaration</u> )	Mandatory Failure to make this mandatory declaration is likely to lead to the Depository refusing to accept the respective instrument of ratification/ acceptance/ accession/ approval	Strongly recommended to track wording in C-Art. 54(2): all remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised <u>without</u> court action and <u>without</u> leave of the court	C-Arts. 8 and 10
Nos. 14, 15, 16 and 17	C-Art. 55	Declarations regarding relief pending final determination of a claim ( <u>Opt-out</u> )	No		C-Arts. 13 and 43 (See also P-Art. VIII)
No. 18	C-Art. 60(1)-(3)	Transitional provisions ( <u>Opt-in</u> )	Yes	Date to be specified in declaration when Convention becomes applicable to pre-existing rights or interests for priority purposes should not prolong mandatory minimum period of three years	C-Art. 1(v)



### Part III – Declarations under the Protocol

A. Form No.	B. Article XXVIII of the Rail Protocol authorises declarations under Article:	C. Headings	D. Declaration	E. Particulars of Declaration, if applicable	F. Relates to Article
No. 19	P-Art. VI	Contractual Choice of Law ( <u>Opt-in</u> )	Yes	<p>(1) Wording declaring application;</p> <p>(2) Technically, this declaration is made under P-Art. XXVII(1);</p> <p>(3) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)</p>	P-Art. XXVII(1)
No. 20	P-Art. VIII	Modification of provisions regarding relief pending final determination of a claim ( <u>Opt-in</u> )	No	<p>(1) Wording declaring application (in part, not wholly);</p> <p>(2) Timetable for remedies under C-Art. 13(1)(a)-(c), shall be no more than <u>10</u> calendar days;</p> <p>(3) Timetable for remedies under C-Art. 13(1)(d)-(e), shall be no more than <u>30</u> calendar days;</p> <p>(4) Technically, this declaration is made under P-Art. XXVII(2);</p> <p>(5) Member States of European Union have transferred their competence to the Union as regards</p>	P-Art. XXVII(2); C-Art. 13



				matters which affect Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	
No. 21	P-Art. VIII	Modification of provisions regarding relief pending final determination of a claim ( <u>Opt-in</u> )	Yes	<p>(1) Wording declaring application (wholly, not in part);</p> <p>(2) Timetable for remedies under C-Art. 13(1)(a)-(c), shall be no more than <u>10</u> calendar days;</p> <p>(3) Timetable for remedies under C-Art. 13(1)(d)-(e), shall be no more than <u>30</u> calendar days;</p> <p>(4) Technically, this declaration is made under P-Art. XXVII(2);</p> <p>(5) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters</p>	P-Art. XXVII(2); C-Art. 13



No. 22	P-Art. IX Alternative A	Remedies on Insolvency ( <u>Opt-in</u> )	No	<p>(1) Wording declaring application of Alternative A (wholly, not in part) to “certain types of insolvency proceedings”;</p> <p>(2) Declared “waiting period” under P-Art. IX Alternative A (4) is 60 calendar days;</p> <p>(3) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(4) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(5) For EU-member states as well as non-EU member states considering adoption of Alternative A, please also see additional comments at the end of III.</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)
No. 23	P-Art. IX Alternative A	Remedies on Insolvency ( <u>Opt-in</u> )	Yes	<p>(1) Wording declaring application of Alternative A (wholly, not in part) to “all types of insolvency proceedings”;</p> <p>(2) Declared “waiting period” under P-Art. IX Alternative A (4) is 60 calendar days;</p> <p>(3) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(4) Member States of European Union have transferred their competence to the Union as regards matters which affect</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)



				<p>Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(5) For EU-member states as well as non-EU member states considering adoption of Alternative A, please also see additional comments at the end of III.</p>	
No. 24	P-Art. IX Alternative B	Remedies on Insolvency ( <u>Opt-in</u> )	No	<p>Strongly not recommended but if made (1) Wording declaring application of Alternative B (wholly, not in part) to “the following types of insolvency proceedings”;</p> <p>(2) Declared period of notice under P-Art. IX Alternative B (3) is 60 calendar days;</p> <p>(3) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(4) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(5) For EU-member states as well as non-EU member states considering adoption of Alternative B, please also see additional comments at the end of III.</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)



No. 25	P-Art. IX Alternative B	Remedies on Insolvency ( <u>Opt-in</u> )	No	<p>Strongly not recommended but if made (1) Wording declaring application of Alternative B (wholly, not in part) to “all types of insolvency proceedings”;</p> <p>(2) Declared period of notice under P-Art. IX Alternative B (3) is 60 calendar days;</p> <p>(3) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(4) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(5) For EU-member states as well as non-EU member states considering adoption of Alternative B, please also see additional comments at the end of III</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)
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No. 26	P-Art. IX Alternative C	Remedies on Insolvency ( <u>Opt-in</u> )	No	<p>(1) Wording declaring application of Alternative C (wholly, not in part) to “the following types of insolvency proceedings”;</p> <p>(2) Declared “number of calendar days” for purposes of P-Art. IX Alternative C (5) is 60;</p> <p>(3) Declared “cure period” under P-Art. IX Alternative C (15) is 60 calendar days;</p> <p>(4) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(5) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(6) For EU-member states as well as non-EU member states considering adoption of Alternative C, please also see additional comments at the end of III</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)
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No. 27	P-Art. IX Alternative C	Remedies on Insolvency ( <u>Opt-in</u> )	Yes <u>if</u> the application of Alternative A is not acceptable to a Contracting State, as a second preference:	<p>(1) Wording declaring application of Alternative C (wholly, not in part) to “all types of insolvency proceedings”;</p> <p>(2) Declared “number of calendar days” for purposes of P-Art. IX Alternative C (5) is 60;</p> <p>(3) Declared “cure period” under P-Art. IX Alternative C (15) is 60 calendar days;</p> <p>(4) Technically, this declaration is made under P-Art. XXVII(3);</p> <p>(5) Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;</p> <p>(6) For EU-member states as well as non-EU member states considering adoption of Alternative C, please also see additional comments at the end of III</p>	P-Art. XXVII(3); C-Arts. 1(k), (1) and P-Arts. I(2)(c),(d)
No. 28	P-Art. X	Insolvency Assistance ( <u>Opt-in</u> )	Yes	<p>(1) Wording declaring application;</p> <p>(2) Technically, this declaration is made under P-Art. XXVII(1)</p>	P-Art. XXVII(1); P-Art. IX
No. 29	P-Art. XIII	Designated entry points ( <u>Opt-in</u> )	No (See Column E)	No declaration is recommended; if one is made, (a) as relates to railway rolling stock, the declaration must be limited to those pertaining to railway rolling stock for which the declaring State is the State of the domicile	C-Art. 18(5)



				of the debtor; and (b) the declaring State should stipulate either that there will be no incremental costs for the International Registry or specify how any incremental costs will be covered by those registering interests through the designated entry point	
No. 30	P-Art. XIII	Designated entry points ( <u>Opt-in</u> )	No (See Column E)	No declaration is recommended; if one is made, (a) as relates to railway rolling stock, the declaration must be limited to those pertaining to railway rolling stock for which the declaring State is the State of the domicile of the debtor; (b) the declaring State should stipulate either that there will be no incremental costs for the International Registry or specify how any incremental costs will be covered by those registering interests through the designated entry point and (c) state that the designated entry point may be used for information required for registrations in respect of notices of sale	C-Art. 18(5)
No. 31	P-Art. XIII	Designated entry points ( <u>Opt-in</u> )	No (See Column E)	No declaration is recommended; if one is made, (a) as relates to railway rolling stock, the declaration must be limited to those pertaining to railway rolling stock for which the declaring State is the State of the domicile of the debtor; and (b) the declaring State should stipulate either that there will be no incremental costs for the International	C-Art. 18(5)



				Registry or specify how any incremental costs will be covered by those registering interests through the designated entry point	
No. 32	P-Art. XIII	Designated entry points ( <u>Opt-in</u> )	No (See Column E.)	No declaration is recommended; if one is made, (a) as relates to railway rolling stock, the declaration must be limited to those pertaining to railway rolling stock for which the declaring State is the State of the domicile of the debtor; (b) the declaring State should stipulate either that there will be no incremental costs for the International Registry or specify how any incremental costs will be covered by those registering interests through the designated entry point and (c) state that the designated entry point may be used for information required for registrations in respect of notices of sale	C-Art. 18(5)
No. 33	P-Art. XIV(2)	System of identification numbers ( <u>Opt-in</u> )	No	(1) Not recommended (identification system by reference to manufacturer's or registrar's identifier affixed onto the rolling stock strongly preferred) but if this is required, the alternative system must be one which applies only to interests created by debtors domiciled in the Contracting State at the time of the agreement creating such interest, uniquely identifies railway rolling stock, does not expose the creditor to the risk of non notification of any	C-Art. 18(1) C-Art. 7(c)



				<p>change of identifier of the registrar and must be subject to agreement with the Supervisory Authority</p> <p>(2) Member States of the European Union should note that Commission Decision 2006/920/EC of 11 August 2006 concerning the technical specification of interoperability relating to the subsystem Traffic Operation and Management of the trans-European conventional rail system adopts a numbering system for railway rolling stock and pursuant to decision 2007/756 of 9<sup>th</sup> November 2007 determines that numbers under this system could be the link between the International Registry and the (EU) National Vehicle Registries; however this is not suitable for the purposes of the Protocol since</p> <p>(a) the numbers can change and therefore will not satisfy the requirement they be unique in accordance with Article XIV(2)</p> <p>(b) the numbers will not always be affixed to existing railway rolling stock</p> <p>(c) they can only apply if the debtor is located in the relevant contracting state at the time the international interest is created and</p> <p>(d) the Interoperability Directive 2008/57/EC does not apply to all railway rolling stock covered by the Protocol</p>	
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Nos. 34 and 35	P-Art. XXIV	Territorial Units ( <u>Opt-in</u> )	See Column E.	<p>(1) Only if required by constitutional principles;</p> <p>(2) If made, Protocol should apply to all territorial units in which railway rolling stock operates</p> <p>(3) If a Contracting State does not make a declaration under P-Art. XXIV, the Protocol will automatically apply to <i>all</i> territorial units of that State; cf. P-Art. XXIV(3)</p>	C-Art. 52 P-Art. XXIV
No. 36	P-Art. XXV(1)	Continued application of some national laws 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 the Protocol relating to public service railway rolling stock ( <u>Opt-out</u> )	No	<p>(1) Not recommended but if a declaration is made, the laws concerned, the extent of their application and the exact identity of the public service railway rolling stock affected should be specified;</p> <p>(2) A Contracting State making a declaration under P-Art. XXV is required to take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit</p>	P-Art. XXV(1)
No. 37	P-Art. XXV(1)	Continued application of all national laws 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 the Protocol relating to public service railway rolling stock ( <u>Opt-out</u> )	No	<p>(1) Not recommended</p> <p>(2) A Contracting State making a declaration under P-Art. XXV is required to take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit</p>	P-Art. XXV(1)



No. 38	P-Art. XXV(4)	Disapplication of protocol articles XXV (2) and (3) [compensation provisions] to some public service railway rolling stock ( <u>Opt-out</u> )	No	(1) Strongly not recommended but if a declaration is made, the exact identity of the public service rolling stock to which it relates, by equipment type, should be specified  (2) A Contracting State making a declaration under P-Art. XXV is required to take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit	P-Art. XXV(2),(3)
No. 39	P-Art. XXV(4)	Disapplication of protocol articles XXV (2) and (3) [compensation provisions] to all public service railway rolling stock ( <u>Opt-out</u> )	No	(1) Strongly not recommended  (2) A Contracting State making a declaration under P-Art. XXV is required to take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit	P-Art. XXV(2),(3)

### Additional Comments with respect to Remedies on Insolvency

Article XXII of the Rail Protocol provides that Regional Economic Integration Organisations which are constituted by sovereign States and which have competence over certain matters governed by the Rail Protocol may sign the Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Regional Economic Integration Organisation has competence over matters governed by the Rail Protocol.

Member States of European Union have transferred their competence to the Union as regards matters which affect Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Consequently, they are barred from making a declaration pursuant to Article XXVII (3) of the Rail Protocol that they will apply one of Alternatives A, B and C of Article IX of the Rail Protocol.



The European Union, in turn, decided to make no declaration with respect to the applicability of the insolvency alternatives in the context of the first equipment-specific Protocol, the Aircraft Protocol.<sup>1</sup> This is due to the fact that a compromise was reached with the Member States that each Member State should be able to make its own decision as to which rule, if any, it wanted to adopt with respect to insolvency. We expect the European Union to adopt this approach also with respect to the Rail Protocol. Although no declaration can be made by the Member States of the European Union due to the overriding competence of the European Union with respect to insolvency, there is nothing to prevent the amendment of the national laws of a Member State so as to result in the same substantive outcome as if a declaration had been made by that Member State pursuant to Article XXVII (3) of the Rail Protocol. Put differently, although Member States technically cannot opt into Alternative A at the time of ratification, acceptance, approval of, or accession to the Rail Protocol, they are free to craft their national insolvency law according to Alternative A. In essence, Member States thus keep their competence concerning the rules of substantive law as regards insolvency.

The Rail Working Group urges Contracting States to adopt Alternative A of Article IX of the Rail Protocol. This provision is probably the single most significant provision of the Rail Protocol economically. Having said this, the Protocol provides significant benefits to creditors even without application of its insolvency regime. In particular, the Rail Protocol sets the framework for a worldwide asset registry that pertains to all rolling stock including trains, equipment running on rail tracks, trams, subway trains and light railway systems, accessible via the internet 24 hours a day, 7 days a week, through which any creditor can check if any other party claims a security interest in a specific piece of equipment. The creditor will be able to register its interest which will then, in almost all cases, take precedence over any other unregistered security interest and over any subsequently registered interest. Furthermore, the Rail Protocol provides a set of basic remedies in the event of the debtor's default. Finally, the umbrella Convention (which can only be applied as regards a category of objects to which a Protocol applies) provides that 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 the Convention.

The optional insolvency regime established by the Rail Protocol to govern creditor's rights where the debtor becomes subject to insolvency proceedings reflects the realities of modern structured finance by ensuring as far as possible that, within a specified and binding time-limit, the creditor either secures recovery of the object or obtains from the debtor the curing of all past defaults and a commitment to perform the debtor's future obligations. On the other hand, insolvency laws traditionally also take into account conflicting interests such as the protection of debtors, economy and jobs. Therefore, if a Contracting State should currently face legal, political or other difficulties in amending its national insolvency laws to reflect the realities of modern finance embedded in Article IX of the Rail Protocol, this should not impede its ratification, acceptance, approval of, or accession to the Rail Protocol. Rather, the respective Contracting State should consider ratification, acceptance, approval of, or accession to the Rail Protocol without adopting Alternative A and revisit this issue at a later point in time (e.g. in the context of an overall review or amendment of its insolvency legislation) on the basis of a subsequent declaration pursuant to Article XXX of the Protocol. A subsequent declaration will only take effect six months after receipt of the notification by the Depository.

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<sup>1</sup> OJ L121 May 15, 2009, p. 5.