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## **DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT CONVENTION AND AN AIRCRAFT PROTOCOL**

(Cape Town, 29 October to 16 November 2001)

### **COMMENTS ON DRAFT CONVENTION**

(Presented by the Rail Working Group (RWG))

The Rail Working Group represents companies and organisations in various parts of the rail industry with important interests in the area of financing of rolling stock. (\*) We have been working for a number of years to prepare a draft protocol to the draft Convention relating to Railway Rolling Stock (the “Rail Protocol”). We are convinced that, as with the proposed Aircraft Equipment Protocol (the “Aviation Protocol”), the provision of an international security system to banks and other parties financing railway rolling stock will deliver substantial economic benefits to the rail sector by:

- Reducing the risk that financiers are currently required to take when lending against railway rolling stock, thereby reducing the cost;
- Facilitating an increasing willingness of financiers to lend against railway rolling stock, thereby permitting more funds to be made available for the rail sector, thereby reducing the costs of funds due to increased supply thereof to the market;
- Eliminating many time-consuming and costly security documents and legal opinions as well as permitting borrower and lender to choose an applicable law for the security created;
- Reducing the scope for (costly) disputes in connection with financing of, or title to, railway rolling stock where at present, in contrast to the position for Aircraft, in most parts of the world there is no mechanism for recording title or security interests in such equipment;
- Permitting even state owned railways to borrow (directly or through leasing) in the private capital markets without the need for state guarantees (actual or implied); and

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(\*) Members of the Rail Working Group: AAE Ahaus Alstatter Eisenbahn • ABB Asset Finance • ADtranz (Deutschland) GmbH • Angel Train Contracts Ltd. • Ansaldo Trasporti s.p.a. • Association of American Railroads • Bombardier Rail • Bruckhaus Westrick Heller Löber • Community of European Railways • Costaferröviaria • debis Financial Engineering GmbH • Ermewa International • Eurofima • European Investment Bank • Ferröviaria • FIAT • Firema • Freshfields • GE Capital • Howard Rosen Solicitor • HSBC Rail (UK) Ltd. • KfW Kreditanstalt for Wiederaufbau • Landesbank Schleswig-Holstein • Lenz & Staehelin • McCarthy Tétrault • SNCB SG • Theodore Goddard • Transnet Ltd. • Trinity Industries, Inc. • UIC International Union of Railways • Union of European Railway Industries • Wiersholm Mellbye & Bech.

- Creating a mechanism for the private sector to finance rolling stock in developing parts of the world and therefore obviating the need for this to be funded through Government aid budgets

The working draft of the Rail Protocol is at an advanced stage and the first meeting of Government Experts to review the draft Protocol took place on March 15/16, 2001 in Berne. We expect a second meeting to take place in the first half of 2002. We respectfully submit the comments set out below to the Conference specified above.

## **1. Text of the Convention**

We support the current draft text subject to the following qualification:

certain minor suggestions have been forwarded to Professor Sir Roy Goode QC, as Rapporteur to the joint UNIDROIT/OTIF Committee of governmental experts, in the past months, based on our experience in preparing the preliminary draft Rail Protocol with a view to these being taken into account in the redrafting process;

We comment below further on the fast track procedure for adoption of, inter alia, the Rail Protocol.

## **2. Structure of the Convention**

We fully support the proposed structure implementing the concept of a Convention setting out certain basic rules and then industry protocols, initially for the Aviation, Space Property and Rail sectors. Moreover, although at the Conference, delegates will be reviewing only the basic Convention and the Aviation Protocol, we reject any idea of an "Aviation only Convention" or, on the other hand waiting for both the Space Property and Rail Protocols to be approved and incorporated into a single Convention. Either course of action would, in our respectful submission, be wrong for a number of key reasons:

- (a) The current concept has accurately reflected the fact that financing and other economic conditions vary for the different industries. In the rail sector for example, the dominance of state-owned or state-guaranteed operators in Europe and other parts of the world has meant that independent, non state-backed finance will only become essential as the sector opens out to competition in the coming years. In the aviation sector this process has advanced considerably further. It is right therefore to focus on this sector first where the need is most urgent (and not to slow down the consideration because of the need to review the Convention's applicability in other sectors);
- (b) On the other hand, an Aviation only Convention would not only throw away years of work of the Rail Working Group and our colleagues in the Space Property Working Group, but delay, probably for many years, the introduction of parallel international rules for the excluded sectors and accordingly will severely constrain plans of governments across the world to encourage more transportation of goods and people by rail for good economic, social and environmental reasons. This is because, in the rail sector at least, the Protocol is not just responding to a current demand but also will be instrumental in creating the conditions for expansion of the rail network without state support (which will always be limited by other political or economic priorities). In other words, there is a "push" and a "pull" effect, whereas the proposed Aviation Protocol appears to be responding (i.e. "pushed") primarily to an existing demand. The Rail Protocol needs to be operative as soon as possible as the private sector is required increasingly to take over the burden of financing the modernization and development of the rail sector and we anticipate this need in the coming 5-10 years. A delay of perhaps 10 years in introducing these international security rules within the rail sector - an inevitable consequence of excluding the possibility of the rail sector being covered by the Convention - will be a

significant drag on the sector's development. Moreover, at a time where the Rail and Aviation Sectors do compete over certain distances, by reducing its comparative costs of funding for a material period it will also give the aviation sector a huge competitive advantage, which surely is not in the overall interests or the stated policy of many States. It should be noted in particular that in areas of the world where state financial support is not automatically available are often the very regions where investment into the rail industry is most urgently needed. Delay will restrict the quantity and quality of the funding available for the rail sector and therefore the benefits described in the first section of this letter. Specifically, it will limit financing through securitisations, of interest both to the private and public sector and a mechanism of growing importance in the way the capital markets are accessed. With less funding and less security available, the costs of funds will remain too high and restrict the competitiveness of the industry and discourage new entrants and healthy competition;

- (c) The Convention "architecture" must be correct in that different industries clearly have different legal and practical considerations. For example, it is usually impossible to restrict the operation of an aircraft to domestic operations whereas this can be the case in relation to certain types of rolling stock or general equipment on a closed rail system. There are about 30,000 aircraft that could be covered by the Convention with only a small number of clearly recognizable manufacturers; in the rail sector there are hundreds of manufacturers and millions of items of rolling stock. Inevitably this results in differing treatment of issues arising from the operation of an international registry. But there are also common issues, which affect all sectors, e.g. bankruptcy considerations and interim relief, where each sector has already benefited from input from experts from other sectors. We anticipate that the considerable sharing of ideas, that has characterized the last eight years as the Convention has been drafted and reviewed, will continue;
- (d) Not only will industry specific Conventions squander the considerable synergies currently operating between the three key sectors currently under consideration but it will also prevent future co-operation – for example in relation to the mechanics, protocols and software required for the operation of the respective industry international registries; and
- (e) An "Aviation only Convention" would be highly inefficient. The considerable costs of arranging another two full scale Diplomatic Conferences can be avoided if the current architecture is adopted but the efficiencies do not stop there. Governments and their experts will be able to focus on the industry specific issues rather than being obliged to rework an entire convention. Practitioners in the future, interpreting and implementing the new systems for the different sectors, will be able to refer to a common base position and common jurisprudence.

We have no objection to non-legally binding consolidations of the Convention and any industry protocol and indeed would envisage preparing such a consolidation for the Convention and the Rail Protocol once both are finalised.

### **3. In favour of the Fast Track procedure**

An important discussion for delegates will be whether subsequent industry sector protocols will need to be approved through a diplomatic conference of some type or whether a fast track approval system can be accepted as is tentatively proposed in Article 49 of the draft Convention. There is scope for debate on how the fast track system should be operated and we do not wish here to provide detailed proposals, merely to comment that it is desirable to have a system, which allows sufficient scope for governments' supervision of the terms of any Protocol, without creating a cumbersome and expensive approval system. But we strongly support the principle that a fast track procedure is appropriate for the following reasons:

- (a) It is considerably more cost effective than waiting for a detailed approval through a diplomatic conference;
- (b) It permits the reference to discussions and conclusions at the Conference and avoids unnecessary repetition;
- (c) Governments are able to exercise sufficient control through the meetings of government experts reviewing the draft protocol since the basic applicable principles have already been considered and approved;
- (d) It will facilitate speedy implementation with the consequent cost savings for the public and private sectors alike (see above).

Lastly, we wish to thank Unidroit and ICAO for granting the Rail Working Group observer status at the Conference and for kindly allowing us to submit our views to the Conference. Further we recognise, and much appreciate, the hard work behind the scenes by the staff of both organisations. We also wish to thank the Aviation Working Group for the extensive input that they have given to this project and wish to acknowledge the extraordinary contributions to international jurisprudence in this area made by Professor Sir Roy Goode QC and Mr Jeffrey Wool, the Chairman of the Aviation Working Group.

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