# Part 3

## A Review of the Luxembourg Protocol

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Introduction

3.1 As its Preamble recites, the Luxembourg Protocol is designed to supplement and modify the Convention to meet the particular requirements of railway rolling stock finance and leasing. Many railway systems are State-owned or heavily dependent on State funds and in a number of countries suffer from a chronic lack of capacity, with obsolete railway rolling stock at or near the end of its useful life. The primary objective of the Convention and Protocol is to stimulate much-needed investment in such systems through additional private financing at lower cost. The two instruments seek to achieve this objective by means of an international legal regime that provides secured lenders, conditional sellers and lessors with an autonomous international interest in railway rolling stock protected by registration in an International Registry, coupled with speedy and effective default remedies, both within and outside the debtor’s insolvency. But the Protocol recognises the need to balance creditors’ remedies against the interest of States in maintaining an essential public service after the debtor’s default. This it seeks to do by a carefully crafted public service exemption allowing a Contracting State to make a declaration that it will continue to apply existing laws which suspend the exercise of Convention remedies in relation to public service railway rolling stock, while at the same time providing necessary safeguards for creditors. In other ways too the Luxembourg Protocol, in building on the principle of party autonomy and commercial predictability, gives Contracting States the right to weigh other considerations against economic benefits and to exclude or modify certain provisions of the Protocol felt to be incompatible with the State’s legal culture and tradition. Adoption of the Cape Town Convention and Luxembourg Protocol may also enable creditor banks to reduce the amount of capital required to be maintained under Basel III because of the enhanced value of rail receivables collateral. A sound international legal regime which gives reassurance to financiers and lessors by reducing risk will enable operators to access capital markets previously denied to them or to obtain their funds at lower rates.

1 Basel III is a global regulatory framework for more resilient banks and banking systems, revised version June 2011, replacing the previous Basel Accords on capital adequacy.
Sources of law

3.2. The Convention and Luxembourg Protocol (which by Article II(2) are together known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock) will be supplemented, as regards registration of railway rolling stock, by regulations and registry procedures made by the Supervisory Authority under Article 17(2)(d) of the Convention and Articles XIV(1) and XV(1) of the Protocol. Such regulations may be amended by the Supervisory Authority from time to time. The regulations will not be confined to purely procedural matters relating to registration but will govern, among other things, access to the International Registry and suspension of Registry operations for maintenance or to deal with technical or security problems. The procedures will deal with administrative items required by the Regulations. As to the Supervisory Authority, see paragraph 2.107.

Entry into force

3.3. Apart from a few provisions of the Convention not relating to objects and therefore coming into force on 16 November 2001 (see paragraph 2.237) all the provisions of the Convention and Luxembourg Protocol will enter into force as regards railway rolling stock on the later of:

   (a) the first day of the month following the expiration of three months after deposit of the fourth instrument of ratification, or for States depositing their instrument of ratification later, the first day of the month following the expiration of three months after such deposit, and

   (b) the date of deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational (Article XXIII(1)).

Paragraph (b) has no counterpart in the Aircraft Protocol but was inserted to avoid the possibility that the Convention and Luxembourg Protocol would

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2 That is, the Secretariat of the Supervisory Authority, namely the Organisation Intergouvernementale pour les Transports Internationaux Ferroviaires (OTIF), which co-sponsored the diplomatic Conference with UNIDROIT following close collaboration between the two organisations.
come into force as regards railway stock before the International Registry was up and running. This would, of course, be a disaster, and one that by good fortune was avoided in the case of aircraft objects because of a political impediment, since removed, to adoption of the Convention and Aircraft Protocol by the European Community. For States acceding to the Luxembourg Protocol after its entry into force the Protocol enters 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 of deposit of the certificate referred to above (Article XXIII(2)).

3.4. Limb (b) of Article XXIII(2) is otiose, because the condition it embodies will necessarily have been satisfied already under Article XXIII(1)(b) in order for the Protocol to have come into force as regards the first four States. A State may not become a Party to the Protocol unless it is or becomes a Party to the Convention (Article XXI(5)). But there is nothing to preclude a State from acceding to the Convention without acceding to the Protocol. See paragraph 2.12.

Structure of the Protocol

3.5. The Protocol prescribes a set of supplementary definitions specifically referable to railway rolling stock (Article I). It modifies the Convention provisions in various respects and contains numerous substantive provisions supplementing the Convention in order to meet the specific needs of the rail industry. These deal with such matters as description of railway rolling stock (Articles V and XIV), choice of law (Article VI), additional default remedies outside insolvency (Articles VII and VIII), particular remedies on insolvency (Article IX), the debtor’s right of quiet possession (Article XI), the Supervisory Authority, the Registrar and the Secretariat (Article XII), the International Registry and supplementary rules governing registration (Article XV and XVI), jurisdiction and waivers of sovereign immunity (Article XVIII) and the preservation, by declaration, of rules of law suspending the exercise of remedies as regards public service railway rolling stock (Article XXV(1)), referred to hereafter as “the public service exemption”.

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Definitions

3.6. The definitions given in the Convention apply equally to the Luxembourg Protocol except where the context otherwise requires (Article I(1)). However, as stated above the Protocol also contains its own list of definitions relevant to railway rolling stock and needs to be read in the light of these.

Influence of the Aircraft Protocol

3.7. At an early stage the decision was taken to follow the text of the Aircraft Protocol as far as possible and to make deviations and additions only because of factors particular to the needs and practices of the rail industry. For this reason the drafters resisted the temptation to make what might be thought as improvements on the text of the Aircraft Protocol, in order to maintain consistency and to avoid any implication that a change in wording was intended to alter the substance. In certain cases, however, it was thought desirable to make changes not attributable to the above factors. Some of these changes are designed merely to make explicit what was implicit in the Convention or Aircraft Protocol or to correct an inconsistency. Among these are the modification of Article 60 of the Convention (Article XXVI) and a slight difference in the text of the Luxembourg Protocol relating to representative capacities (Article IV). These modifications are not intended to change the substance of the provision in question, merely to clarify its meaning. Other modifications are intentional changes of substance in order to produce what was seen to be a more practical rule or to introduce an option not available under the Aircraft Protocol or remove an option given under it. Among such modifications are the following:

(1) A differentiation in the identification requirements for the constitution of an international interest (Article V) and the registration of an international interest (Article XIV) by removing the specificity required for the former and allowing an agreement creating or providing for an international interest to identify railway rolling stock by item, by type, or by a statement that the agreement covers all present and future railway stock or all such stock except for specified items or types. This flexibility as regards the constitution of an international interest avoids the need for a new security agreement each time the debtor acquires an
additional item of railway rolling stock and enables security to be given over fleets of railway wagons rather than individual wagons. The specificity required for registration in order to enable third parties to make an asset search is not needed as regards the relationship between the parties to an agreement. Article V is even broad enough to cover a floating security such as the English floating charge.

(2) The substitution of calendar days for working days in the provisions relating to relief pending final determination and remedies on insolvency (Articles VIII and IX). This is because what constitutes a working day varies from country to country and even from one locality to another within a given country, making it difficult for a party not in the country or locality concerned to know when a designated time period will expire.

(3) The provision of a third option, Alternative C, in the provisions relating to remedies on insolvency (Article IX).

(4) The omission of a provision extending the Convention and Protocol to outright sales, and the substitution of a provision for registration of notices of sale for information only and without effects under the Convention or Protocol (Article XVII).

(5) The omission of a provision requiring the debtor’s consent to an assignment, a requirement contained in Article XV of the Aircraft Protocol.

**Objects to which the Convention and Luxembourg Protocol apply**

3.8. The Convention and Luxembourg Protocol apply to railway rolling stock as defined by Article I(2), that is:

“vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, 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.”
This definition covers all types of railway rolling stock, with or without traction, regardless of speed, size or carrying capacity, whether used for passenger transport, freight or shunting, whether operating domestically or across national borders, whether for transportation on railway lines between cities and towns or up mountain tracks and whether on, above or below railway lines or other guideways. Accordingly the definition encompasses passenger and freight wagons (railroad cars), locomotives, self-propelled multiple-unit trains, articulated cargo sprinters, high-speed trains, trams, tram-trains, vehicles used in light rail and underground transportation, cable cars running on a track and even locomotives and carriages of model trains running on a fixed track and intended for transportation (as opposed to locomotives and carriages of toy trains or exhibition trains), including in each case accessories and other components. The common element of all these vehicles is that they run on, under or above a fixed track or guideway which governs the exact line of motion of the vehicle, as is the case with trains running along the traditional rail track, (for example, those used on the Paris metro and running on pneumatic tyres but with a guideway), Maglev monorail trains which are levitated above the track by electromagnetic force and funiculars and other cable railways. Vehicles which do not possess this element are not railway rolling stock. So the definition does not cover trolley-buses, which, unlike trams, do not run on rails but are powered by connection to overhead cables that do not guide the exact movement of the vehicle, nor does it cover road trains, which are trucking vehicles carrying two or more trailers on roads, or cable cars not running on a track.

3.9. What constitutes an item of railway rolling stock depends on the construction of the train and how easily the cars can be separated. In the case of a tram the entire set of articulated vehicles is constructed as a single entity, with wiring looms, etc., running the length of the tram and there is no intention to be able to split it into shorter sections; indeed, to do so would require a major overhaul. So the relevant unit for registration purposes is the

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3 Locomotives are often popularly referred to as “engines”, but this usage is avoided here as there are many kinds of engine used in rail transport which are not locomotives, for example, engines in or under the car of a multiple-unit train, which are components of the car, not distinct items of railway rolling stock. Indeed, engines are specifically treated as components in the definition of railway rolling stock and, unlike aircraft engines, are not separately registrable.
tram as a whole. The same is true of a permanently coupled articulated train where adjacent cars are not only sitting on a shared bogie but are permanently connected so that again the train functions as a single unit and will be treated as such for registration purposes. By contrast a simple train consists of cars which sit on separate bogies are readily detachable and exchangeable, while a separable articulated train set is one in which adjacent cars, though resting on a shared bogie, are similarly able to be easily detached and exchanged. In both cases, while the train functions as a single item of railway rolling stock, each car is a distinct registrable unit. However, for the purposes of Article 7 of the Convention (constitution of agreements) and Chapter III (default remedies) there is nothing to preclude a security agreement covering a complete train or trains without individual identification. Rights in components (including railway engines) prior to installation or after removal are outside the scope of the Convention (since they do not constitute “objects” as defined by Article 1(u) of the Convention) and are governed by the applicable law. See Article 29(7) of the Convention, discussed in paragraph 2.168. As regards the components listed in Article I(2)(e) a traction system is a system for the supply of motive power to a train; an engine provides the power for a locomotive, an articulated set of cars or a single powered car and is to be distinguished from a locomotive, which is a vehicle with no payload capacity of its own but contains a number of components and generally pulls and pushes carriages and wagons (see note 3). While a locomotive contains an engine it also contains other components, such as traction systems, brakes, bogies and pantographs (if electric). A locomotive constitutes an item of railway rolling stock and is not a mere component. Brakes are mechanisms which are used to reduce the speed of a train; an axle is a shaft to which revolving wheels are attached; a bogie supports and steers a railway carriage, wagon or locomotive; a pantograph is a collapsible frame mounted on the roof of an electric locomotive, electric articulated train set, trolleybus or tram which accesses power through contact with an overhead power line.

**Convention inapplicable to outright sales**

3.10. The provisions of the Convention apply in relation to railway rolling stock as provided by the terms of the Protocol (Article II(1)). In contrast to the position under the Aircraft and Space Protocols, the Luxembourg Protocol does not extend any provisions of the Convention to outright sales, though it
does authorise the registration of notices of sales for information only and without any Convention effects (see paragraph 3.52).

**Power of derogation**

3.11. Under Article III, in their relations with each other, the parties may, by agreement in writing, exclude the application of Article IX (dealing with insolvency) or derogate from or vary the effect of any of the provisions of the Protocol except Article VII(3) and (4), which relates to the exercise of default remedies. The power to vary the provisions of the Protocol does not apply to Article IX, which can be excluded but not modified. The reason for this is that whichever of the three alternative versions of Article IX is chosen by a Contracting State it can only be adopted in its entirety (Article XXVII(3)). See further paragraph 5.32. The power of derogation is limited to relations between the parties themselves. They cannot derogate from provisions affecting a third party except by agreement with that third party, nor, of course, can they derogate from provisions concerning the rights of Contracting States.

**Representative capacities**

3.12. 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 IV). So an international interest under a security agreement may be taken by an agent or trustee for bondholders or other creditors in the name of the agent or trustee as chargee and may be registered in that name. Whether in such a case default remedies are also exercisable by one or more of the creditors directly depends on the applicable law and the terms of the trust or agency agreement. But if the agent or trustee takes enforcement measures Article IV precludes the party against whom they are taken from contending that the agent or trustee has no locus standi to do so. Article IV departs from the wording of Article VI of the Aircraft Protocol by encompassing all the registrable categories listed in Article 16(1), which is
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what Article VI of the Aircraft Protocol intended and how it should be interpreted.4

Identification of railway rolling stock in agreements

3.13. Reference has already been made to the differing identification requirements for the constitution of an international interest and its registration (see paragraph 3.7(1)). The requirements for identification of railway rolling stock for registration purposes are altogether more stringent and complex and are discussed in paragraphs 3.42 et seq.

The applicable law; choice of law

3.14. Like the Convention the Luxembourg Protocol contains various provisions referring matters to the applicable law. These are as follows:

(1) Under Article VI, subject to a declaration by a Contracting State, the parties are free to choose the law governing their relations inter se (see paragraph 3.15).

(2) Under Article IX, Alternative A, paragraph 5(b) and Alternative C, paragraph 6(b), unless and until the creditor is given the opportunity to take possession of the railway rolling stock after the occurrence of an insolvency-related event it is entitled to apply for any other forms of interim relief available under the applicable law (see paragraphs 3.72, 3.77, 3.81). Under Article IX, Alternative A, paragraph 11 and Alternative C, paragraph 12, the provision in paragraph 10 that no obligations of the debtor under the agreement may be modified without the creditor’s consent does not affect any authority of the insolvency administrator under the applicable law to terminate the agreement (see paragraph 3.74).

(3) Article IX, Alternatives B and C provide in paragraph 3(b) that upon the occurrence of an insolvency-related event the insolvency administrator or the debtor, as applicable, is to give the creditor the

4 See the Official Commentary on the Convention and Aircraft Protocol, paragraph 5.33.
opportunity to take possession in accordance with the applicable law (see paragraphs 3.76, 3.79).

(4) Paragraph 4 of Alternative B provides that the applicable law may permit the court to require the taking of any additional step or the provision of any additional guarantee (see paragraph 3.77).

(5) Under Article XI(2), nothing in the Convention or Protocol affects the liability of the creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.

3.15. By Article VI, which applies only where a Contracting State has made a declaration under Article XXVII, the parties to an agreement or a related guarantee contract or subordination agreement or contract of sale are free to choose the law to govern their contractual rights and obligations, wholly or in part, and unless otherwise agreed their choice is taken to be a reference to the domestic rules of law of the designated State (i.e. excluding its conflict of laws rules) or, where that State comprises several territorial units, the domestic law of the designated territorial unit. This choice must be respected by the courts of a Contracting State but only if it is a Contracting State which has made a declaration under Article XXVII. In such a Contracting State the choice of law by the parties is not open to attack on grounds that might otherwise have been available, for example that the chosen law has no connection with the parties or the subject-matter of the transaction or that the transaction is a wholly domestic transaction involving no foreign element. However, Members States of the European Union are likely to be precluded from making a declaration under Article VI (see paragraph 3.18).

3.16. The choice of a foreign law is effective to displace rules of the *lex fori* which are mandatory in the sense of being incapable of exclusion by agreement of the parties if the *lex fori* applies but are not considered so important as to impose them on contracts governed by a foreign law. Examples of mandatory rules which can be excluded by a choice of law clause are rules governing the validity of a contract or the enforceability of penalty clauses and other restrictions on amounts payable. However, Article VI will not displace the overriding mandatory rules of the *lex fori*, that is, rules which apply regardless of the otherwise applicable law. But such rules do not in any way limit the
freedom of the parties to choose the applicable law, they merely preclude the selected law from being applied in a manner inconsistent with the overriding rules.

3.17. The reference to “law” requires that any choice by the parties be a national legal system, as opposed to the broader “rules of law”, which could encompass rules common to a number of States or accepted internationally or even the lex mercatoria. “Guarantee contract” is defined by Article I(2)(a) in terms which, read with Article I(2)(b), cover not only suretyship guarantees but demand guarantees, standby letters of credit and other forms of credit insurance. Article VI does not extend to contractual provisions in an assignment of an international interest. Moreover, it is confined to provisions affecting the parties’ contractual relationship and does not extend to property rights. As to the applicable law where the parties do not make a choice, see paragraphs 2.55 et seq.

3.18. As a Regional Economic Integration Organisation the European Community is likely to decide to make no declaration under Article XXVII(1) relating to Article VI (see paragraph 2.233, n. 38), with the result that Member States of what is now the European Union may not make such declarations either (see paragraphs 3.28(1), n. 2.233). Member States are bound by the rules in the EC Regulation relating to the applicable law in civil and commercial transactions (Rome I), with the result that the parties cannot avail themselves of Article VI to choose the applicable law; and while Rome I generally respects the autonomy of the parties as to choice of law there are qualifications, particularly as to the impact of a rather complex set of differing kinds of mandatory rule.

Default remedies generally

3.19. The default rules of the Convention are supplemented by Articles VII, VIII and IX (Alternative A, paragraph 8) of the Luxembourg Protocol in certain respects to meet the particular needs of the rail industry. One set of these provisions adds a new remedy, export and physical transfer of railway rolling stock; the other modifies some of the existing provisions on remedies. The provisions are largely taken from the Aircraft Protocol, even to the point
of adopting an erroneous cross-reference in Article VIII(6),\(^5\) but they are simpler in one respect, in that the remedy of de-registration is not relevant to railway rolling stock, but more complex in another in restricting the exercise of remedies in respect of railway rolling stock habitually used to provide a service of public importance, a restriction not contained in the Aircraft Protocol but provided in a different form in the Space Protocol.\(^6\)

**Export and physical transfer**

3.20. Article VII(1) provides that 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. The purpose of these additional remedies is to remove the railway rolling stock still further from the debtor’s control and transfer control to the creditor. The effect of the provisions is to enable the creditor to invoke the co-operation of the administrative authorities in a Contracting State in connection with export and physical transfer.

3.21. If the creditor wishes to avail itself of the procedures laid down in the Protocol for procuring export and physical transfer, it must follow one of the two routes prescribed, the conditions varying somewhat according to which route is taken. Neither route is available unless the appropriate declaration has been made by the Contracting State that is the primary insolvency jurisdiction (see below). However, Article VII(1) is not itself dependent on a declaration by a Contracting State and may therefore be invoked independently of the Protocol route to export and physical transfer; indeed, this will be necessary if the requisite declaration has not been made. In such a case it suffices that the creditor satisfies the requirements of Article VII(1) and (2) and follows the procedures prescribed by the law and administrative rules of the place where the railway rolling stock is situated. It is likely that in most cases the creditor will wish to follow one of the routes set out in the Protocol itself where the necessary declaration has been made by a Contracting State and the requisite

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5. See the Official Commentary on the Cape Town Convention and the Aircraft Protocol (3rd edition), paragraph 3.32, discussing the corresponding provision in Article X(6) of the Aircraft Protocol.

6. See the Official Commentary on the Space Protocol, paragraphs 3.78 et seq.
conditions are satisfied, because the administrative authorities are then obliged to provide the remedies and cannot impose separate procedural requirements of their own. However, there is nothing to prevent the creditor from taking a power of attorney from the debtor at the outset giving the creditor irrevocable authority to procure export and physical transfer of the railway rolling stock. The first route, via Article VIII(6), is for the creditor to obtain an order for advance relief under Article 13 from a court in the jurisdiction where the railway rolling stock is located, or equivalent relief from a foreign court whose jurisdiction is recognised by the home court, and notify the relevant authorities of the grant of the order. This is referred to below as “the court route”. The creditor is then entitled to have the remedies made available within five working days. The second route, via Article VII(6), is for the creditor to give reasonable prior notice in writing of the proposed export to the requisite “interested persons” (see paragraph 2.80) This route is referred to below as the “out-of-court” route.

3.22. Whether the creditor proceeds via the court route or the out-of-court route, certain conditions common to the two routes must be observed. Additional conditions are then specified for each route as described below. The common conditions are as follows:

(1) The Contracting State must have made a declaration under Article XXVII(2) applying at least Article VIII(6), if not the whole or any other part of Article VIII.

(2) The debtor must have agreed to the additional remedies, though this may be at any time, not necessarily in the agreement creating or providing for the international interest (Article VII(1)). The remedies are exercisable only to the extent that the debtor has so agreed.

(3) The circumstances specified in Chapter III of the Convention, relating to default remedies, must exist (Article VII(1)). This means that the debtor must be in default of its obligations under the agreement. 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 above remedies (Convention, Article 11(1)). In the absence of such agreement “default” means a default which substantially deprives the creditor of what it is entitled to expect under the agreement (Convention, Article
Also necessary is the prior written consent of the holder of any registered interest ranking in priority to that of the creditor (Article VII(2)). This requirement cannot be excluded by agreement under Article III since although it is not one of the provisions of Article VII specified in Article III as incapable of derogation, Article VII(2) does not concern the relations of creditor and debtor inter se and is therefore outside the scope of Article III. However, Article VII(2) says nothing about unregistered non-consensual rights or interests having priority by virtue of a Contracting State’s declaration under Article 39. This is because the priority in question is given not by the Convention but by the law of the declaring State, which is not applicable in another Contracting State except to the extent provided by such State’s own conflict of laws rules. See paragraphs 2.204 et seq.

Each of the two Protocol routes will now be examined in more detail on the assumption that the common conditions have been met.

The court route

3.23. Article VIII(6) provides the trigger for action by the authorities where the creditor follows the court route. A creditor invoking Article VIII(6) must have obtained an order for advance relief under Article 13(1) from a court in a Contracting State where the railway rolling stock is located or an equivalent order from a foreign court, which need not itself be a court of a Contracting State. In effect the order must be one which gives possession or control to the creditor or otherwise removes control from the debtor. In the case of an order by a foreign court the relief must be “recognised” by a court of the Contracting State whose administrative authorities are involved. “Recognised” denotes recognition of the foreign court’s jurisdiction to make the order granting the relief, whether under the Convention or under other rules of recognition of the Contracting State. The basic idea is that any order should be either made or recognised by a court in a Contracting State which is the State where the railway rolling stock is located. The relevance of Article 13 is not apparent from Article VIII(6) because of a drafting slip copied from the corresponding provision of the Aircraft Protocol. The second reference to Article VII(1)
makes no sense because nowhere in the Convention or Protocol is there any reference to the grant by a court of relief under Article VII(1). The reference should be to an order granting relief under Article 13(1) of the Convention, as is clear from (a) an earlier draft presented by the Aviation Working Group in relation to aircraft objects in which the precursor of Article X(6) of the Aircraft Protocol referred back to the relief specified in what became Article 137 and (b) the fact that, as indicated by its heading, the whole of Article VIII is concerned with the modification of provisions regarding relief pending final determination.

3.24. To trigger Article VIII(6) the creditor must notify the relevant authority (a) that relief has been granted under Article 13(1) and (b) that the creditor is entitled to procure the remedies of export and physical transfer. The purpose of this requirement is to dispense with the need for the authority to investigate external facts and to require it to rely solely on the creditor’s notification. In short, the process is perceived as purely documentary. Once the creditor has notified the administrative authorities of the grant of relief they come under two distinct obligations. The first obligation is to make the remedies available within seven calendar days of the notification. This must mean seven calendar days of the authorities’ receipt of the notification rather than its dispatch. The second obligation is expeditiously to co-operate with and assist the creditor in the exercise of the remedies in accordance with the applicable safety laws and regulations, which are unaffected by Article VIII(6) (see Article VIII(7)).

The out-of-court route

3.25. Where the creditor does not pursue the court route Article VIII(6) does not apply and instead the creditor, if a chargee, must comply with Article VII(6) by giving reasonable prior notice in writing of the proposed export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention, that is, the debtor and guarantors (including issuers of demand guarantees and standby credits and insurers), and

(b) interested persons specified in Article 1(m)(iii) of the Convention, that is, others who have rights in or over the railway rolling stock, being persons who have given notice of their rights to the chargee within a reasonable time prior to the export and physical delivery (Article VII(6)).

These requirements are not imposed on a creditor pursuing the court route and thus does not have to be observed in cases within Article VIII(6), the reason being that a court asked to make an order under Article 13(1) to trigger Article X(6) can itself require notice to interested parties under Article 13(3). Moreover, even for a creditor pursuing the non-court route, Article VII(6) applies only to a chargee and matches the provision applicable under Article 8(4) to a proposed sale or lease by a chargee. A conditional seller or lessor is not affected by the requirement, for the same reason as it is not subject to a regime of the kind specified in Article 8(3), that is, because as owner (at least in the relationship with the conditional buyer or lessee) the creditor is simply asserting the right to control its own property.

**Duty to respect priorities**

3.26. Reference has already been made to the general duty of an enforcing creditor to respect priorities as regards registered interests (see paragraph 2.76). The same applies to the exercise of the remedies of export and physical transfer. If the railway rolling stock is exported to another Contracting State the priority of higher-ranking registered interests, including holders of non-consensual rights or interests registered under Article 40, is not affected. However, if the railway rolling stock is exported to a non-Contracting State the courts of that State would be free to hold that any sale or other dealing with the railway rolling stock overrode the rights of higher-ranking creditors under that State’s law as the law applicable under its conflict of laws rules. Nevertheless, whether railway rolling stock is to be exported to a Contracting or a non-Contracting State, the enforcing creditor’s obligations under the Protocol remain the same, namely (i) to give notice to “interested persons” as required by Article VII(6)(a) and (b) and (ii) either to obtain the consent of the registered higher-ranking creditors to the export and physical delivery or to discharge the debts owed to such creditors.
Insolvent debtor

3.27. Where the debtor is insolvent and a Contracting State has made a declaration applying Alternative A of Article IX, then if (a) the additional remedies have become exercisable, (b) the creditor has become entitled to possession under paragraph 3 of Alternative A, and (c) the creditor notifies the relevant authorities that it is entitled to procure the above remedies in accordance with the Convention, they must make such remedies available within seven calendar days and must expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations (Article IX, Alternative A, paragraph 8). As discussed above, the process to be followed by the authorities is purely documentary, dispensing with the need for the authority to investigate external facts.

Modification of Convention provisions on remedies

3.28. The Luxembourg Protocol modifies the Convention in various respects to give greater certainty for the parties.

(1) Exclusion of Article 8(3)

Article VII(3) replaces Article 8(3) of the Convention with a more general duty of commercial reasonableness. This cannot be excluded by agreement (Article III). The duty imposed on a chargee to exercise remedies in a commercially reasonable manner is extended to cover all remedies in relation to railway rolling stock and thus to embrace not only remedies of the creditor under the security agreement but those conferred on the assignee of associated rights qua transferee of the international interest under Article 34 but not remedies in relation to the associated rights themselves. But a remedy given in relation to railway rolling stock is 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 (Article VII(3)). In consequence Article 8(3), which is limited to security agreements, is disapplied. On signing the Convention and Aircraft Protocol as a Regional Economic Integration Organisation the European Community (now the European Union) decided to make no declaration under Article XXX(2) of that Protocol. Had it done so, all Member States would have had to make the same declaration. The effect of the Council’s decision, while precluding Member
States from making a declaration under Article XXX(2), is to leave them free to implement such parts of Article X of the Aircraft Protocol as they wish in domestic legislation, so that each Member State is free to go its own way. The Council also made a decision on the mode of implementation of Articles 13 and 43 by Member States the effect of which has been discussed earlier (paragraph 2.260). Proposals for a similar Council decision as regards the Luxembourg Protocol have been put forward by the European Commission.8

(2) Crystallisation of requirements of Article 8(4)

A chargee giving fourteen or more calendar days’ prior written notice to interested parties of a proposed sale or lease is deemed to satisfy the requirement of “reasonable prior notice” specified in Article 8(4) (Article VII(4)). While Article VII(3) extends the requirement of commercial reasonableness to the exercise of remedies under Articles 9, 10 and 12 of the Convention and, by extension, Article VII(1) of the Protocol (see Article II(1)), some of these provisions will rarely be caught by the requirement. It can hardly apply to the remedies given by Article 9, which require either the consent of the debtor or a court order and incorporate various provisions for the protection of the debtor but otherwise do not specify a mode of proceeding to which the requirement of reasonableness could apply. Similarly the requirement will not usually apply to remedies under Article 10, because the creditor is in principle entitled to terminate the agreement for default and to repossess, sell or do what he likes with his own property. Article VII(3) does not apply to the additional remedies referred to in Article 13 of the Convention as remedies given by the applicable law or the agreement since these are not remedies “given by the Convention”.

(3) Modification of provisions regarding relief pending final determination (advance relief)

The provisions for speedy relief pending final determination of the creditor’s claim under Article 13 of the Convention are modified by Article VIII so as (a) to provide for a decision within the time specified in a declaration of the Contracting State, (b) to add the remedy of sale and application of the

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8 See paragraph 2.233, n. 38.
proceeds of sale if the parties specifically agree and (c) to permit the parties to exclude the application of Article 13(2) of the Convention (which empowers the court to impose conditions for the granting of advance relief). However, Article VIII applies only where a Contracting State has made a declaration to that effect under Article XXVII and only to the extent of that declaration.

The public service exemption

3.29. Article XXV of the Luxembourg Protocol addresses the problem of the potential impact of the exercise of a creditor’s remedies on the provision of public service railway rolling stock, that is, railway rolling stock habitually used for the purpose of providing a service of public importance. Whether a railway system is state-owned or in private hands, there is an overriding public interest in ensuring the continuance of passenger and freight services of public importance, and this could be frustrated if, on default by the operator, the creditor were to exercise its rights of repossession so as to lead to withdrawal of those services. Indeed, in certain jurisdictions there could even be constitutional impediments to the suspension of such services. An interruption of service which merely causes inconvenience to passengers while still enabling them to reach their destinations in reasonable time is not sufficient to attract the application of Article XXV. But serious interruption of services for the transportation of commuters on their way to work or of essential freight on a main line would ordinarily be considered an interference with services of public importance such as to attract the restrictions in Article XXV on the exercise of remedies. The volume of traffic carried and the frequency of transportation are not, however, the only determinants. Regard must also be had to the nature of what is being carried, for example, the transportation of chemicals or other hazardous materials. Creditors, for their part, see no reason why a defaulting debtor or a State or State-appointed entity acting in the debtor’s place should remain free to continue carrying passengers or freight without making payments to the creditor. The public service exemption provided by Article XXV was one of the most intensely examined issues in the diplomatic Conference in Luxembourg, and the outcome of the discussions is a carefully crafted compromise designed to balance the interests of the State in avoiding disruption to the carriage of passengers and freight by rail and the interests of creditors in maintaining the economic value of their investment. Article XXV embodies four key elements:
The power to control the exercise of remedies

3.30. Under Article XXV(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 in its territories 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 in relation to public service railway rolling stock as specified in that declaration notified to the Depositary. The following points should be noted:

(1) “Rules of its law” means rules of law of the declaring State. What constitutes “rules of law” is a matter for the law of the declaring State and could include administrative rules and procedures as well as legislative provisions and judicial decisions.

(2) Only those rules of law in force at the time of deposit of the Contracting State’s declaration may be invoked by that State. There is nothing to preclude the State from making new rules of law and depositing a fresh declaration covering such rules. However, in no case may a declaration adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which the relevant declaration is received by the Depositary (Article XXV(5)). So creditors are protected against the retrospective operation of new rules of law.

(3) Article XXV applies only to the railway rolling stock and the public service provision specified in the declaration notified to the Depositary.

(4) Article XXV applies both to passenger vehicles and to freight vehicles.

(5) For Article XXV to apply the railway rolling stock must be habitually used for the purpose of providing a service of public importance. Occasional use for such a purpose is not sufficient.

(6) Whether the rail transportation service provided by the debtor is a service of public importance depends on the facts, and in particular on the volume of traffic carried by the service and the perception of the public importance of the service in the Contracting State in question.
Passenger or freight vehicles habitually used to carry a substantial number of passengers or a substantial volume of freight on a main line would ordinarily be considered to provide a service of public importance, and this is so even if, on suspension of service of the line, an alternative line was available. A service does not cease to be of public importance merely because there are alternative services. The question is the nature of the service provided, not the availability of other means of transport if the service is suspended. On the other hand, even the provision of rail transport for a relatively small number of passengers might fall within Article XXV if this was serving a rural locality in which there were no other means of transport.

The duty of preservation and maintenance

3.31. Under Article XXV(2) any person, including a governmental or other public authority, that under rules of law of a Contracting State making a declaration under Article XXV(1), exercises a power to take or procure possession, use or control of any public service railway rolling stock has a duty to preserve and maintain it from the time of exercise of the power until possession, use or control is restored to the creditor. Where, for example, there are contractual provisions in a public service contract relating to railway rolling stock by which, on default by the provider of the public service, a government agency can appoint another person to assume the benefit and burden of the contract and take possession of the railway rolling stock, that person, on taking possession, must maintain and preserve the railway rolling stock until it is restored to the creditor. The duty of preservation and maintenance does not apply in the circumstances set out in Article XXV(4), discussed in paragraphs 3.34-3.35.

The duty of payment

3.32. Article XXV(3) provides that during the period referred to above the person taking possession must pay or procure payment to the creditor of an amount equal to the greater of:

(a) the amount that person is required to pay under the rules of law of the declaring Contracting State; and

(b) the market lease rental in respect of such railway rolling stock.
Article XXV(3) reflects the fact that the purpose of the public service exemption is to ensure continuance of the service, from which the new provider will derive revenue, and that it would be unfair to allow it to do this without making a fair payment for use of the railway rolling stock to the creditor. But the duty to make the payment exists even for a period when the person taking possession does not in fact use or procure use of the railway rolling stock. If there are rules of law of the declaring State providing for the amount of the payment to the creditor then the person taking possession has to pay that amount or, if higher, the market lease rental in respect of the railway rolling stock. This is the rental that can be commanded on the market on the grant of a lease. Where the debtor holds possession under a lease, the rental payable under that lease may provide evidence of the lease market rental but this will not necessarily be the case, and the lease market rental may be higher or lower than that charged under the lease on which the debtor defaulted, though in the former case the creditor will have to account for the surplus (see paragraph 3.33). The duty of payment, like the duty of preservation and maintenance, does not apply in the circumstances set out in Article XXV(4). See paragraphs 3.34-3.35.

3.33. Article XXV(3) deals with the time of payment and the application of any surplus. The first rental payment must be made by the person taking possession within ten calendar days of so doing, and subsequent payments must be made on the first day of each successive month thereafter. If in any month the amount payable exceeds the amount due to the creditor under the agreement creating or providing for the international interest the surplus is to be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

3.34. Under Article XXV(4) a Contracting State whose rules of law do not provide for the obligations of preservation, maintenance and payment 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 the declaration. It should be noted that it is not necessary that the declaring State’s rules of law should affirmatively exclude the above obligations in order for Article XXV(4) to apply; it suffices that they make no provision for their performance. However, since “rules of law” includes judicial decisions, it is open to a court to rule that even without any legislation to that
effect the possessor is required by rules of law to perform some or all of the obligations in question.

3.35. Article XXV(4) further provides that nothing in it precludes a person from agreeing with the creditor to perform the above obligations or affects the enforceability of any agreement so concluded. This provision caters for the common case where a contract is concluded between the person taking possession, or the government entity appointing that person, and the creditor dealing with maintenance, preservation and payment. Where such a contract is concluded the fact that the rules of law of the declaring State do not provide for such obligations is irrelevant.

The Contracting State’s duties

3.36. Article XXV(6) provides that a Contracting State making a declaration under Article XXV must take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit. This is a signal to Contracting States to be cautious before making declarations which would adversely affect the interests of creditors or reduce the availability of credit. Clearly if major players in the market for the financing and leasing of railway rolling stock were to take the view that declarations made under Article XXV were unfairly prejudicing creditors by excluding some or all of the above obligations they might react by declining to enter into future agreements for the financing or leasing of railway rolling stock or, if continuing to conclude such agreements, might significantly increase their charges. Those are factors which a Contracting State is required to take into consideration, though having done so it is free to take the view that the balance of interests nevertheless requires it to make the declaration in question.

Supervisory Authority

3.37. Article XII provides that the Supervisory Authority for the International Registry for railway rolling stock is to be a body established by representatives of States Parties appointed in accordance with that Article. Meanwhile the Preparatory Commission established by Resolution No. 1 is to be the Provisional Supervisory Authority. The Supervisory Authority may establish a commission of experts. It is to be assisted by a secretariat. The Secretariat is OTIF.
3.38. Under Article 27(2) of the Convention the Supervisory Authority and its officers and employees enjoy such immunity from legal or administrative process as is specified in the Protocol. However, the Luxembourg Protocol does not address the immunity of the Supervisory Authority. On the international plane its immunity must rest on such status as it may have in international law as an organisation established under an international Convention by representatives of sovereign States and enjoying international legal personality under Article 27(1) of the Convention.

Secretariat

3.39. The Luxembourg Protocol does deal with the immunity of the Secretariat (OTIF). Article XII(9) does this by reference to Article 27(3) and (4) of the Convention, which confer on the Supervisory Authority exemption from taxes and such other privileges as may be provided by agreement with the host State (Article 27(3)), together with immunity of its assets, documents, data bases and archives of the International Registry from seizure or other legal or administrative process (Article 27(4)). Moreover, the Headquarters Agreement between OTIF and the Confederation of Switzerland provides for privileges and immunities for OTIF.

Registrar: liability and insurance

3.40. The liability of the Registrar under the Luxembourg Protocol for errors, omissions and system malfunction is strict but, in contrast to the unlimited liability of the Registrar of the aircraft Registry, is limited to loss caused up to an amount not exceeding the value of the railway rolling stock to which the loss relates, with an overall limit of liability of 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 (Article XV(5)). These are likely to provide for a ceiling liability of 5 million SDRs per event of loss. However, these limits do not apply to the Registrar’s liability for damages for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees (Article XV(6)). The amount of the insurance or financial guarantee against liability referred to in Article 28(4) of the Convention is to be not less than the amount determined by the Supervisory Authority to be appropriate having regard to
the prospective liability of the Registrar (Article XV(7)). This is likely to be fixed at not less than 5 million SDRs per event of loss and not less than 15 million SDRs per annual insurance period, covering three events of loss per annual insurance period, but without obligation to procure automatic reinstatement of such cover if a claim is made.

The International Registry system for railway rolling stock

3.41. The Convention envisages a separate International Registry for each of the three categories of equipment covered by the Convention. The International Registry for railway rolling stock is in the course of being established by the Preparatory Commission, which as provisional Supervisory Authority will issue the first Regulations governing the International Registry. It is expected to follow the general approach of the International Registry for aircraft objects, though obviously with variations reflecting the different character of railway rolling stock and the different requirements of the Luxembourg Protocol. Its centralised functions are required to be operated and administered by the Registrar on a 24-hour basis (Article XV(4)), the intention being that the service should operate seven days a week throughout the year. The International Registry is, of course, entitled to suspend operations for reasonable periods for repair and maintenance. Either party to a registrable transaction can effect registration with the consent of the other. Registration may also be effected in the name of an agent, trustee or other representative (see paragraph 3.12), but it is not necessary to state the capacity of the registrant. A person required by Article 25(2) to procure discharge of a registered prospective international interest or a registered prospective assignment must take such steps as are within its power to do so no later than ten calendar days after receipt of the demand in the manner that Article provides (Article XV(2)), whilst on discharge by the debtor of its obligations to the beneficiary of a subordination the beneficiary is allowed ten calendar days after written demand to procure (not merely to take such steps as are within its power to procure) the discharge (Article XV(3)). The Supervisory Authority is entitled to set fees for use of the facilities of the International Registry on the basis of recovery of reasonable costs but not with a view to profit. See paragraph 5.68.
Identification of railway rolling stock for registration purposes

3.42. As previously mentioned, the provisions of the Luxembourg Protocol concerning identification of railway rolling stock distinguish the identification criteria for the constitution of an international interest, which are governed by Article V and are flexible (see paragraph 3.7(1)), from those required by Article XIV for registration, which are more stringent because they require that the asset against which a search is made be uniquely identifiable. For aircraft objects the identification criteria are simple: manufacturer's name, generic model designation and serial number. For railway rolling stock the requirements imposed by Article XIV for registration purposes are more complex and under Article XV the search criteria are left to be established by regulations. This is partly because of the fact that it was not always the practice for manufacturers to affix serial numbers to railway rolling stock (particularly the case for older railway rolling stock) and partly because the number of an individual wagon may change, in addition to which certain existing national and regional registration systems for railway rolling stock, such as the North American Uniform Machine Language Equipment Register (UMLER), for other purposes allocate numbers that are in common usage in the State or region concerned and can be recycled. In the railway industry it is common to use structured numbers the different components of which identify different things, such as the status, ownership or use of the item of railway rolling stock. A change in the status, etc., results in a change in the related component of the number. It is envisaged that the registration system for the International Registry for railway rolling stock will use unstructured numbers, so that a change in the data will not affect the number, thus enabling the registered item to retain its unique identifiability. Article XIV(1) provides that a Contracting State may by declaration state the system of national or regional identification numbers to be used with respect to items of railway rolling stock subject to an international interest created or provided for, or intended to be created or provided for, by an agreement entered into by a debtor situated in that Contracting State at the time of conclusion of the agreement. Subject to agreement between the declaring State and the Supervisory Authority the system must ensure unique identification of the equipment.

3.43. Accordingly a feature of the registration system for railway rolling stock which distinguishes it from the system under the Aircraft Protocol is that under Article XIV(1) of the Luxembourg Protocol identification numbers by
which an item of railway rolling stock will be identified in the Registry are
allocated by the Registry itself. They need not be serial numbers. The internal
identification number so allocated must be:

(a) affixed to the item of railway rolling stock; or

(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.

Article XIV(1) is designed to deal with three alternatives. The first is where
there is no identifier on the rolling stock; the second, where there is a
manufacturer’s serial number; and the third, where is a national or regional
identification number, with or without a manufacturer’s serial number. Where
the item of railway rolling stock carries a manufacturer’s serial number then in
the ordinary way that is the number that will be supplied to the International
Registry by the registrant and linked by the International Registry to its internal
number. Where the item does not carry such a number then, except in cases
within (c) or where there is no manufacturer’s serial number, the International
Registry, on being supplied by the registrant with the manufacturer’s name and
identification number, will itself allocate an internal number linked to the
manufacturer’s name and identification number and the number so allocated
must then be affixed to the item. Under (c) the International Registry is
supplied by the registrant with a national or regional identification number for
the item in question and must then allocate a number associated with the
national or regional number. This is designed for cases where the national or
regional number can be reused. There is nothing to preclude the use of
alphanumeric numbers. Details of the registration requirements will be dealt
with in regulations, a central purpose of which will be to ensure that any
identification number is and remains unique and is not reusable.

Affixation

3.44. Affixation of an identification number to an item of railway rolling
stock denotes attachment to the item in a manner which, while allowing of
alteration or removal, is not intended to be merely transient. This can be
done in a variety of ways, for example, by a fixed number plate, painting or
embossment on the rolling stock bar code, or an electronic number embedded in or inscribed on a microchip or some other form of electronic identification tag.

**Association with the manufacturer’s name and identification number**

3.45. This involves a link between the number allocated by the International Registry to the item of railway rolling stock and the name of its manufacturer and the identification number assigned by the manufacturer and affixed to the item.

**Association with a national or regional identification number**

3.46. This is a reference to a national or regional number allotted by a system the subject of a declaration by a Contracting State. Under Article XIV(2) a Contracting State may, for the purposes of Article XIV(1), by declaration state the system of national or regional identification numbers that are to be used with respect to items of railway rolling stock subject to an international interest that is created or provided for, or intended to be created or provided for, by an agreement entered into by a debtor situated in that State. Subject to agreement between the Supervisory Authority and the declaring State, the identification system must ensure the unique identification of each item of railway rolling stock to which the system applies. This means that, subject to such agreement, the system must not be one which allows the same number to be used in connection with two different railway vehicles.

3.47. The Contracting State’s declaration must include detailed information on the operation of the system. Further, the registration in the International Registry in respect of an item of railway rolling stock to which the declared system applies will be valid only if it specifies all the national or regional numbers to which the item has been subject since entry into force of the Protocol and the time during which each number has applied to them. In this way the registration is designed to provide a full history of the numbers allocated to the item from the time of entry into force of the Protocol, thus establishing a link between the first number so allocated and the number allocated by the International Registry.
Designated entry points

3.48. Article XIII empowers a Contracting State, pursuant to Article 18(5) of the Convention, to designate an entity or entities in its territory as the entry point or entry points through which information required for registration shall or may be transmitted to the International Registry. However, no such designation may be made in relation to notices of national interests, or registrable non-consensual rights or interests, arising under the laws of another State. Moreover, a designation made under Article XIII 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. The use of a designated entry point is made voluntary in such cases because the registration of notices of sale has no effects under the Convention (see paragraph 3.52). Article XIII(1) requires that designated entry points be operated at least during working hours in their respective territories. The provisions and procedures relating to designated entry points apply only to registrations, not to searches, which are made direct to the International Registry.

Who can register

3.49. Either party to a registrable transaction can effect registration with the consent of the other. Registration may also be effected in the name of an agent, trustee or other representative. See paragraph 3.12.

Against what object must registration be effected?

3.50. What constitutes a registrable unit - in particular, whether is a train as a whole or individual carriages – depends on its construction and the separability of the carriages. See paragraph 3.9.

Information required to effect registration

3.51. Article XIV of the Luxembourg Protocol provides fairly elaborate criteria for identification of railway rolling stock for registration purposes (see paragraphs 3.42 et seq.). The information required to effect a registration will be governed by regulations.
Sales

3.52. The Aircraft and Space Protocols provide for the extension of the registration and priority provisions of the Convention to sales of aircraft objects under contracts of sale. By contrast Article XVII of the Luxembourg Protocol merely allows registration of notices of sale of railway rolling stock, but any registration made or certificate issued in respect of a notice of sale is for the purposes of information only and does not affect the rights of any person, or have any other effect, under the Convention or the Protocol. So registration of a notice of sale does not secure any form of priority or attract any of the provisions relating to international interests. Its sole effect is that in some jurisdictions it may be regarded as constituting notice of the existence of the sale for the purposes of priority under national law. In practice creditors may be expected to search against notices of sale as a way of checking whether there are any other title claimants.

Searches and search certificates

3.53. Regulations will prescribe the types of search that will be able to be made in respect of railway rolling stock, the information to be supplied for the purpose of a search and the issue of search certificates.

Registration errors

3.54. The Registrar is responsible for the International Registry’s own errors and omissions but not for errors in data supplied to it which it passes on unchanged (Article 28(2)). Errors in data such as the names of the debtor are much less likely to have significant adverse effects in an asset-based registration system than in a debtor-based registration system. Errors in the description of an item of railway rolling stock, on the other hand, could lead to more serious consequences. As to whether an error might invalidate a registration or expose a registrant to liability, see paragraph 2.121. In principle the Registrar is liable for any loss caused by the system malfunction (Convention, Article 28(1)).
Priorities

3.55. It has been seen earlier that under Article 29 of the Convention, in the absence of an agreement for subordination, a registered interest has priority over an unregistered interest and as between two registered interests priority is determined by the order of registration. Accordingly when a transaction is concluded involving two or more chargees, they can either agree on the order of registration or, more conveniently, agree that one shall be subordinated to the other and the subordination agreement registered so as to bind an assignee of the subordinated interest where this is registered first. It is to be expected that the International Registry for railway rolling stock will also accommodate divided interests in a space asset or multiple creditors holding a single interest.

3.56. The debtor’s right of quiet possession under Article XI(1) as against a person other than its creditor, e.g. a chargee, in effect constitutes a priority rule. See further paragraphs 3.57-3.58.

Debtor’s right to quiet possession and use

3.57. Article XI of the Luxembourg Protocol establishes a quiet possession regime which is in principle dependent on registration of the creditor’s international interest before registration of a chargee’s interest and follows the priority rule in Article 29(4) (see paragraphs 2.156 et seq.). Under Article XI the right to quiet possession and use (“quiet possession”) is conferred on a debtor who is a conditional buyer or lessee vis-à-vis its creditor, the conditional seller or lessor, and vis-à-vis the holder of another interest in the object. In all cases the right of quiet possession depends on the terms of the agreement between debtor and creditor. To the extent that the right is qualified by the title reservation or leasing agreement it is qualified not only as against the creditor but also as against the chargee. Subject to the terms of the agreement the debtor is given the right to quiet possession as against:

(a) its creditor and the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraph 2.156); and

(b) the holder of any interest to which the debtor’s right or interest would be subject under the above provisions, to the extent that such holder has so agreed.
For brevity of analysis the holder of the interest referred to above will be assumed to be, and will be described as, a chargee under a security agreement entered into by the conditional seller or lessor as chargor.

3.58. The effect of Article XI is that (a) where the debtor who is a conditional buyer or lessee has priority over a chargee because the debtor’s creditor (conditional seller or lessor) registered its international interest before the creditor registered its charge that priority, unless and to the extent that the debtor has otherwise agreed, will carry with it a right of quiet possession as against the chargee (thus making explicit what is anyway implicit in the priority rule itself) and (b) the debtor will also have a right of quiet possession as against a chargee to whose interest the debtor’s right of quiet possession would otherwise be subject, to the extent that the chargee has so agreed. Such an agreement is in effect a subordination corresponding to the subordination provided for in Article 29(5) and qualifying the priority rule in Article 29(4). Article 29(5), which permits the variation of competing priorities, and the registration thereof binding third parties, applies to the foregoing rules. So if a chargee who would otherwise have had priority over a conditional buyer or lessee agrees to hold its interest subject to the right of quiet possession of the conditional buyer or lessee, this constitutes a variation of priorities within Article 29(5) so as to subordinate the charge and entitles the conditional buyer or lessee to register the subordination, which should be done in order to bind an assignee of the subordinated chargee’s interest. However, the chargee may stipulate that the subordination is not to be registered, in order to ensure that if the conditional buyer or lessee defaults the chargee can take enforcement measures without having a cloud on its title. The chargee’s consent to entry of the chargor into the conditional sale or leasing agreement itself does not by itself constitute an implied subordination to the right of quiet possession of the conditional buyer or lessee in the absence of any express or implied agreement for subordination between the chargee and the conditional buyer or lessee. By the same token, a debtor who would otherwise have priority against the chargee may agree to waive its right of quiet possession as against the chargee, and in that event the waiver should be registered as a subordination in order to bind an assignee of the title reservation or leasing agreement. The accrued right of quiet possession of the debtor or conditional buyer cannot be terminated by a subsequent subordination agreement between the creditor or conditional seller and the chargee, which operates only as between those parties. In contrast to the corresponding provisions in the other two Protocols Article
XI(1)(a) does not extend the right of quiet possession to the debtor “in the capacity of buyer”. This is because, unlike the other Protocols, the Luxembourg Protocol does not provide for the registration of outright sales and the consequential priority of the buyer who is the first to register. However, Article 29(3)(b) of the Convention provides that a buyer takes free from an unregistered interest, and does so even if it has actual knowledge of such an interest, and the right of quiet possession will normally follow from the buyer’s acquisition of a clear title.

3.59. There could be a case in which two charges have been granted, one of which is registered before the registration of the international interest of the conditional seller or lessor, the other after such registration. In such a case the conditional buyer or lessee has a right of quiet possession against the second chargee but not against the first. The right of quiet possession against the second chargee is not affected by a subsequent subordination agreement between the two chargees, which cannot deprive the debtor of its accrued right of quiet possession against the beneficiary of the subordination. In determining whether the conditional buyer or lessee has a right of quiet enjoyment against a chargee the sole question, in the absence of a subordination agreement between them, is whether the international interest of the conditional seller or lessor was registered before that of the chargee. A change in priority of the two chargees is irrelevant.

3.60. The Protocol does not define quiet possession or state what kinds of act constitute an infringement of the right of quiet possession, but the concept of quiet possession denotes freedom from interference with the debtor’s possession, use or enjoyment of the railway rolling stock. Accordingly any such act of interference constitutes a breach of the right to quiet possession, whether it takes the form of physical seizure, disablement of the railway rolling stock, restriction of access to it or otherwise. However, the creditor is liable only for interference for which it is directly or indirectly responsible, as where the creditor takes possession itself or authorises a third party to do so or where the railway rolling stock is arrested or taken in execution by or on behalf of a third party by way of recovery of sums due from the creditor to that third party, including sums payable under a judgment or order of the court. Similar considerations apply to the liability of a holder of interest from which the debtor takes free pursuant to Article 29(4) of the Convention.
3.61. Article XI applies only where a debtor is not in default within the meaning of Article 11 of the Convention. That Article permits the parties to agree on what constitutes a default. Where no such agreement is contained in the contract, the default must be substantial. Assuming no such default, Article XI entitles the debtor to quiet possession, in accordance with the agreement, as against (a) its creditor, and (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraphs 3.57-3.58 above).

3.62. As stated above, the rules governing the priority of the right of quiet possession vis-à-vis a third party such as a chargee may be varied by agreement (Article 29(5)).

3.63. The right of quiet possession of a conditional buyer or lessee as against a chargee where the interest of the conditional seller or lessor was registered before registration of the charge is brought to an end by subsequent discharge of the former registration (see paragraph 2.156), though the conditional buyer or lessee may still have a remedy against the conditional seller or lessor in the event of interference with its quiet possession.

Remedies on insolvency

3.64. Article IX introduces special rules in relation to railway rolling stock designed to strengthen the creditor’s position vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event, that is, (i) the commencement of insolvency proceedings against the debtor, or (ii) the debtor’s declared intention to suspend or actual suspension of payments where the creditor’s right to institute insolvency proceedings or to exercise remedies under the Convention is suspended by law or State action (Article 1(2)(c)). “Insolvency proceedings” means bankruptcy, liquidation or other collective judicial or 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 (Convention, Article 1(l)). “Court” generally means a court of law or an administrative or arbitral tribunal established by a Contracting State (Article 1(h)) but in regard to arbitral tribunals this is a case where the context otherwise requires, since such tribunals do not normally control or supervise a debtor for the above purposes. It is open to a Contracting State to declare the
relevant “court” or “courts” for the purpose of Article 1 (Article 53). “Insolvency administrator” is defined by Article 1(k) of the Convention as 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 law. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.

3.65. Article IX, which in the event of an assignment of the international interest can be invoked by the assignee, applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII. “Primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which is deemed to be the place of the debtor’s statutory seat or, if none, the place where the debtor is incorporated or formed, unless proved otherwise (Article I(2)(d)). Where such a Contracting State has made a declaration applying Article IX the fact that the railway rolling stock in question is located in another Contracting State which has not made such a declaration does not affect the application of Article IX in the declaring State.

3.66. A Contracting State may elect to make a declaration applying Alternative A, Alternative B or Alternative C or it may make no declaration at all, in which case its existing insolvency law will continue to apply. Even where a Contracting State has made a declaration under Article XXVII it is open to the parties to exclude the application of Article IX by agreement in writing (Article III), but they cannot vary it, only exclude it in its entirety (see paragraphs 5.9, 5.32). This is because each of the alternative options for which a Contracting State may make a declaration has to be adopted entire if it is to be adopted at all (see below). Under Article XXVII(4) of the Protocol the courts of Contracting States (i.e. Contracting States other than the Contracting State where the debtor has its centre of main interests) are required to apply Article IX in conformity with the declaration made by the Contracting State which is the primary jurisdiction. So if there are secondary insolvency proceedings in another Contracting State relating to railway rolling stock situated in that State the courts of that State must apply the version of Article IX selected by a declaration of the Contracting State of primary jurisdiction.

3.67. The equivalent provisions in Article XI of the Aircraft Protocol offered two alternative versions, Alternative A and Alternative B. The Luxembourg
Protocol adds a third, Alternative C. It is open to a Contracting State to adopt one of these, though only in its entirety (Article XXVII(3)), or to adopt none of them and simply continue to apply its ordinary domestic law.

**Alternative A**

3.68. The “hard”, or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. Paragraphs 3 and 7 of Alternative A of Article IX require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State’s declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to 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. “Related transaction documents” is not defined but is intended to cover all documents, other than the agreement itself, which impose obligations in respect of the transaction, for example, obligations embodied in any separate loan agreement or in a promissory note given in respect of it. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A, the creditor can apply for and is entitled speedily to obtain a court order requiring the insolvency administrator or the debtor to give possession of the railway rolling stock. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). The following points arise under paragraph 3 of Alternative A:

“Insolvency administrator or the debtor, as applicable”

3.69. The phrase “insolvency administrator or the debtor, as applicable” covers three situations. The first concerns cases within Article I(2)(c)(ii) of the Protocol, that is, where there are no insolvency proceedings and the insolvency-related event consists of 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 exercise remedies under the Convention is prevented or suspended by law or State action. In such a case
there is no insolvency administrator and it is the debtor itself upon which the duties fall. The second involves cases within Article I(2)(c)(i) where there is a gap between the commencement of the insolvency and the appointment of the insolvency administrator. During that gap the debtor again is the party responsible. Of course, the debtor's freedom of action may be circumscribed by the lex concursus. The third situation is where the estate is being administered in insolvency proceedings by a debtor in possession.

“Waiting period”

3.70. The waiting period begins on the occurrence of an insolvency-related event as defined by Article I(2)(c) and is the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

“The date on which the creditor would be entitled to possession if this Article did not apply”

3.71. This must be interpreted as referring to a right to possession arising after the occurrence of an insolvency-related event as defined by Article I(2)(c). The underlying premise is that such commencement causes a stay on the creditor’s right to possession. However, where there is no stay, whether because (a) the insolvency-related event is not the commencement of proceedings but the declaration of an intended suspension of payment, (b) the relevant insolvency law does not impose a stay, (c) any stay imposed is lifted during the waiting period, or (d) the railway rolling stock does not form part of the debtor’s estate under the applicable insolvency law (which could, for example, be because it is held under a title reservation agreement or a leasing agreement), the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 3(b) of Alternative A of Article IX(1) is to be interpreted as if it read “would be entitled, or becomes entitled, to possession of the railway rolling stock notwithstanding the insolvency proceedings or other insolvency-related event”. The insolvency administrator or the debtor can only avoid loss of the right to possession if it has cured all defaults, other than a default cured by the opening of insolvency proceedings, by the earlier of the expiry of the waiting period and the accrual or resumption of the creditor’s right to possession and has within the same time agreed to perform all future obligations under the agreement, including obligations under other contracts incorporated by reference into the agreement.
3.72. Unless and until the creditor is given the opportunity to take possession the insolvency administrator or the debtor, as applicable, must preserve the railway rolling stock and maintain it and its value in accordance with the agreement, but may use the railway rolling stock under arrangements designed to preserve and maintain it and its value. This would seem to include earning income from continued operation of the railway rolling stock. Meanwhile the creditor for its part is entitled to apply for any other forms of interim relief available under the applicable law (Alternative A, paragraph 5). What constitutes interim relief varies with the applicable law. In a number of jurisdictions any form of relief which is considered appropriate before a final determination has been made on the merits qualifies as interim relief, so that in those jurisdictions sale of the object to which the proceedings relate can be ordered by way of interim relief, whereas other jurisdictions look to the finality of what is ordered and consider sale to be an irrevocable act and therefore inappropriate for interim relief. A court in a Contracting State before which interim relief is sought will thus apply its own law in deciding whether a particular remedy qualifies as interim relief. What constitutes the applicable law is to be determined by the rules of private international law of the forum State (Article 5(3)), and the availability of interim relief will usually be regarded as procedural in character and therefore governed by the lex fori. Where the insolvency-related event is the commencement of the insolvency proceedings the forum State will almost invariably be the State in which the proceedings are opened and the lex concursus will apply. A separate rule applies as regards advance relief under Article 13 of the Convention in that sale and the application of the proceeds of sale are made available as a form of relief under that Article if at any time the debtor and the creditor specifically agree (Protocol, Article VIII(3)).

3.73. The power to grant the creditor interim relief under paragraph 5(b) of Alternative A of Article IX in a Contracting State that has made a declaration applying Alternative A does not affect the ordinary jurisdiction of an insolvency court, even in a Contracting State which has not made such a declaration, to grant such interim relief as its law allows. Where insolvency proceedings are opened in one Contracting State the jurisdiction of the courts of another Contracting State to grant interim relief may, of course, be circumscribed by rules of the latter State’s law requiring it to recognise the exclusive jurisdiction of the insolvency court of the former State, as where both Contracting States have adopted the UNCITRAL Model Law on cross-
border insolvency or both are Member States of the European Union and as such required to apply the EC Insolvency Regulation.

3.74. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor’s remedies beyond the above time-period and from modifying the debtor’s obligations without the creditor’s consent. In effect this removes, for railway rolling stock, the preservation of the court’s powers under Article 30(3)(b) of the Convention (see paragraph 2.175). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors’ rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor’s obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor’s obligations under “the agreement”, that is, the security agreement, title reservation agreement or leasing agreement relating to the railway rolling stock, and says nothing about security assignments of debtor’s rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor’s remedies permitted by the Convention or Protocol, applies to all remedies, not merely those relating to the railway rolling stock. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11).

3.75. The creditor’s protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1), are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention, namely that rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be applied to displace the priority of a registered international interest.
Alternative B

3.76. The “soft”, or discretion-based, version, Alternative B, requires the insolvency administrator or the debtor, as applicable, upon the creditor’s request and within the period specified in the declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations under the agreement and related transaction documents or give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law (Alternative B, paragraph 3). “Related transaction documents” is not defined but would cover all documents, other than the agreement itself, which impose obligations in respect of the transaction, for example, obligations embodied in any separate loan agreement or in a promissory note given in respect of it. The right to take possession may be given either by the agreement, in which case it is the law governing the agreement that will be the applicable law, or by the procedural rules of the forum, in which case the applicable law will be the lex fori.

3.77. Unlike the hard rule in Alternative A which requires performance of all the debtor’s obligations, including cure of all prior defaults other than the insolvency itself, under Alternative B the applicable law may condition the creditor’s rights. In particular, if the insolvency administrator does not give the required statement or give up possession after stating it will do so, the applicable law may “permit the court to require the taking of any additional step or the provision of any additional guarantee” (Alternative B, paragraph 4). This wording is infelicitous in that it does not indicate what is meant by “additional step”, there being no mention in paragraph 3 of any prior step such as an order for possession, nor is it clear why paragraph 4 purports to provide what the applicable law may do, that being, one would have thought, a matter for the applicable law itself. The intended effect of paragraph 4 appears to be that the court may permit the creditor to take possession upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee permitted by the applicable law. This would allow the court, if so empowered by the applicable law, to require the creditor to furnish a guarantee against loss suffered by the debtor as the result of the order if on the substantive hearing the creditor’s claim were to prove unsuccessful. Since such relief is essentially procedural, so that the applicable law is the lex fori, it is not clear why any reference to the applicable law is necessary.
3.78. Compared with Alternative A the creditor’s rights are qualified in three significant respects. First, the insolvency administrator does not have to take action to cure all defaults or give the creditor an opportunity to take possession; it merely has to give notice to the creditor whether it will do either of these things. Second, if the insolvency administrator does not give the required notice or if, having declared it will give the creditor the opportunity to take possession, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession and if leave is granted conditions may be imposed. So under the “soft” version of Article IX the court’s discretion is substituted for the creditor’s entitlement to take possession. Pending the court’s decision regarding the claim and the international interest the railway rolling stock may not be sold (Alternative B, paragraph 7). Third, Alternative B contains no equivalent to paragraph 12 of Alternative A that no rights or interests, other than non-consensual rights or interests covered by a declaration under Article 39, are to have priority over registered interests.

Alternative C

3.79. Alternative C is the intermediate version. It is less rigorous than Alternative A in that it gives discretionary powers to the court but more stringent than Alternative B in that the exercise of the court’s discretion is closely circumscribed. Alternative C follows Alternative A in requiring the insolvency administrator, within the specified period, to cure all defaults or give the creditor an opportunity to take possession. The only difference is that the period in question is labelled the “cure period” rather than the “waiting period” and is a period commencing with the date of the insolvency-related event, which is a more precise formulation than in paragraph 4 of Alternative A. Payments under the agreement are not suspended during the cure period but continue to accrue. Alternative C differs from Alternative B in that it enables the insolvency administrator to apply to the court for an order suspending its obligation to give the creditor an opportunity to take possession of the railway rolling stock for a period (“the suspension period”) commencing with the end of the cure period and ending no later than the expiration of the agreement or any renewal of it, and on such terms as the court considers just (Alternative C, paragraph 4). So instead of having to leave the initiative to the creditor to apply for leave to repossess the insolvency administrator can itself apply for a suspension order. The suspension order may be applied for and, indeed, made during the cure period but can only come into force after the
cure period has ended. Any such order must require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate as they become due and that the insolvency administrator perform all other obligations arising during the suspension period (Alternative C, paragraph 4). So the creditor is entitled to receive payment of sums accruing during the suspension period ahead of other creditors in the insolvency and to have other obligations arising during that period carried out. Since the court’s power of suspension is limited to suspension of the insolvency administrator’s duty to give possession, the court not only must order payments of sums accruing due during the suspension period but has no power to postpone payment of sums accruing prior to the commencement of the suspension period, including an amount payable under an acceleration clause.

3.80. If an application is made for a suspension order, the creditor may not take possession of the railway rolling stock pending an order of the court. However, if the application is not granted within such number of calendar days from the date of its filing as is specified in a declaration made by the Contracting State in which the application is made, it is to be deemed withdrawn unless the creditor and the insolvency administrator otherwise agree (Alternative C, paragraph 5). This is designed to safeguard the creditor against the possibility of a dilatory judicial process.

3.81. Unless and until the creditor is given the opportunity to take possession the insolvency administrator must preserve the railway rolling stock and maintain it and its value in accordance with the agreement as under Alternatives A and B. Meanwhile the creditor is entitled to apply for any other forms of interim relief available under the applicable law, as to which see paragraphs 3.72-3.73.

3.82. Paragraph 8 of Alternative C provides that where during the cure period or any suspension period the insolvency administrator 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 may retain possession of the railway rolling stock and any suspension order made by the court is to cease to have effect.
3.83. The remaining provisions of Alternative C follow paragraphs 9 to 13 of Alternative A except for the references to paragraphs 4, 5 and 8 and the addition of paragraph 15.

Non-consensual rights or interests

3.84. None of the three Alternatives deals with the enforcement rights of the holder of a non-consensual right or interest covered by a declaration under Article 30.

The insolvency provisions and Member States of the European Union

3.85. A special situation exists for Member States of the European Union. This is because the duty of cooperation imposed on Member States by EU law precludes them from concluding international agreements deviating from the position adopted by the EU. In its decision of 6 April 2009 the Council of what was then the European Community decided to make no declaration under Article XXX(3) of the Aircraft Protocol as to the adoption of either Alternative A or Alternative B, while declaring that Member States kept their competence regarding rules of substantive law as regards insolvency. The only reason for the EC's concern with the insolvency provisions of the Convention and Protocol was to ensure that nothing affected the Insolvency Regulation, which is primarily a conflict of laws convention. If the EC had made a declaration applying Alternative A or Alternative B all Member States of the EU choosing to ratify the Convention and Protocol would have had to make the same declaration, whereas it had been agreed with Member States that each should be free to go its own way. The result is that Member States are not permitted by EU law to make any declaration applying Article XI but they remain free either to retain their own substantive insolvency law without amendment or to reproduce the effects of Alternative A or Alternative B by domestic legislation. The European Commission has proposed to the Council that similar measures be adopted in relation to the Luxembourg Protocol.9

3.86. The position taken by what is now the EU operates only at the level of domestic law within the EU. Accordingly while as a matter of EU law a declaration made by a Member State may be invalid, this is of no relevance

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9 See paragraph 2.233, n. 38
on the international plane, so that the Depositary is required to accept declarations deposited in accordance with the Convention and Protocol even if they are void under EU law. The European Court of Justice has itself recognised on several occasions that the EC/EU is bound by international law, so that ratification of an international instrument in a form which breaches EU law can be dealt with only within the confines of EU law itself, for example, by steps to compel the offending Member State to exercise its power under the Convention or Protocol to withdraw or amend the offending declaration.

**Insolvency assistance**

3.87. Article X(2) provides that the courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX. The phrase “in accordance with the law of the Contracting State” means “so far as not incompatible with”. It is not necessary that the Contracting State’s law should provide for co-operation; it is sufficient that it does not preclude it from being given. Whether in any particular case the Contracting State’s law is a barrier to co-operation depends partly on any relevant legislation and partly on the judicial policy of its courts in cases of similar kind. Regard must also be had to the 1997 UNCITRAL Model Law on Cross-Border Insolvency in Contracting States that have adopted the Model Law.

**Assignment of unregistered interest**

3.88. The assignee of an international interest is entitled to have it registered, whether or not the assigned international interest has itself been registered, in order to secure a measure of priority for its assignment. See paragraph 2.189.

**Waiver of sovereign immunity**

3.89. Under Article XVIII of the Luxembourg Protocol a waiver of sovereign immunity from the jurisdiction of the courts specified in Articles 42
and 43 which is given in writing and contains a description of the railway rolling stock as specified in Article V of the Protocol is binding and, if the other conditions to such jurisdiction have been satisfied, is effective to confer jurisdiction. (The provision that the waiver contain a description of the railway rolling stock refers to the instrument of waiver – usually the agreement in which the waiver clause is contained – and does not require that the description be contained in the waiver clause itself. Earlier drafts more accurately required that the waiver “be in a writing that contains a description of the object”. This was altered to the present wording but the intended effect is the same. Similarly, a waiver relating to enforcement is effective to permit enforcement if the above requirements are satisfied. The requirements as to description are the more general requirements set out in Article V, not the more detailed ones in Article XIV. Accordingly any description which enables the railway rolling stock to be identified as falling within the scope of the agreement suffices. A waiver of immunity from jurisdiction is not by itself a waiver of immunity from enforcement.

**Remedies for breach of Protocol obligations**

*Breach of Protocol by a party to an agreement*

3.90. Examples of breach of a provision of the Luxembourg Protocol by a party to the agreement are the following:

(1) Breach by the creditor of its duty under Article VII(3) to exercise a remedy in a commercially reasonable manner.

(2) Breach by the debtor of its duty under paragraph 3 of Alternative A of Article IX to give possession of railway rolling stock to a creditor.

(3) Breach by the debtor of its duty under paragraph 5 of Alternative A of Article IX to preserve the railway rolling stock and maintain its value in accordance with the agreement.

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11 More accurately, breach of national law implementing the Protocol.
(4) Breach by the creditor or a chargee of the debtor’s right of quiet possession under Article XI.

_Breach of Protocol by a Contracting State_

3.91. It will have been seen that the Protocol imposes various duties on Contracting States and their competent authorities, for example in regard to export and physical delivery (Article VII(5)); insolvency assistance (Article X); and the operation of designated entry points (if any) at least during working hours (Article XIII(1)). But no direct remedy is given to a creditor who suffers loss as the result of any such duty being broken. See paragraph 2.228.

_Relationship with other Conventions_


_Internal transactions_

3.93. Under Article 50 of the Convention a Contracting State may, within rather narrow limits, by declaration exclude the Convention as regards internal transactions, which are there defined in terms which require that the key elements are to be found in the same State and the interest created by the transaction has been registered in a national registry in the declaring State. Article XXIX(2) of the Luxembourg Protocol extends the meaning of internal transaction to cases where the relevant railway 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.

_Declarations_

3.94. Like the Convention and the Aircraft Protocol, the Luxembourg Protocol contains various provisions for declarations. These are collected in
Articles XXVII-XXXI. A Contracting State may make a subsequent declaration, other than one authorised under Article 60, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration (Article XXX) and the same applies to the withdrawal of declarations (Article XXXI) and the denunciation of the Protocol (Article XXXII). Declarations made under the Convention are deemed to have also been made under the Protocol (Article XXIX), thus avoiding the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under the Convention.

3.95. Declarations under the Protocol are of four kinds: opt-in declarations, opt-out declarations, declarations relating to the operation of the Protocol within a Contracting State and mandatory declarations. The pattern of declarations under the Luxembourg Protocol provisions is as follows:

**Opt-in declarations**

3.96. Provisions of the Luxembourg Protocol applicable in a Contracting State only if it makes a declaration to that effect are the following:

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>VI</td>
<td>Choice of law</td>
</tr>
<tr>
<td>VIII</td>
<td>Modification of provisions regarding relief pending final determination, and time within which such relief to be granted</td>
</tr>
<tr>
<td>IX</td>
<td>Remedies on insolvency and selection of Alternative A, Alternative B or Alternative C</td>
</tr>
<tr>
<td>X</td>
<td>Insolvency assistance.</td>
</tr>
</tbody>
</table>

**Opt-out declarations**

3.97. Provisions of the Luxembourg Protocol applicable unless excluded by a declaration are:

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>XXV(4)</td>
<td>Obligations specified in Article XXV(2), (3), subject to the qualifications in Article XXV(5),(6).</td>
</tr>
</tbody>
</table>
Declarations relating to the operation of the Protocol within a Contracting State

3.98. Provisions of the Luxembourg Protocol as to the application of a Contracting State’s own laws are the following:

- Article XIII Designated entry points
- Article XIV Systems of national or regional identification numbers
- Article XXIV Territorial units
- Article XXV Public service railway rolling stock.

Mandatory declarations to be deposited at time of ratification, etc.

3.99. These are declarations which a Regional Economic Integration Organisation is required to be made in every case at the time of ratification or adoption in order for the instrument of ratification or adoption to be accepted:

- Article XXII(2) Transfer of competence to a Regional Economic Integration Organisation
- Article XXVII(2) Time-period required by Article VIII(2) for speedy relief.

3.100. The effect of the declaration system is that a Contracting State must make a declaration if:

(a) it wishes to adopt an opt-in provision, i.e. Article VI, VIII, IX and X; or
(b) it wishes to exclude Article XXV(2), (3); or
(c) the declaration is mandatory, i.e. Articles 48(2) and 54(2).

3.101. In all other cases the Contracting State need take no action. All declarations other than a mandatory declaration made by a Regional Economic Integration Organisation under Article XXII(2) may be modified or replaced by subsequent declarations under Article XXX or withdrawn under Article XXXI. A mandatory declaration under Article XXII(2) may be made only at the time of ratification, etc., and changes to the competence of the Regional Economic Integration Organisation are to be promptly notified to the
Depositary. Even though Article XXVII is expressed to permit declarations to be made at the time of ratification, they need not be made at that time but may be made subsequently under Article XXX and thereafter replaced by a new declaration under that Article or withdrawn under Article XXXI. The effect of Article XXVII, therefore, is that such declarations may be made at any time.

3.102. There is no requirement for a declaration made by one State to be accepted by other States. A Contracting State may make a subsequent declaration, other than one authorised under Article 60, but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration (Article XXX(3)) and the same applies to the withdrawal of declarations (Article XXXI(2)) and the denunciation of the Protocol (Article XXII(3)).

3.103. Certain opt-in declarations by a Contracting State are required to set out information relating to the declaration without which the declaration cannot be accepted by the Depositary. These are declarations under the following Articles:

- Article VIII(2) Time-period required where (opt-in) declaration made under Article VIII(2) (Article XXVII(2))
- Article IX Types of insolvency proceeding covered by any declaration under Article IX and time-period required by that Article (Article XXVII(3)).

Regional Economic Integration Organisations

3.104. Article XXII follows the wording of Article 48 of the Convention as regards regional economic integration organizations. See paragraph 2.231. A Regional Economic Integration Organisation, like a Contracting State, may not become a Party to the Protocol unless it is or becomes also a Party to the Convention (Article XXI(5) as applied by Article XXII(3)). The only REIO so far to have availed itself of Article 48 is the European Community (now the European Union), which has made a declaration under Article XXX(5) of the Aircraft Protocol that it will not apply Article XXI of that Protocol extending jurisdiction under Article 43. Instead Brussels I will apply. However, there is no comparable provision in the Luxembourg Protocol.
Territorial units

3.105. Article XXIV contains provisions relating to territorial units which track those of Article 52 of the Convention (see paragraph 2.242).

Depositary and its functions

3.106. The Depositary is UNIDROIT. Article XXXIV follows Article 62 of the Convention.