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LUXEMBOURG PROTOCOL

TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the Convention on International Interests in Mobile Equipment (the “Convention”) as it relates to railway rolling stock, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance,

HAVE AGREED upon the following provisions relating to railway rolling stock:

Comment

5.1. The Preamble reflects the primary purpose of a Protocol to the Cape Town Convention, which is to adapt the Convention to the particular requirements of the industry sector affected while otherwise leaving it unchanged. The Luxembourg Protocol, like the Convention, is based on the policy of a high degree of party autonomy and the need to provide the creditor with adequate safeguards in the event of default, safeguards reinforced as regards railway rolling stock by the insertion of additional remedies and the modification of provisions of the Convention restricting the exercise of remedies. However, it also incorporates provisions enabling a Contracting State to balance its legal philosophy on key issues against the economic advantages of particular provisions and to make a declaration excluding such provisions, wholly or in part, where an opt-out is required, or to make no declaration, where an opt-in is required.
CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article I — Defined terms

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. In this Protocol the following terms are employed with the meanings set out below:

   (a) “guarantee contract” means a contract entered into by a person as guarantor;

   (b) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

   (c) “insolvency-related event” means:

      (i) the commencement of the insolvency proceedings; or

      (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

   (d) “primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;
(e) “railway rolling stock” means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, 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.

Comment

Definitions

5.2. The first point to note is that, except where the context otherwise requires, terms used in the Protocol have the same meanings as those used in the Convention (Article I(1)). So the 40 Convention definitions have always to be borne in mind when reading the Protocol.

5.3. “guarantee contract”, “guarantor” – these terms cover not only suretyship guarantees and credit insurance, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits. A guarantor is an “interested person” within the definition of Article 1(m)(ii) of the Convention and as such is entitled to be given notice of an intended sale or lease by the creditor (Article 8(4)) and to discharge a security interest after default by the debtor (Article 9(4)) and be considered for protection by the court in proceedings for advance relief (Article 13(2), (3)). The parties to a related guarantee contract may choose the law to govern their relations inter se (Article VIII(2)).

5.4. “insolvency-related event” – an event which triggers the remedies of the creditor specified in alternative versions in Article IX, which itself is dependent on the making of a declaration by the Contracting State concerned and can be excluded by agreement of the parties (Article III). There are two alternative limbs to the definition. The first is the traditional commencement of insolvency proceedings. For the meaning of this see, Article 1(d) of the
Convention and paragraph 4.10. The second, a declared intention to suspend payments, or actual suspension of payments, where a creditor may not commence proceedings or exercise Convention remedies by law or State action, also constitutes an insolvency-related event. This is required because, in certain systems, railway rolling stock is not eligible for insolvency proceedings (see Illustration 57, paragraph 5.7). More generally, the basic intent of the second limb of the provision is to trigger the starting of the time-period in Article IX of the Protocol (any Alternative) where there are financial problems and State action or law (whether made or taken before or after a declared intention to suspend payment) prevents application of the remedies under the Convention. Where the law preventing or suspending the right to institute insolvency proceedings is not in force and State action has not been taken at the time of the declaration of intention, the declaration becomes an insolvency-related event when such law comes into force or the requisite State action has been taken.

5.5. “primary insolvency jurisdiction” – the Contracting State in which the centre of the debtor’s main interests is situated. There is a rebuttable presumption that this is the place of the debtor’s statutory seat or, if none, the place where it is incorporated or formed. This last is a slightly different formulation from that used in Article 4(1)(a) of the Convention, which refers to the Contracting State “under the law of which” the debtor is incorporated or formed. In practice, this will almost invariably be the law of the place of incorporation or formation. The presumption does not cover all possibilities. In particular it does not apply to a natural person, and in this case the “centre of main interests” is presumably the debtor’s place of business or, if more than one, its principal place of business.

5.6. “railway rolling stock” – this definition covers all types of vehicle movable on a fixed railway track or directly on or above or below a guideway, however powered, regardless of speed, size or carrying capacity, whether used for passenger transport, freight or shunting, whether operating domestically or across national borders, and whether for transportation on railway lines between cities and towns or up mountain tracks. A guideway is a track or channel governing the exact line of motion of a vehicle and though in principle, the term includes the conventional railway track it is usually applied to alternative guidance structures where the wheels are not flanged, for
example those used for vehicles carried on or above a monorail. Vehicles which do not move on a fixed track, such as lorries, road trains and trolleybuses and certain types of cable car, fall outside the definition of railway rolling stock (see further paragraph 3.8). A railway bogie is the housing of the wheelset and other equipment underneath the chassis on which a body (if any) of the item of railway rolling stock is placed. A pantograph is an apparatus that conducts electric current from overhead wires to a locomotive unit. Whether the relevant unit for registration purposes is the whole train or an individual carriage depends on its construction. Engines other than locomotives themselves, for example engines installed in or under the car of a multiple-unit train, are components of the car, not independent objects for the purposes of the Protocol.

5.7. **Illustration 57**

Under the laws of State X, government-controlled railways may not be subject to insolvency proceedings. Rail 1 is a government-controlled railway. Rail 2 is an affiliate of Rail 1, which holds a 25% interest in Rail 2. The remaining 75% interest is held by private investors. On 2 January, Rail 1 declares its intent to suspend payments to all creditors. On 15 January, Rail 2 declares its intent to suspend payments to all creditors, and on 17 January State X, by presidential decree, establishes a moratorium on legal actions against Rail 2. For the purposes of Article IX of the Protocol, an insolvency-related event has occurred on 2 January with respect to Rail 1, and on 17 January with respect to Rail 2.

**Article II — Application of Convention as regards railway rolling stock**

1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.

2. The Convention and this Protocol shall be known as the **Convention on International Interests in Mobile Equipment** as applied to railway rolling stock.
Comment

5.8. Paragraph 1 emphasises in relation to railway rolling stock the controlling power of the Protocol as provided by Articles 6 and 49 of the Convention.

Article III — Derogation

The parties may, by agreement in writing, exclude the application of Article IX and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article VII(3) and (4).

Comment

5.9. Article III enables the parties, by agreement in writing, to exclude the application of Article IX altogether or, in their relations with each other, to derogate from or vary the effect of any of the provisions of the Protocol except Article VII(3) and (4). “Writing” includes authenticated teletransmission (Convention, Article 1(nn)). The exclusion of Article IX by agreement of the parties is not, of course, necessary unless the Contracting State that is the primary jurisdiction has elected to make a declaration under Article XXVII(3). Where this is the case, then despite the absence of the word “other” before “provisions” it seems clear from the use of the word “exclude” in relation to Article IX, in contrast to “derogate from or vary”, that the power of derogation or variation is not exercisable in relation to Article IX and that the parties must either exclude the application of Article IX in its entirety or adhere in full to the Alternative selected by the State that is the primary insolvency jurisdiction. This is logical because the question which, if any, of the three alternatives is to be selected is a matter for the Contracting State that is the primary insolvency jurisdiction, not the parties, and the Contracting State cannot select part of Alternative A, Alternative B or Alternative C but must select one of those alternatives in its entirety or make no declaration at all. Any exclusion agreement can be invoked by the insolvency administrator as well as the debtor. The parties cannot derogate from the provisions of Article VII(3) and (4), laying down certain conditions for the exercise of remedies, and can
derogate from or vary other provisions of the Protocol only in the relations between themselves and not so far as affecting third parties.

Article IV — Representative capacities

A person may, in relation to railway rolling stock, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention, in an agency, trust or representative capacity.

Comment

5.10. This provision in effect permits a person to take any action under the Convention – entering into agreements, effecting registrations of any kind in the International Registry and asserting rights and interests – in a representative capacity, whether as agent, trustee or in some other representative capacity. Article IV, which applies both to disclosed and to undisclosed representation (a party need not disclose or identify its representative capacity in the International Registry), reflects the central role of representation arrangements in railway rolling stock financing, where the sums involved often require syndicated lending and the conferment of representation powers on a trustee or agent. Where a trustee or agent effects a registration on behalf of beneficiaries or principals, it is not open to the beneficiaries or principals to make a separate registration of the same interest. Whether the representative is entitled to take enforcement measures on behalf of the creditors is a matter governed by the agreement (usually an inter-creditor agreement) under which the representative is appointed, but the party against whom such measures are taken is precluded by this Article from contending that the representative has no locus standi. This Article also facilitates the coordination of fractional ownership, an increasingly common feature in complex railway vehicle acquisitions and financing.
Article V — Identification of railway rolling stock in the agreement

1. For the purposes of Article 7(c) of the Convention and Article XVIII(2) of this Protocol, a description of railway rolling stock is sufficient to identify the railway rolling stock if it contains:

   (a) a description of the railway rolling stock by item;

   (b) a description of the railway rolling stock by type;

   (c) a statement that the agreement covers all present and future railway rolling stock; or

   (d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.

2. For the purposes of Article 7 of the Convention, an interest in future railway rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer.

Comment

5.11. During the Luxembourg diplomatic Conference it was pointed out that unique identification of an object, though essential to an asset-based registration system, was not needed for the constitution of an international interest, which is based on the agreement of the parties and is not dependent on registration. In consequence, the Luxembourg Protocol distinguishes the identification requirements for the constitution of an agreement, to which the present Article is directed, from the more stringent requirements for registration imposed by Article XIV. Article V(1) allows any method of description which enables the railway stock to be identified to the agreement creating or providing for the international interest, whether the description is by item, by
type or by a statement that the agreement covers all present and future railway rolling stock or all such rolling stock except for specified items or types. So a security interest can be taken over a fleet of railway wagons and over future railway rolling stock without the need for a new agreement every time an additional item of rolling stock is acquired. Article V(2) dispenses with the necessity for a new, post-acquisition act of transfer by the debtor. Article V as a whole derives its inspiration from Articles 5 and 7 of the 1988 UNIDROIT Convention on International Factoring. By necessary implication it also overrides that part of Article 2(2) requiring that the object be uniquely identifiable.

Article VI — Choice of law

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVII.

2. The parties to an agreement or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

Comment

5.12. The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum State. The Protocol refers a number of matters to the applicable law (see paragraph 3.14). The laws of some jurisdictions impose certain restrictions on party choice, as by excluding selection of the law of a State which has no connection with the parties or the transaction or where all the elements of the transaction are situated, so that the transaction is a domestic transaction. Seeking commercial predictability, the present Article, which applies only where a Contracting State has made a declaration to that effect under Article XXVII, allows the parties to an agreement or a related guarantee contract or
subordination agreement to choose a law governing their relations *inter se* without restrictions of this kind. States that are not prepared to permit an unqualified selection by the parties will not opt into this provision. The parties’ choice must be respected in all Contracting States that have made a declaration under Article XXX(1). The choice of law is effective to displace rules of the *lex fori* which are mandatory only in the sense that they cannot be excluded by agreement but which can be excluded by choice of a foreign law, but such choice does not affect overriding mandatory rules of the *lex fori*, that is, rules which are considered of such importance by the *lex fori* that they apply regardless of the applicable law. Such rules do not displace the applicable law except so far as inconsistent with it, they merely sit on top of the applicable law. Member States of the European Union are likely to be precluded from making a declaration under Article VI, being bound by the EC Regulation on the law applicable in civil and commercial matters (Rome I). See paragraph 3.28(1).

5.13. The law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules. This is in line with the usual conflict of laws approach in international conventions in relation to commercial transactions and avoids problems of *renvoi*. 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*.

5.14. Article VI(3) deals with cases where the parties select the law of a territorial unit of a multi-unit State. Although, in contrast to Article 52(1) of the Convention, Article VI(3) is not expressed to be limited to territorial units which have their own system of law, this is inherent in the Article, for otherwise there would be no distinct legal system to consider and the party choice would have to be interpreted as a reference to the law of the State itself. Article VI(3) is not confined to federal States but applies wherever a State has territorial units with different systems of law.

5.15. In the relations between themselves the parties may apply the selected law to only part of their contract and, in consequence, may apply different laws to different parts or issues (*dépeçage*).
5.16. Party choice is limited to contractual rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor’s insolvency, and are outside the scope of this Article.

5.17. There is no requirement that the agreement on a choice of law be in writing, though in practice it almost invariably will be.

5.18. The ability to select the governing law on contractual matters applies not only to agreements constituting international interests but also to contracts of sale, guarantees and subordinations, as well as to other contracts incorporated by reference into any of the foregoing so as to become terms of them.

5.19. Illustration 58

Creditor brings proceedings before a court of competent jurisdiction in Ruritania for payment due to Creditor from Guarantor under a guarantee of Debtor’s obligations under a loan agreement secured by a security agreement, the guarantee being expressed to be governed by Urbanian law. Debtor is a company having its sole place of business in Ruritania, while Creditor was incorporated and carries on business in Urbania. Both Urbania and Ruritania are Contracting States. Under Ruritanian law (but not Urbanian law) such a guarantee is ineffective even as between the parties unless witnessed by a notary, and this is a requirement that cannot be waived by agreement of the parties to the guarantee. Urbania is the subject of economic sanctions by Ruritania and Ruritanian law also contains a provision that any transactions by a Ruritanian national which are entered into with a national of Urbania without prior government approval are illegal and void.

The requirement of Ruritanian law requiring the guarantee to be witnessed by a notary in order for it to be valid is a rule of domestic mandatory law which applies only to a contract governed by Ruritanian law and therefore has no application to a guarantee governed by Urbanian law. However, the rule of Ruritanian law rendering void a guarantee given to a national of Urbania without government approval is an overriding mandatory rule of the lex fori which applies regardless of the otherwise applicable law and in the absence of such approval the guarantee is void.
PART 5

CHAPTER II

DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

Article VII — Modification of default remedies provisions

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of railway rolling stock from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to railway rolling stock. Any remedy given by the Convention in relation to railway rolling stock shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving fourteen or more calendar days’ prior written notice of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the “reasonable prior notice” specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.
ARTICLE VII – MODIFICATION OF DEFAULT REMEDIES PROVISIONS

6. A chargee proposing to procure the export of railway rolling stock under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the export.

Comment

5.20. Articles VII to IX need to be read together. They contain two distinct sets of provisions. The first set relates to the additional remedies of export and physical transfer. This comprises Articles VII(1), (2), (5) and (6) and VIII(6). For a comprehensive analysis, see paragraphs 3.20 et seq. The second set embodies modifications of the provisions governing the Convention remedies and comprises Article VII(3) and (4) and Article VIII (other than paragraph (6)). These provisions are discussed in paragraph 3.28 and in the annotations to Article VIII.

5.21. Article VII(1) adds two remedies to those given in the Convention, namely export and physical transfer of the railway rolling stock. It is important to note that these remedies are not an authority to transfer to any specified territory (e.g. in contravention of applicable export control rules) but rather are only authority to transfer railway rolling stock from its existing territory. These additional remedies are available to all creditors, that is, chargees, conditional sellers, and lessors, and are included in the remedies available pending final determination under Article 13 of the Convention. They enable the creditor to move the railway rolling stock to another State, whether or not a Contracting State, though subject in either case to the laws of that State.

5.22. The Protocol itself provides machinery for procuring the remedy of export and physical transfer. This is available only where the Contracting State in which the railway rolling stock is located has made a declaration under Article XXVII applying Article VIII. However, Article VII(1), which prescribes the remedy, is not itself dependent on a declaration, so that whether or not a
Contracting State has made the requisite declaration, it is open to the creditor to fulfil the conditions of Article VII(1) and (2) which are prerequisites to the substantive remedies (see paragraph 5.23) and then procure these in conformity with the procedural requirements of the _lex rei sitae_ (see Article 14 and paragraph 4.116). But if the necessary declaration has been made it is likely that the creditor will prefer to use the Protocol machinery, which obliges the administrative authorities to provide the remedy if the conditions prescribed by the Protocol are met and precludes it from imposing separate procedural requirements of its own.

5.23. To obtain the Protocol remedy it is necessary that, in addition to the Contracting State’s declaration applying Article VIII, four further conditions are satisfied:

(1) The debtor must have agreed to the remedy (Article VII(1)).

(2) The debtor must be in default (Article VII(1)) within the meaning of Article 11 (Article VII(1)).

(3) The creditor must also obtain the prior written consent of the holder of any registered interest ranking in priority to that of the creditor (Article VII(2)). This last condition is mandatory and cannot be excluded by agreement (Article III). It is not necessary to obtain the prior consent of the holder of an unregistered non-consensual right or interest covered by Article 39. See paragraph 3.22.

(4) The creditor must either give notice to interested persons as provided by Article VII(6) or obtain an order for advance relief under Article 13 from a court in the jurisdiction where the aircraft is registered and notify the administrative authorities in accordance with Article VIII(6) (the second reference to Article VII(1) in Article VIII(6) is a mistake and should be a reference to Article 13 of the Convention), or equivalent relief from a foreign court whose jurisdiction is recognised by the home court, and notify the administrative authorities of the grant of the order. The remedies must then be made available within seven calendar days. The applicable authorities must then expeditiously co-operate with and assist the creditor in the exercise of those remedies in accordance with any applicable safety laws and regulations.
5.24. Article 8(3) of the Convention requires that the extra-judicial remedies given by Article 8(1) be exercised in a commercially reasonable manner. Parties cannot derogate from this provision (Article 15). Paragraph 3 of the present Article disapplies Article 8(3) in relation to railway rolling stock and instead extends the requirement of commercial reasonableness to embrace all remedies given by the Convention. This provision is also mandatory and cannot be excluded by agreement (Article III).

5.25. As under Article 8(3), a remedy is deemed to be exercised in a commercially reasonable manner where exercised in conformity with a provision of the agreement except where such a provision is “manifestly unreasonable”. This wording embodies a strong presumption in favour of the reasonableness of a contractual provision as to the mode of exercise of a remedy and is designed to encourage reliance on contract wording, particularly where the wording is customary in international rail financing and leasing contracts.

5.26. Article VII(4) crystallises the meaning of “reasonable prior notice” in Article 8(4) of the Convention. There is a safe-haven of 14 calendar days. Parties may select and rely on that time-period. Alternatively, it is open to the parties to agree a longer period but not a shorter one, since Article III precludes derogation from Article VII(4). The reference to calendar days rather than working days represents one of the departures from the Aircraft Protocol, adopted to give greater certainty and to avoid the need to ascertain what are working days in the particular locality in which the remedy is to be exercised.
application for relief as is specified in a declaration made by the Contracting State in which the application is made.

3. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”

and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.

4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.

5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

6. With regard to the remedies in Article VII(1):

   (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the creditor notifies such authorities that the relief specified in Article VII(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and

   (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

7. Paragraphs 2 and 6 shall not affect any applicable safety laws and regulations.
ARTICLE VIII – MODIFICATION OF PROVISIONS REGARDING RELIEF
PENDING FINAL DETERMINATION

Comment

5.27. Article VIII(6) has already been discussed in paragraph 5.23(4). The remaining provisions of Article VIII need to be read in conjunction with Article VII(3) and (4).

5.28. Article VIII applies in a Contracting State only if and to the extent that the Contracting State has made an affirmative declaration to that effect under Article XXVII. For the purposes of the Convention, “speedy” in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made (Article VIII(2)). A Contracting State which makes a declaration under Article VIII is required by Article XXVII(2) to specify a binding time-period for the purpose of paragraph 2 of the present Article within which the speedy relief sought is to be given. On the principle that a party cannot complain of matters caused by its own acts or omissions, a creditor will not have grounds for complaint if a court fails to give relief within the specified time because, for example, the creditor has not filed the correct documents or followed the proper procedures. Paragraph 3 adds sale and application of the proceeds of sale to the speedy relief that can be sought under Article 13(1) of the Convention, subject, however, to the requirement that the debtor and the creditor “specifically agree”, that is, agree expressly (though not necessarily in writing) to the court’s ordering a sale and application of the proceeds of sale on the creditor’s application. This agreement may be made at any time. As a corollary, paragraph 4 of the Article adds provisions matching those of Article 9(5) of the Convention.

5.29. Article 13(2) of the Convention provides protection for the debtor but imposes transaction costs. In relation to railway rolling stock, Article VIII(5) enables that concern to be addressed by permitting the relevant parties to exclude Article 13(2) by an agreement in writing. This would not otherwise be allowed, since under Article 15 of the Convention Article 13(2) is a mandatory provision. Such agreement does not, however, exclude the debtor’s rights under the applicable law to pursue a claim against the creditor for failure to perform any of its obligations to the debtor under the Convention, nor does it preclude the debtor from exercising any right to damages or other relief given by the lex fori applicable (a) to the relief under Article 13 or (b) on final determination of the creditor’s claim, if the claim is dismissed and the debtor
Article IX — Remedies on insolvency

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII.

2. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

Alternative A

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the railway rolling stock to the creditor no later than the earlier of:

   (a) the end of the waiting period; and

   (b) the date on which the creditor would be entitled to possession of the railway rolling stock if this Article did not apply.

4. For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 3:

   (a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and
(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve the railway rolling stock and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 3, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article VII(1):

(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency
administrator under the applicable law to terminate the agreement.

12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

13. The Convention as modified by Articles VII and XXV of this Protocol shall apply to the exercise of any remedies under this Article.

*Alternative B*

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVII whether it will:

   (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

   (b) give the creditor the opportunity to take possession of the railway rolling stock, in accordance with the applicable law.

4. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

5. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

6. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with
ARTICLE IX – REMEDIES ON INSOLVENCY

paragraph 3, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the railway rolling stock but fails to do so, the court may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

7. The railway rolling stock shall not be sold pending a decision by a court regarding the claim and the international interest.

Alternative C

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall within the cure period:

   (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

   (b) give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law.

4. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under subparagraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the “suspension period”). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.
5. If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the railway rolling stock pending an order of the court. If the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

6. Unless and until the creditor is given the opportunity to take possession under paragraph 3:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

7. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve and maintain it and its value.

8. Where during the cure period or any suspension period the insolvency administrator or the debtor, as applicable, cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement and related transaction documents, the insolvency administrator or debtor may retain possession of the railway rolling stock and any order made by the court under paragraph 4 shall cease to have effect. A second cure period shall not apply in respect of a default in the performance of such future obligations.

9. With regard to the remedies in Article VII(1):
(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

10. Subject to paragraphs 4, 5 and 8, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.

11. Subject to paragraphs 4, 5 and 8, no obligations of the debtor under the agreement and related transactions may be modified in insolvency proceedings without the consent of the creditor.

12. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

13. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

14. The Convention as modified by Articles VII and XXV of this Protocol shall apply to the exercise of any remedies under this Article.

15. For the purposes of this Article, the “cure period” shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
Comment

5.30. This provision is perhaps the single most significant provision economically. If the sound legal rights and protections embodied in the Convention and Luxembourg Protocol are not available in the insolvency context, they are not available when they are most needed. It follows Article XI of the Aircraft Protocol, but with a third Alternative, Alternative C. In the preparation of that Protocol a special Insolvency Working Group, made up of international experts from differing legal systems, was formed to develop this provision. Article XI of the Aircraft Protocol, as modified in the subsequent intergovernmental negotiations, is the result of that work. Similar policies and technical considerations apply to Article IX of the Luxembourg Protocol.

5.31. This Article, which modifies Article 30(3) of the Convention, is designed to provide in relation to railway rolling stock a special insolvency regime to govern the creditor’s rights where the debtor becomes subject to insolvency proceedings or an insolvency-related event (as defined in Article I(2)(c) of the Protocol) has otherwise occurred. The underlying purpose is to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains from the debtor or the insolvency administrator, as the case may be, the curing of all past defaults and a commitment to perform the debtor’s future obligations. Article IX applies only where a Contracting State that is the primary insolvency jurisdiction (as defined by Article I(2)) has made a declaration under Article XXVII(3), and it may be excluded by the parties (Article III), though only in its entirety (see paragraph 5.32).

5.32. There are three alternative texts of this Article, Alternative A, the “hard”, or rule-based, version, and Alternatives B and C, the “soft”, or discretion-based, versions. A Contracting State considering making a declaration under Article IX has a number of options. It may decide to make no declaration at all, in which case Article IX will not apply and the Contracting State’s national insolvency law, in its current form, will continue to be applicable in this context. A Contracting State may opt to apply Article IX to all types of insolvency proceeding or only to some, and it may apply Alternative A to some types of insolvency proceeding and Alternatives B or C to others, or apply one of these alternatives to all or only some types of
insolvency proceeding and make no declaration as to others. But to whatever
type of insolvency proceeding Alternative A, Alternative B or Alternative C is
applied, it must be applied in its entirety. This is because each of the
alternatives embodies a set of integrated provisions which make it
impracticable to select one or more without the others. All the Alternatives
impose obligations on “the insolvency administrator or the debtor, as
applicable”. The debtor itself will be the relevant party where (a) the
insolvency-related event is a cessation of payments and insolvency proceedings
cannot be opened or have not yet been opened or (b) insolvency proceedings
have commenced but the insolvency administrator has not yet been appointed,
or (c) the estate is being administered by a debtor in possession. Alternative A
states expressly in paragraph 4 that references in this Article to the “insolvency
administrator” are to that person in its official, not its personal, capacity. So
duties are imposed on the insolvency administrator only in its capacity as such.
This provision merely states what must be obvious anyway. It is not replicated
in any of the other Alternatives but the same rule implicitly applies. Article IX
does not provide for the case where there are two or more holders of
registered international interests relating to the same object. Where this occurs,
the duties of the insolvency administrator are owed to the secured creditors
successively in order of their priority, and only when the obligations owed to
the first such creditor have been discharged does the next in line become
entitled to invoke Article IX. The insolvency administrator need not be a
court-appointed official; any method of appointment authorised by law
suffices.

Alternative A

5.33. Alternative A requires the insolvency administrator, by the end of the
“waiting period” specified in the declaration of the relevant Contracting State
or any earlier date on which the creditor would otherwise be entitled to
possession under the applicable law, either (a) to give possession of the railway
rolling stock to the creditor or (b) to cure all defaults (other than a default
constituted by the opening of insolvency proceedings, which, of course, is not
capable of being cured) and to agree to perform all future obligations under the
agreement and related transaction documents., including obligations under
other transaction documents (e.g. a loan agreement) which the debtor has, by
virtue of their incorporation by reference, agreed to perform under such
agreement (see Illustration 59, paragraph 5.43). “Related transaction
documents” is not defined but includes promissory notes given as payment under the agreement or as security for payment, and documents which embody collateral contracts and undertakings forming part of the overall transaction between the parties. It does not, however, include undertakings which are given orally and not embodied in the agreement or some other document. The duties must be performed before the end of the waiting period if the creditor has previously become entitled to possession. The underlying premise is that the commencement of the insolvency proceedings produces a stay on the creditor’s right to possession. Where this is not the case or where any stay has been lifted, the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 3(b) 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.” Unless and until the creditor is given the opportunity to take possession, the insolvency administrator must preserve the railway rolling stock and its value in accordance with the agreement and, subject to this, may allow its use, while the creditor is entitled to apply for any other forms of interim relief available under the applicable law (see paragraph 3.72). The applicable law is determined by the lex fori. The forum is not necessarily the insolvency forum, since courts chosen by the parties have jurisdiction (Convention, Articles 42, 43(2)), as do courts of a Contracting State on the territory of which the debtor is situated where the interim relief is, by the terms of the order granting it, enforceable only in the territory of that Contracting State (Article 43(2)). Paragraph 8 requires the registry authority and administrative authorities in a Contracting State, as applicable, to make available to the creditor the remedy of export and physical transfer no later than seven calendar days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention, in addition to which they must expeditiously co-operate and assist the creditor, though only in conformity with the applicable safety laws and regulations. It is implicit in this provision that the creditor is in fact entitled to exercise the remedies in question. So if the insolvency administrator’s duty to give up possession under paragraph 3 has not yet arisen under that paragraph or the insolvency administrator has acquired the right to retain possession under paragraph 8, the requisite authorities will not be obliged to provide any assistance to the creditor.

5.34. The duty of the insolvency administrator or the debtor under the Convention to preserve the railway rolling stock and its value comes to an end
Article IX – Remedies on Insolvency

5.35. Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor’s consent (paragraphs 9 and 10). Moreover, no second waiting period may be imposed in respect of a breach of a commitment to perform future obligations. Accordingly, under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of a security interest over railway rolling stock, or vary the terms of the agreement, without the consent of the creditor, nor would provisions of national insolvency law providing for an automatic stay pending reorganisation be operative beyond the declared waiting period. The effect is to displace Article 30(3)(b) of the Convention. Finally, paragraph 12 provides that no rights or interests other than non-consensual rights or interests of a category covered by a declaration under Article 39(1) are to have priority in insolvency proceedings over registered interests. The underlying rationale of Alternative A is to give railway rolling stock financiers and lessors the assurance of a clear and unqualified rule.

5.36. Alternative A presupposes that the creditor holds an international interest which is effective in the insolvency proceedings, either because it was registered in the International Registry prior to the commencement of those proceedings or because it is otherwise effective under the applicable law (see Article 30(1) and (2) of the Convention and paragraphs 4.207-4.209).

Alternative B

5.37. Alternative B requires the insolvency administrator or the debtor, as the case may be, upon the request of the creditor, to notify the creditor within the time specified in a declaration by the Contracting State whether it will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take possession of the railway rolling stock, in the latter case subject to any additional step or the provision of any additional guarantee that the court may
require as permitted by the applicable law. 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. If the insolvency
administrator or debtor does not either give the notice as to performance or give
the creditor possession, the court may (but is not obliged to) permit the creditor
to take possession on such terms as the court may order. In contrast to the
position under Alternative A of Article IX, the insolvency administrator or the
debtor is not required to take any action unless and until required to do so by the
creditor; accordingly, any time-period specified in a declaration by a Contracting
State as regards Alternative B should be expressed to commence not earlier than
the time the insolvency administrator or the debtor receives the creditor’s
request. Paragraph 6 of Alternative B of Article IX does not specifically deal with
the case where the insolvency administrator or the debtor agrees to cure all
defaults and to perform all future obligations but fails to do so. In that situation,
there seems no reason why the court should not be able to exercise its powers
under paragraph 6.

5.38. Paragraph 5 of Alternative B of Article IX requires the creditor to
provide evidence of its claims and proof that its international interest has been
registered. There is no similar provision in Alternative A. This is because
Alternative B, unlike Alternative A, involves an application to the court, and
the evidence and proof are to be provided to the court. Again in contrast to
Alternative A, the requirement to furnish proof that the international interest
has been registered signifies that the creditor cannot invoke the provisions of
Alternative B without first registering its international interest. This is despite
the fact that such registration is only one of the methods of preserving the
effectiveness of the international interest on the debtor’s insolvency, the other
being its effectiveness under the applicable law (Article 30(2)). The latter is not
sufficient to enable the creditor to invoke the provisions of Alternative B.
Paragraph 6 of Alternative B provides that if the insolvency administrator does
not give notice in conformity with paragraph 3 or fails to give the creditor the
opportunity to take possession when the insolvency administrator has declared
that it will do so, 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. So in the absence of a court
order or consent of the debtor the creditor may not take possession. Paragraph
7 states that the railway rolling stock may not be sold pending the court’s
decision. It would seem that the creditor’s ability to exercise other remedies is governed by the applicable insolvency law.

Alternative C

5.39. 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”, but they appear to mean the same thing except that the commencement date of the cure period is specified (see Alternative C, paragraph 15). Payments under the agreement are not suspended during the cure period but continue to accrue.

5.40. 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 3). 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.

5.41. If a suspension order is sought it must be applied for during the cure period but it can be made either during the cure period or later. Any suspension must commence from the end of the cure period and end no later than the expiration of the agreement or any renewal thereof (Article 4). 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 (paragraph 4). So the creditor is entitled to receive payment of sums accruing during the suspension period ahead of other creditors in the insolvency – assuming, of course, that there are funds to do so – and to have other obligations arising during that period carried out.

5.42. While the court is not obliged to make an order for payment of sums accruing due prior to the commencement of the suspension period it has
power to make an order for such payment, wholly or in part, as a term of suspending the insolvency administrator’s duty to give the creditor an opportunity to take possession, and the sum ordered to be paid could be an amount payable under an acceleration clause. Indeed, there appears to be nothing to preclude the court from requiring all defaults (other than a default constituted by the opening of insolvency proceedings) to be cured as a condition of suspending the creditor’s right to possession.

5.43. **Illustration 59**

Railco 1, the owner of a locomotive, leases it to Railco 2, a company situated in State X, where the locomotive was located at the time of the transaction. Railco 2 files for bankruptcy on 1 April. The lessor’s international interest was not registered in the International Registry, but under the laws of State X is nevertheless effective in the debtor’s bankruptcy. Railco 1 also financed Railco 2’s acquisition of a second locomotive. The international interest arising under the security agreement relating to this was registered on 1 March. State X has declared Alternative A for all insolvency proceedings (and for other insolvency-related events not subject to insolvency proceedings – see paragraph 5.87). It has declared a 60-day waiting period. The law of State X requires debtors to return assets owned by third parties immediately, but freezes all action by secured creditors against insolvent debtors for six months. Railco 2 must comply with the law of State X and immediately return the leased locomotive. The financed locomotive must be returned at the end of the 60-day period unless all defaults are cured and the debtor agrees to perform its future obligations. In the meantime, obligations under the security agreement may not be modified and the locomotive must be preserved, and Railco 2 will be required to maintain the locomotive in accordance with the terms of the security agreement, even if that requires expenditure from general assets of the estate.
Article XI — Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the railway rolling stock in accordance with the agreement as against:

   (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and
(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.

2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.

Comment

5.45. Article XI establishes a quiet possession regime which is based on transparency through use of the International Registry and is directly linked to the priority rule in Article 29(4); indeed, it can properly be regarded as itself a supplementary priority rule that can be varied by a subordination agreement between debtor and chargee registrable under Article 16(1)(e). It 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. Failing such agreement, the default must be substantial. Assuming no such default, a debtor is entitled to quiet possession, on the terms of the agreement, as against (a) its creditor, (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention (see paragraph 2.156), and (c) any interest to which it would otherwise be subordinated where the holder of that interest agrees to the debtor's quiet possession (see paragraphs 3.57 – 3.63.

5.46. Conversely, a debtor is not entitled to quiet possession as against the holder of any interest to which the debtor takes subject. Yet reflecting the principle of party autonomy, the foregoing rules may be varied by the agreement of the relevant parties. Where registrations are made reflecting these subordinations, third parties are bound thereby. See also paragraph 4.125 as to such registrability.

5.47. Article XI does not state which acts constitute a breach of the debtor's right to quiet possession once it is in possession. In the relations between the debtor and the creditor this is left to the agreement between them. Questions not dealt with by the agreement or arising in the relationship between the
debtor and third parties are left to the applicable law. Seizure or attempted seizure of the railway rolling stock by the creditor (in the absence of default) or by a lessor’s chargee under a charge registered after registration of the lessor’s interest would clearly be an infringement of the right to quiet possession. So too would seizure, absent a default, by a third party at the request or by the authority of the creditor or chargee, or arrest of the object by the third party for sums due to it from the creditor, or a taking of the object in execution of a judgment obtained by the third party against the creditor or chargee.

5.48. Quite independently of Article XI, the debtor may have remedies against the creditor for any interference with the debtor’s possession which is a breach of the agreement under the applicable law.

5.49. *Illustration 60*

Head lessor, HL, leases a locomotive to lessee, L. HL’s international interest is registered on 1 January. The lease expressly requires that any sub-lease be “subject and subordinate” to the head lease. L enters into discussions with sub-lessee, SL, to sub-lease the locomotive. Negotiations are finalised on 1 March. SL refuses to sign the sub-lease until HL agrees to SL’s quiet possession. HL so agrees, so that its international interest is subordinated to SL’s right of quiet possession under the Convention, but the subordination is not registered with the International Registry to reflect the variation to the normal outcome under Article XI(1)(b). L registers its international interest as sub-lessee on 1 April. HL assigns its rights as lessor under the head lease, together with its international interest, by way of security on 1 August to C, who registers the assignment the same day. HL defaults under its loan agreement with C, giving C the right to exercise remedies under its security agreement. SL is entitled to quiet possession vis-à-vis HL under their agreement, but not vis-à-vis C, who is not bound by the unregistered subordination. The fact that C’s assignment was registered later than the registration of L’s international interest is irrelevant, because in the absence of registration of the subordination agreement C is entitled to rely on the fact that HL’s international interest was registered before that of L and that accordingly, SL cannot invoke Article XI(1)(a) against HL or against C as HL’s assignee.
5.50.  *Illustration 61*

The facts are the same as in Illustration 60 except that HL did not consent to the sub-lease, there was no assignment to C, and L defaulted in its obligations under the head lease. HL is entitled to recover possession of the locomotive from SL, who under Article XI(1)(b) is not entitled to quiet possession vis-à-vis HL.

**CHAPTER III**

**REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN RAILWAY ROLLING STOCK**

**Article XII — The Supervisory Authority and the Registrar**

1. The Supervisory Authority shall be a body established by representatives, one representative to be appointed:

   (a) by each State Party;

   (b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and

   (c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF).

2. In the designation of the States referred to in sub-paragraphs (b) and (c) of the preceding paragraph regard shall be had to the need to ensure broad geographical representation.

3. The term of appointment of the representatives appointed pursuant to sub-paragraphs (b) and (c) of paragraph 1 shall be that specified by the designating Organisations. The terms of those representatives serving
on the date when this Protocol enters into force for the tenth State Party shall expire no later than two years after that date.

4. The representatives referred to in paragraph 1 shall adopt the initial rules of procedure for the Supervisory Authority. Adoption shall require agreement of:

(a) a majority of all the representatives; and

(b) a majority of the representatives appointed pursuant to sub-paragraph (a) of paragraph 1.

5. The Supervisory Authority may establish a commission of experts consisting of:

(a) persons nominated by Signatory and Contracting States and having the necessary qualifications and experience; and

(b) other experts as necessary

and entrust the commission with the task of assisting the Supervisory Authority in the discharge of its functions.

6. A secretariat (the Secretariat) shall assist the Supervisory Authority in the discharge of its functions, as directed by the Supervisory Authority. The Secretariat shall be OTIF.

7. In the event that the Secretariat becomes unable or unwilling to discharge its functions, the Supervisory Authority shall designate another Secretariat.

8. The Secretariat shall, on being satisfied that the International Registry is fully operational, forthwith deposit a certificate to that effect with the Depositary.

9. The Secretariat shall have legal personality where not already possessing such personality, and shall enjoy, in relation to its functions under the Convention and this Protocol, the same exemptions and immunities as are provided to the Supervisory Authority under Article 27(3)
of the Convention and to the International Registry under Article 27(4) of the Convention.

10. A measure taken by the Supervisory Authority that affects only the interests of a State Party or a group of States Parties shall be taken if such State Party or the majority of the group of States Parties also approve of the measure. A measure that could adversely affect the interests of a State Party or a group of States Parties shall have effect in such State Party or group of States Parties if such State Party or the majority of the group of States Parties also approve of the measure.

11. The first Registrar shall be appointed for a period of not less than five or more than ten years. Thereafter, the Registrar shall be appointed or re-appointed for successive periods each not exceeding ten years.

Comment

5.51. Whereas the Supervisory Authority for the International Registry for aircraft objects is an international, intergovernmental body that has been in existence for many years, the Supervisory Authority for the International Registry for railway rolling stock is a new body to be established by representatives of States Parties as provided by Article XII. Meanwhile its functions are performed by a Preparatory Commission acting under the authority conferred by Resolution No. 1 of the Luxembourg diplomatic Conference.

5.52. Article 27(2) of the Convention provides that the Supervisory Authority and its officers are to enjoy such immunity from legal or administrative process as is specified in the Protocol. However, the Luxembourg Protocol is silent on the question of the immunity of the Supervisory Authority. On the international plane, its immunity must rest on its status 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. However, the Headquarters Agreement between OTIF and the Confederation of Switzerland provides for privileges and immunities for OTIF.
Article XIII — Designated entry points

1. A Contracting State may at any time designate, by declaration, an entity or entities as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under the laws of another State. The various entry points shall be operated at least during working hours in their respective territories.

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of notices of sale.

Comment

5.53. Article XIII implements for railway rolling stock Article 18(5) of the Convention (see paragraphs 4.137-4.139). It is for each Contracting State to decide whether to make a declaration designating an entity as the entry point for the transmission of registration information to the International Registry.

5.54. Any Contracting State is free to make a declaration under Article XXXI but in most cases this will have effect only in relation to railway rolling stock located in the territory of the declaring State. That limitation is not expressly stated but it is, however, a necessary limitation, for only that State has the requisite control.

5.55. A further limitation is that an entry point may not be designated for registration of a notice of a national interest, or of a non-consensual right or interest, arising under the laws of another State. Subject to this an entry point may be designated for any kind of registration, whether of an international or prospective international interest, a notice of a national interest, or a registrable non-consensual right or interest, arising under the law of the State designating the entry point, an assignment or prospective assignment, a subordination, or an amendment or discharge of a registration.
5.56. The effect of not requiring use of a designated entry point, or merely
permitting its use, is that registrations can be made directly with the
International Registry. It is open to a State to require use of a designated entry
point for some classes of transaction only while leaving the registration of
other classes within the Convention to be effected directly. It is not, of course,
open to a State to prohibit direct registration of categories of transaction
without allowing access to the designated entry point for such categories.

5.57. A Contracting State which designates an entity pursuant to this Article
will be free to add such additional requirements (including the payment of fees)
as it considers necessary for transmission of data to the International Registry,
though in doing so it will need to have regard to Article 26 of the Convention.

5.58. Use of the entry point may be made optional or compulsory except in
the case of information required for registrations of notices of sale, for which
use of the entry point cannot be made compulsory. This reflects the fact that
such registrations cannot affect the rights of any person, or have any other
effects, under the Convention or Protocol (Article XVII).

5.59. The registration will take effect as provided by Article 19 of the
Convention; receipt of information at the national entry point is not sufficient.
Similarly, the fact that a registration made via an entry point does not qualify
for national registration under national law is irrelevant under the Convention.
An interest is a valid interest if it complies with the Convention’s substantive
requirements. Its priority is established when it is registered with the
International Registry.

5.60. Searches will be able to be made on-line from any point connected to the
International Registry and are not made through a national entry point.

**Article XIV — Identification of railway rolling stock for registration purposes**

1. For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe a system for
the allocation of identification numbers by the Registrar which enable the unique identification of items of railway
rolling stock. The identification number shall be:
(a) affixed to the item of railway rolling stock;

(b) associated in the International Registry with the manufacturer's name and the manufacturer's identification number for the item so affixed; or

(c) associated in the International Registry with a national or regional identification number so affixed.

2. For the purposes of the preceding paragraph, a Contracting State may, by declaration, state the system of national or regional identification numbers that shall be used with respect to items of railway rolling stock subject to an international interest that is created or provided for, or is intended to be created or provided for, by an agreement entered into by a debtor situated in that Contracting State at the time of the conclusion of that agreement. Such a national or regional identification system shall, subject to agreement between the Supervisory Authority and the Contracting State making the declaration, ensure the unique identification of each item of railway rolling stock to which the system applies.

3. A declaration by a Contracting State according to the preceding paragraph shall include detailed information on the operation of the national or regional identification system.

4. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 2 has been made shall, in order for the registration to be valid, specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol under Article XXIII(1) and the time during which each number has applied to the item.
Comment

5.61. Article XIV sets out the identification requirements for the purposes of registration. Article V prescribes a quite different, and much more flexible, rule for identification for the purpose of constituting an agreement, where it is necessary only that an item of railway rolling stock be identifiable as falling within the scope of the agreement, without the need for unique identification. The simple identification criteria prescribed by the Aircraft Protocol for both agreements and registration – manufacturer’s serial number, name and model designation – could not be adopted for railway rolling stock, because it has not hitherto been the universal practice for manufacturers to allot serial numbers, in addition to which certain jurisdictions or regions had identification systems for other purposes which involved allocation of numbers that could be reused and applied to different items of railway rolling stock. What is prescribed by Article XIV is a system prescribed by regulations for the allocation of a number by the International Registry which enables the unique identification of items of railway rolling stock. The identification number may be one of three alternatives, namely the number (a) affixed to the item of railway rolling stock or (b) associated with the manufacturer’s name and identification number (which might or might not be a serial number) for the item so affixed or (c) associated in the International Registry with a national or regional identification number allocated by the requisite national or regional authority and affixed to the railway rolling stock. Details of the registration requirements will be prescribed by regulations.

5.62. In order for the third (i.e. national or regional) method of identification to be used it is necessary that:

(1) the Contracting State shall have declared the system of national or regional identification numbers used for 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 the agreement;

(2) subject to agreement between the Supervisory Authority and the declaring State the system ensures the unique identification of each item of railway rolling stock to which it applies; and
(3) the registration specifies all the national or regional identification numbers allocated since entry of the Protocol into force and the time during which each number has applied to the item.

In theory, the Supervisory Authority can act on its own initiative in allocating an identification number associated with a national or regional identification number, whether or not the national or regional system ensures unique identification. In practice, it is likely that the Supervisory Authority will want to secure the integrity of the International Registry either by insisting on full uniqueness or by agreeing to accept a system which ensures that the likelihood of duplication of numbers is small. See further paragraphs 3.42-3.47

Article XV — Additional modifications to Registry provisions

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by the regulations.

2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than ten calendar days after the receipt of the demand described in such paragraph.

3. Where a subordination has been registered and the obligations of the debtor to the beneficiary of the subordination have been discharged, the beneficiary shall procure the discharge of the registration no later than ten calendar days after written demand by the subordinated party delivered to or received at the beneficiary’s address stated in the registration.

4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.
5. The Registrar shall be liable under Article 28(1) of the Convention for loss caused up to an amount not exceeding the value of the railway rolling stock to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.

6. The preceding paragraph shall not limit the Registrar's liability for damages for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees.

7. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar.

8. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

Comment

5.63. Paragraph 1 of this Article states, for the purposes of Article 19(6), the basic search criteria for railway rolling stock. Article 19(6) determines when an interest is “searchable”, which, under Article 19(2) and (3), determines when it is valid. That, in turn, establishes priority for the purposes of Article 29 of the Convention. The criteria are to be established by regulations.

5.64. Paragraphs 2 and 3 give greater precision to the phrase “without undue delay” in Article 25(2), specifying a period no later than ten calendar days after receipt of the demand for the discharge or, in the case of subordinations, within ten calendar days after receipt of or delivery to the beneficiary’s address stated in the registration. But the obligation to procure the discharge within
this time is not a strict one; all that is required is that the holder of the prospective international interest or the person in whose favour a prospective assignment is registered takes such steps as are within its power.

5.65. The International Registry is required to provide its centralised registration and search facilities on a 24-hour basis (Article XV(4)) and the intention of the provision is that the facility should be available seven days a week throughout the year, though it may be necessary from time to time to close the Registry for limited periods for maintenance, repair, upgrading of systems, technical security and the like; obviously, the Registry will seek to keep disruption to the service to a minimum. Contracting States providing national entry points are responsible for ensuring that these operate at least during working hours in their respective territories (Article XIII(1)).

5.66. Paragraph 5 sets two limits on the Registrar’s liability. First, the liability for loss caused cannot exceed the value of the railway rolling stock to which the loss relates. Second, the Registrar’s total liability cannot exceed 5 million Special Drawing Rights in any one calendar year or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations. Special Drawing Rights are units of account established by the International Monetary Fund and calculated in terms of a basket of major currencies. The limit in relation to SDRs is an overall annual limit, not a limit per event, and raises the question whether, in the case of two or more claims in the same calendar year, they are to be dealt with on a first-in-time basis, which could result in later claimants being denied payment because the overall limit had been exceeded, or on a pro rata basis, which would mean that no one claim in a calendar could be paid until all other claims in the same calendar year had been established and quantified. It is open to the Supervisory Authority to fix a higher overall limit and prescribe the manner in which that is to be calculated. See paragraph 3.78.

5.67. Paragraphs 7 and 8 of this Article deal with insurance of the Registrar against liability. Paragraph 7 provides that the amount of the insurance or financial guarantee to be procured by the Registrar is to be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the Registrar’s prospective liability (see paragraph 3.40). The Registrar is entitled to obtain cover for a greater amount and may also, under paragraph 8, cover events for which it is not liable under Article 28 of the Convention.
Article XVI — International Registry fees

1. The Supervisory Authority shall set and may from time to time amend the fees to be paid in connection with registrations, filings, searches and other services the International Registry may provide, in accordance with its regulations.

2. The fees referred to in the preceding paragraph shall be determined so as to recover, to the extent necessary, the reasonable costs of establishing, implementing and operating the International Registry, as well as the reasonable costs of the Secretariat associated with the performance of its functions. Nothing in this paragraph shall preclude the Registrar from operating for a reasonable profit.

Comment

5.68. The Supervisory Authority is required to set and may from time to time amend fees. In setting the fees, the Supervisory Authority is entitled to charge for reasonable setting-up costs – which will thus be recouped over a period rather than falling on the States Parties to the Convention and Luxembourg Protocol – and the reasonable costs of operating the International Registry. Such costs may obviously include provision for servicing of equipment, repair and replacement and maintenance of the system as a state-of-the-art registration system. The Supervisory Authority is also entitled to set the fees so as to recover the reasonable costs of the Secretariat (OTIF) associated with the performance of its functions. But otherwise, in contrast to the Supervisory Authority for the aircraft International Registry, the Supervisory Authority for the rail International Registry is not entitled to have regard to the costs of its own functions, powers and duties when fixing the fees of the International Registry. The cost of establishing and operating national entry points is not a matter for the International Registry and must be borne by the Contracting State in which the entry point is established.

5.69. Nothing in Article XVI(2) precludes the Registrar from operating for a reasonable profit.
Article XVII — Notices of sale

The regulations shall authorise the registration in the International Registry of notices of sale of railway rolling stock. The provisions of this Chapter and of Chapter V of the Convention shall, in so far as relevant, apply to these registrations. However, any such registration and any search made or certificate issued in respect of a notice of sale shall be for the purposes of information only and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.

Comment

5.70. Under the Aircraft Protocol, parties to a sale of an aircraft object may register the sale and secure the benefit of the priority provisions of the Convention. By contrast, Article XVII of the Luxembourg Protocol, though allowing registration of notices of sale, provides that any such registration and any search made or certificate issued is to be for information purposes only and is not to have effects under the Convention or Protocol. The sole purpose of the registration facility is to give notice of the sale transaction with a view to securing a priority under national law. It is, of course, for the applicable law to determine whether a voluntary registration in the International Registry has any significance in the application of its priority rules. Article XVII does not provide for the registration of notice of a prospective sale; such registration would be pointless because it is extremely unlikely that it would be capable of producing any effects under national law.

CHAPTER IV

JURISDICTION

Article XVIII — Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to
enforcement of rights and interests relating to railway rolling stock under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. A waiver under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V(1) of this Protocol.

Comment

5.71. The reason for this Article is that many railways are owned or controlled by States or State entities, and while under the law of many States it is considered an aspect of State sovereignty that a State can waive its immunity, this is not universally true. This Article makes it clear that a waiver of immunity is binding, though only where it is in a writing that describes the railway rolling stock. The waiver may relate to immunity from jurisdiction, enforcement or both. The instrument of waiver should make clear its extent. The general rule of international law, which is not affected by this Article, is that waiver of immunity from suit does not by itself constitute waiver of immunity from enforcement. Though Article XVIII(2) says that the waiver must contain a description of the railway rolling stock, what is meant is not necessarily the waiver clause itself but the instrument of waiver, which will usually be the agreement containing the waiver clause. See paragraph 3.89.

CHAPTER V

RELATIONSHIP WITH OTHER CONVENTIONS

Article XIX — Relationship with the UNIDROIT Convention on International Financial Leasing

Comment

5.72. The 1988 UNIDROIT Leasing Convention provides for the rights of parties involved in an international financial leasing transaction, including the lessor, the lessee and the supplier. The lessee is given various direct rights against the supplier, in place of remedies against the lessor, in whose favour basic default remedies are specified. The lessor’s real rights are also protected in the event of the lessee’s bankruptcy. The effect of Article XIX is that, as between two Contracting States which are Parties both to the Leasing Convention and the Cape Town Convention, the latter supersedes the former in its entirety, not merely in cases of inconsistency.

Article XX — Relationship with the Convention concerning International Carriage by Rail (COTIF)


Comment

5.73. COTIF is the treaty establishing OTIF and providing for its functions and for the responsibility of Member States. OTIF, as Secretariat of the Supervisory Authority, is responsible for assisting the Supervisory Authority (Article XII(6)) and for certifying that the International Registry is fully operational and depositing this certificate with UNIDROIT (Article XII(8)), this being a condition of the Protocol’s entry into force (Article XXIII). To the extent that the exercise of these functions would be inconsistent with COTIF, the Luxembourg Convention prevails.
CHAPTER VI

FINAL PROVISIONS

Article XXI — Signature, ratification, acceptance, approval or accession

1. This Protocol shall be open for signature in Luxembourg on 23 February 2007 by States participating in the diplomatic Conference to adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment held at Luxembourg from 12 to 23 February 2007. After 23 February 2007 this Protocol shall be open to all States for signature at the Headquarters of UNIDROIT in Rome until it enters into force in accordance with Article XXIII.

2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.

3. Any State which does not sign this Protocol may accede to it at any time.

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.

5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

Comment

5.74. A State may not become a Party to the Luxembourg Protocol without also becoming a Party to the Convention, which requires not only that the State is a Contracting State but that the Convention has entered into force for that State (Vienna Convention on Treaties, Article 2(1)(g)). See further paragraph 2.236.
Article XXII — Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

Comment

5.75. This Article enables a Regional Economic Integration Organisation established by sovereign States and having competence over matters within the scope of the Protocol to adhere to the Protocol as if it were a Contracting State. For the corresponding provision in the Convention, see Article 48 and paragraphs 4.310-4.312.
Article XXIII — Entry into force

1. This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:

   (a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession, and

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

2. For other States this Protocol 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 referred to in sub-paragraph (b) of the preceding paragraph.

Comment

5.76. Paragraph 1 deals with entry into force as regards the four States whose ratification brings the Luxembourg Protocol into force. Paragraph 2 deals with States adhering to the Protocol thereafter. Sub-paragraph (a) of paragraph 1 is designed to ensure that the Protocol cannot come into force until the International Registry is operational. Its repetition in paragraph 2 is otiose because the Convention will already have come into force under paragraph 1. The Convention does not come into force as regards railway rolling stock until the Luxembourg Protocol has been brought into force (see paragraph 2.236).
Article XXIV — Territorial units

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.

3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

4. Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

   (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;

   (b) any reference to the location of the railway rolling stock in a Contracting State refers to the location of the railway rolling stock in a territorial unit to which the Convention and this Protocol apply; and
(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.

Comment

5.77. This Article applies to the Luxembourg Protocol the same provisions as apply to the Convention under Article 52, and reference should be made to paragraphs 4.322-4.324. The reference to “administrative authorities”, which was carried over in error to the Convention by Article 52(5)(c), denotes the authorities concerned with the enforcement of the remedy of export and physical transfer referred to in Articles VII(1) and IX, Alternative A, paragraph 8. Article XXIV(1) does not apply to the extent that the law in relation to the matters dealt with in the Protocol is the same in all territorial units, whether because they have adopted uniform laws or because the law is federal law.

Article XXV — Public service railway rolling stock

1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway rolling stock habitually used for the purpose of providing a service of public importance (“public service railway rolling stock”) as specified in that declaration notified to the Depositary.

2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock
from the time of exercise of such power until possession, use or control is restored to the creditor.

3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:

   (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and

   (b) the market lease rental in respect of such railway rolling stock.

The first such payment shall be made within ten calendar days of the date on which such power is exercised, and subsequent payments shall be made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depositary, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.

5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.
6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

Comment

5.78. Article XXV, the drafting of which was the subject of intensive discussion at the diplomatic Conference, reflects a compromise between the right of a creditor to enforce the remedies conferred upon it by the Convention and Protocol and the wish of certain States, both for policy and constitutional reasons, to be able to maintain laws in force restricting the exercise of such remedies in relation to public service railway rolling stock in order to avoid disruption to services of public importance. “Public service railway rolling stock” means railway rolling stock habitually used for the purpose of providing a service of public importance. This covers rolling stock used for the carriage of freight as well as rolling stock used for the carriage of passengers. Whether the rail transportation service provided by the debtor is a service of public importance depends on the perception of the public importance of the service in the declaring State. The volume of traffic carried may be a relevant factor but of greater importance is the nature of what is being transported. For example, safety and security issues arising from the transport of nuclear waste would make the provision of such transport a service of public importance even if occurring only infrequently. See further paragraph 3.29.

5.79. A Contracting State may at any time make a declaration that it will continue to apply rules of its law in force at the time of the declaration precluding, suspending or governing the exercise of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of the Protocol. However, such a declaration may not adversely affect rights and interests of creditors arising under an agreement entered into prior to receipt of the declaration by the Depositary, UNIDROIT. Any declaration may be replaced or modified by a subsequent declaration, which can cover rules of law not in force at the time of the earlier declaration, but again not so as to affect the rights and interests of creditors under existing agreements (Articles
XXV(5), XXX). “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.

5.80. Various duties are imposed on a person, including a governmental or other authority, that exercises powers under rules of law to take possession, use or control the railway rolling stock. In particular, such a person must preserve and maintain the rolling stock, and make the payments as provided by paragraph 3, from the time it takes possession to the time possession, use or control is restored to the creditor. But if such rules of law (which include law established by decisions of courts) do not provide for such duties, the Contracting State may exclude them by a separate declaration, though this does not preclude any agreement with the creditor for the performance of such duties.

5.81. For a detailed analysis of Article XXV, see paragraphs 3.29-3.36.

Article XXVI — Transitional provisions

In relation to railway rolling stock Article 60 of the Convention shall be modified as follows:

(a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;

(b) replace paragraph 3 with the following:

“3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years and not later than ten years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is
registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

Comment

5.82. Paragraph 1 of Article 60 of the Convention sets out the general principle that unless otherwise declared by a Contracting State, the Convention does not apply to a pre-existing right or interest, which retains its priority under the applicable law. Any such declaration is controlled by the provisions of Article 60(3).

5.83 Article XXVI amends Article 60 to make explicit various points that are implicit in that Article in its unamended form. Article XXVI does not change the substantive effect of Article 60.

5.84. The Convention comes into force as regards railway rolling stock on the date of coming into force of the Luxembourg Protocol. See Article XXIII and paragraph 5.73. Article 60(2)(a) of the Convention is amended by Article XXVI of the present Protocol to make it clear that the right or interest will be a pre-existing right or interest if the debtor is not situated in a Contracting State at the time when the right or interest is created or provided for, even if the debtor later moves to a Contracting State and thereby establishes the effective date of the Convention for that debtor.

5.85. Subject to the effect of a declaration under Article 60, a pre-existing right or interest is outside the scope of the Convention and Protocol for all purposes (see paragraph 4.347). Where a pre-existing interest is assigned after the effective date of the Convention, the assignee stands in the position of the assignor, no new interest is created and the interest assigned remains a pre-existing interest and thus outside the scope of the Convention unless covered by a declaration under Article 60.

1 See the Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment – Third Edition, paras 2.250 et seq.
5.86. The amendments to Article 60(3) contain express provisions dealing with various points which under the original text had to be arrived at by a purposive interpretation.

**Article XXVII — Declarations relating to certain provisions**

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI and X.

2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article VIII, wholly or in part. If it so declares, it shall specify the time-period required by Article VIII(2).

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of one of Alternatives A, B and C of Article IX and, if it so declares, it shall specify the type of insolvency proceeding, if any, to which it will apply such Alternative. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article IX under paragraph 4 of Alternative A, paragraph 3 of Alternative B or paragraphs 5 and 15 of Alternative C, as applicable.

4. The courts of Contracting States shall apply Article IX in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.

**Comment**

5.87. For a description of the system of declarations, see paragraphs 2.259 *et seq.*, 3.94 *et seq*. As to the time when a declaration may be made, see paragraph 3.101.
5.88. Declarations relating to Articles VI, VIII, IX, X and XXVII are opt-in declarations; there are no opt-out declarations.

5.89. For the various options open to a Contracting State when considering a declaration under Article IX, see paragraph 5.32. A Contracting State making a declaration under paragraph 3 must apply the entirety of the selected Alternative; it cannot combine elements of one Alternative with elements of another (see paragraph 5.32). It may, however, select different Alternatives for different insolvency procedures.

5.90. Paragraph 3 requires a Contracting State to specify “the types of insolvency proceeding” to which it will apply Alternative A, Alternative B or Alternative C. However, the intention is to cover both forms of insolvency-related event referred to in Article I(2)(c) and the second of these deals with the case where the creditor cannot pursue insolvency proceedings. Accordingly, paragraph 3 should be interpreted as enabling a Contracting State to specify the types of insolvency proceeding or other insolvency-related event to which Alternative A, Alternative B or Alternative C is to apply.

5.91. Paragraph 3 also requires that the declaration state the time-period required by Article IX within which the debtor or the insolvency administrator has to give possession or cure all defaults and agree to perform all future obligations (Alternatives A and C) or to give notice whether it will do so (Alternative B). Whereas under Alternatives A and C of Article IX the duty arises automatically upon the occurrence of an insolvency-related event, under Alternative B it arises only on request by the creditor. Accordingly, any time-period specified by a declaration in relation to Alternative B should be expressed to commence not earlier than the date of receipt of the creditor’s request by the insolvency administrator or the debtor.

5.92. Paragraph 4 requires Contracting States to apply Article IX in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction, defined in Article I(2)(d). So if there are secondary insolvency proceedings in another Contracting State relating to a space asset 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.
Article XXVIII — Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XIII, XIV, XXIV, XXV, XXVII, XXIX and XXX may be made in accordance with these provisions.

2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

Comment


Article XXIX — Declarations under the Convention

1. Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol unless stated otherwise.

2. For the purposes of Article 50(1) of the Convention, an “internal transaction” shall also mean, in relation to railway rolling stock, a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant railway rolling stock is only capable, in its normal 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.

Comment

5.94. Paragraph 1 of this Article is arguably unnecessary but has the merit of making it clear that declarations under the Convention relating to specified provisions apply to any modification of those provisions by the Luxembourg Protocol. See further the annotations in Part 4 to the Articles listed.
5.95. Under Article 50(1) of the Convention, a Contracting State may make a declaration that the Convention is not to apply to internal transactions, though the effect of this is considerably cut down by Article 50(2) (see paragraph 4.318). An internal transaction is defined by Article 1(n) in terms that require the interest created by the transaction to have been registered in a national registry in the declaring State. Paragraph 2 of the present Article provides an additional category of internal transaction which does not necessitate such registration. All that is required for paragraph 2 to apply is that the railway rolling stock should, in its normal course of use, be capable of being operated only on a single railway system within the Contracting State because of track gauge or other design elements.

**Article XXX — Subsequent declarations**

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.

2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.
ARTICLE XXXII – DENUNCIATIONS

Comment

5.96. For a description of the system of declarations, see paragraphs 2.259 et seq., 3.94 et seq. As to the time when a declaration may be made, see paragraph 3.101.

Article XXXI — Withdrawal of declarations

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

2. Notwithstanding the preceding paragraph, this Protocol shall continue to apply, as if no such withdrawal had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

Comment

5.97. See paragraphs 4.344-4.345.

Article XXXII — Denunciations

1. Any State Party may denounce this Protocol by notification in writing to the Depositary.

2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.

3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.
Comment

5.98. See paragraph 4.346.

5.99. It is open to a Contracting State which is Party to the Luxembourg Protocol and other Protocols to denounce that Protocol while continuing to adhere to the others. A Contracting State which is Party only to the present Protocol and denounces it without denouncing the Convention remains bound only by those final provisions of the Convention which are operative independently of the Luxembourg Protocol. See paragraph 4.315.

Article XXXIII — Review Conferences, amendments and related matters

1. The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

   (a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;

   (b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;
(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by four States in accordance with the provisions of Article XXIII relating to its entry into force.

Comment

5.100. See paragraph 4.364.

Article XXXIV — Depositary and its functions

1. Instruments of ratification, acceptance, approval or accession shall be deposited with UNIDROIT, which is hereby designated the Depositary.

2. The Depositary shall:

   (a) inform all Contracting States of:

      (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

      (ii) the date of the deposit of the certificate referred to in Article XXIII(1)(b);
(iii) the date of entry into force of this Protocol;
(iv) each declaration made in accordance with this Protocol, together with the date thereof;
(v) the withdrawal or amendment of any declaration, together with the date thereof; and
(vi) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Protocol to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.

Comment

5.101. See paragraphs 4.365-4.369.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.
DONE at Luxembourg, this twenty-third day of February, two thousand and seven, in a single original in the English, French and German languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

Comment

5.102. The three texts were duly authenticated by the President of the Conference as being linguistically aligned, and all are equally authentic.