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The Cape Town International Rail Registry and the Development of State Registries

Martin Fleetwood and Peter Bloch*

The International Rail Registry, established pursuant to the Cape Town Convention on International Interests in Mobile Equipment, will be a new global electronic commerce system for recording and establishing the relative priority of security interests in railway rolling stock. Although there is a history of national rail registries recording operational details of railway rolling stock there are few examples of registries in which security interests can be recorded. However, in recent years a significant number of countries have begun to establish state registries for recording security interests in movable assets. This article surveys the progress being made around the world with respect to such registries. This article will also consider some of the discussions which arose around how the International Rail Registry will interface with national registries as well as the evolution of the numbering system to identify specific items of railway rolling stock.

The international registry system plays a central and critical role in the operation of the Cape Town Convention system. As Professor Sir Roy Goode described it, '[r]egistration gives public notice of an international interest or a prospective international interest and enables the creditor to preserve its priority and the effectiveness of the international interest in insolvency proceedings against the debtor.'¹

With respect to aviation, the Cape Town registry system was a logical next step in the development of registries and security interests. There was a history of aircraft registries in which security interests in aircraft were filed: the 1948 Geneva Convention on the International Recognition of Rights in Aircraft² provided for, among other things, the 'protection of secured creditors (banks) who lend money on

the security of aircraft'³ and 'the definition and protection of privileged and priority claims against aircraft.'⁴ This Convention, which came into force in 1953, has 90 state parties.⁵ Thus, there was more than a half century of international practice with respect to aviation registry security interests by the time the Cape Town Convention and Aviation Protocol came into force in 2006.⁶

By contrast, there is little tradition of rail equipment registries in which security interests are filed. Indeed, there is little tradition of registries for any form of property other than real property. In much of the world, particularly those countries whose legal systems are based

³ International Civil Aviation Organization, *Administrative Package for Ratification of or Adherence to the Convention on the International Recognition of Rights in Aircraft*, signed at Geneva on 19 June 1948, 1; text at www.icao.int/secretariat/legal/Administrative%20Packages/geneva_en.pdf, accessed 30 September 2014.

⁴ *Ibid.*

⁵ Office of the Legal Advisor, US Department of State, *Treaties in Force*, 2013, 329-330.

⁶ Convention on International Interests in Mobile Equipment and the Aircraft Protocol to the Convention on International Interests in Mobile Equipment, both signed on 16 November 2001 at a diplomatic conference held in Cape Town, South Africa from 29 October to 16 November 2001.

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¹ Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and the Luxembourg Protocol thereto on Matters specific to Railway Rolling Stock* (Unidroit 2014) 73.

² 19 June 1948, 310 UN Treaties Series 151.

on a civil law code, property rights are viewed more as absolute ownership rights rather than transferrable possessory rights.⁷ In the survey that follows, the gap between the regime in most countries and what the Luxembourg Protocol⁸ provides highlights the need for the later.

Latin America

In Latin America, 'wealth has continued to be mainly linked to real property. As a result, personal property security devices have been and continue to be of little importance.'⁹ Local Civil Codes still, for example, consider personal property as accessory to land.¹⁰ Thus, throughout Central and South America, registries of personal property interests are a rarity. There has been piecemeal legislation to address particular needs but the multiplicity of these has created conflicting devices and practices that make Latin American secured financing law uncoordinated and inconsistent.¹¹

This has started to change with the adoption by some states of the 2002 Model Inter-American Law on Secured Transactions ('Model Law').¹² The Model Law regulates security interests in all types of movable property, whether corporeal or incorporeal, present and future.¹³

⁷ See Boris Kozolchik and John M Wilson, *The Organization of American States' Model Inter-American Law on Secured Transactions*, (National Law Center for Inter-American Free Trade 2002) 30.

⁸ Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007) (hereinafter 'Luxembourg Protocol').

⁹ John M Wilson, 'Movable Equipment Financing in Latin America: Application of the OAS Model Law, the Cape Town Convention and the Luxembourg Rail Protocol', (2007) *Uniform Law Review*, 475-476.

¹⁰ *Ibid* 476.

¹¹ *Ibid* 477.

¹² The Organization of American States, at its Sixth Inter-American Specialized Conference on Private International Law, held in Washington, D.C. in February 2002, adopted the Model Inter-American Law on Secured Transactions; text at www.oas.org/dil/CIDIP-VI-securedtransactions_eng.htm, accessed 30 September 2014.

¹³ Kozolchik and Wilson (n 7) 23.

It allows for the creation of a non-possessory security mechanism, providing notice to third parties and allows enforcement upon default.¹⁴ It creates a single registry database containing all registered security interests.¹⁵ Building on this work, the Organisation of American States ('OAS') approved Model Registry Regulations in 2009,¹⁶ which are designed to foster the establishment of efficient, publicly accessible security rights in moveable assets.¹⁷

Mexico, Peru, Colombia, Guatemala and Honduras have enacted legislation, which in varying degrees, is based on the Model Law. Some early adoptees enacted legislation that deviated in important ways from the Model Law and which produced an inefficient or less than optimal system. Peru's law, for example, 'forced the registrars of the loans or security agreements to scrutinize them to determine if the secured creditor who filed the notice of the security interest was legally entitled to do so' which 'rendered the notice filing system envisaged by the OAS Model Law ... inoperative.'¹⁸ Mexico's system allows 'a large number of liens on personal property collateral to remain unrecorded or to be recorded in several registries without proper cross-filing or information on their perfection and priority.'¹⁹

By contrast, some states in Latin America have enacted all of the Model Law's key provisions. Guatemala did this in 2007.²⁰ By

¹⁴ Wilson (n 9) 479.

¹⁵ Kozolchik and Wilson (n 7) 20-21.

¹⁶ Seventh Inter-American Specialized Conference on Private International Law (CIDIP – VII) held in Washington, D.C. 2009.

¹⁷ Department of International Law, Organization of American States, *Secured Transaction Reform in the Americas Newsletter*, August 2013, 3; http://www.oas.org/en/sla/dil/docs/secured_transactions_newsletter_aug_2013.pdf, accessed 10 September 2014.

¹⁸ See Boris Kozolchik, 'Implementation of the OAS Model Law in Latin America' (2002) 28 *Arizona Journal of International and Comparative Law* 20.

¹⁹ *Ibid* 21.

²⁰ Ley de Garantía Mobiliaria, Directive 51-2007, 16 November 2007, Diario Oficial (Guat); OAS, Model Inter-American Law On Secured Transactions (2002), http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm, accessed on 30 September 2014.

Decree 51–2007, Guatemala established a unified registry for secured transactions, the *Registro de Garantías Mobiliarias*, where parties can register a wide range of assets including: tangible, intangible and derived assets; real estate and other immovable assets by incorporation or destination, or any rights that are a part of these assets.²¹ Article 44 of the Decree specifies that assets included in the registry reinforce the creditor's rights to be indemnified for losses or damage that are not from the asset's normal use that occur during the term of the registry's guarantee.²² The term lasts five year but can be extended in three year increments. Regardless of the number of renewals, the registration dates from the original date of filing.²³ Honduras has perhaps done the best job so far in fully enacting the Model Law. Its registry is a product of state-of-the-art substantive law and regulations and is the most faithful to the OAS Model Law.²⁴ One commentator stated that its secured transactions law, registry and regulations 'have become a model for the developing world.'²⁵

In Latin America, usage of the OAS Model Law should make adoption of the Luxembourg Protocol a much easier step. The two 'instruments are based on compatible legal principles.'²⁶ While they may differ in some ways, such as how the property is described and the scope of collateral that is subject to the two systems,²⁷ they share most of the basic features. In fact, the OAS Model Law contemplates the existence of specialized registries, such as the one based on the Luxembourg Protocol, and seeks to accommodate them by expressly stating '[w] here another law or an applicable international convention requires title to movable property to be registered in a special registry, and contains

provisions relating to security interests created over such property, such provision shall have precedence over this Law to the extent of any inconsistency between the two.'²⁸

United States and Canada

In the United States, the Surface Transportation Board ('STB') operates a recordation facility for security interests in, and leases of, rail cars and locomotives. Specifically, the governing legislation provides that:

A mortgage ... lease, equipment trust agreement, conditional sales agreement or other instrument evidencing the mortgage, lease, conditional sale, or bailment of or security interest in vessels, railroad cars, locomotives, or other rolling stock, or accessories used on such railroad cars, locomotives, or other rolling stock (including superstructures and racks), intended for a use related to interstate commerce shall be filed with the Board in order to perfect the security interest that is the subject of such instrument. The assignment of a right or interest under one of those instruments and an amendment to that instrument or assignment including a release, discharge, or satisfaction of any part of it shall also be filed with the Board. The instrument, assignment, or amendment must be in writing, executed by the parties to it, and acknowledged or verified under Board regulations. When filed under this section, that document is notice to, and enforceable against, all persons.²⁹

Under this system, the parties to the transaction may file the documents embodying the security agreement itself, such as a lease or security agreement. In the alternative, the parties may file a memorandum of the lease or security agreement.³⁰ The STB assigns a recordation number to each filing, and records are indexed by filing number and by the names of the parties. Once such a filing is made with the STB, it constitutes notice against all other parties and such a lien is deemed perfected in

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Merek Dubovec, 'UCC Article 9 Registration System for Latin America', (2011) 28 *Arizona Journal of International and Comparative Law* 117, 142.

²⁵ Kozolchik (n 18) 24.

²⁶ Wilson (n 8) 479.

²⁷ *Ibid* 480–482.

²⁸ OAS Model Law on Secured Transactions, Article 37.

²⁹ 49 USC 11301(a).

³⁰ Francis Nolan, 'What does a Surface Transportation Board (STB) Filing Tell You?', (2014) *National Law Review* 2.

all jurisdictions.³¹ The identity of the rolling stock that is the subject of the security interest is established by the alphabetical prefix and numerical road number allocated to that piece of equipment by a private entity, the American Association of Railroads.³² That identification regime is known as the Uniform Machine Language Equipment Register, and it applies to both US and Canadian railroad rolling stock.³³ It is state law and the Federal Bankruptcy Code that determine the ranking and priority of liens, security interests and other claims on rolling stock.³⁴

Similar in many ways is the Canadian recordation system, which is administered by the Registrar General of Canada. Section 104(1) of the Canada Transportation Act 1999 provides for the deposit with the Registrar General of mortgages, hypothecs, assignments and other related instruments (or copy or summary of such document) and that once done it is valid against all persons.³⁵ Section 105(1) provides for the deposit with the Registrar General of leases, sales, conditional sales, installment sales, mortgages, hypothecs, bailments, leasing deposits and security agreements (or copies or summaries of such document) and provides that once deposited, they are valid against all persons.³⁶ Documents are indexed in this registry only by the names of the parties.

Western Europe (European Union)

Historically, within Europe there has been limited use of registries for recording a security interest in moveable property. The main use of registries has been in respect of ships and more recently aircraft, but in both cases it can be argued that this has come about

because of the significant cost of these assets as well as the international nature of their use. Where companies provide security over their assets there is generally a requirement for the security interest to be registered in the relevant companies registry for that country; Companies House for example in the case of the UK. Registration provides a level of notification to third parties that there is a security interest over some or all of the assets of the company (had they checked the registry) and will, *inter alia*, provide evidence of priority for competing security interests.

The development of railways in most of Europe has been characterized with the initial construction and operation of the rail network being undertaken by private companies but for the railways to have been nationalized during the early to mid-part of the 20th century. This was driven by a combination of private railway companies struggling financially in the 1920s and 30s and the political ideology that major infrastructure assets should be in the ownership (and direction) of the State. Once a State had ownership of the railways, there was little need for a register of security interests in the railway rolling stock as specific assets of the State were not the subject of any security interest. Where assets crossed international borders there would be general inter-State agreements regarding the protection of those assets. Europe has a long history of international organizations being established to deal with cross border issues in rail, the first being the Central Office for International Carriage by Rail, which was organized in 1893.³⁷

With the European Commission working towards the opening up of the European rail market to competition,³⁸ both from the private sector and for State-owned railways to compete in other countries, more attention has been paid to taking security over railway rolling stock and the registration of such security. However, the pattern for railway rolling stock in Europe has been for rolling stock leasing companies to be

³¹ Jason Strain, 'Protection of Liens in Railroad Cars, Locomotives and other Rolling Stock', *Martindale.com*, 6 May 2008, 1.

³² Nolan (n 30) 2-3.

³³ *Ibid.*

³⁴ *Ibid* 2.

³⁵ Canada Transportation Act, Section 104, (SC 1996, c 10)

³⁶ *Ibid*, Section 104.

³⁷ OTIF website: <http://www.otif.org/index.php?L=2>, accessed 22 October 2014.

³⁸ Directive 1991/440/EC.

the owners of the rolling stock which is then leased to the train operators who actually use it. National vehicle registries for EU Member States are required to identify both the owner and the user of mainline rolling stock³⁹ and so this arguably acts as a partial registry of the owner's interest. However, access to such national registries is generally not available to the wider public, which defeats the objective of a security register.

Leasing has been a common method of financing moveable assets in Europe for a number of years and so lessors have grown fairly comfortable with the risks associated with this, notably how to retake possession of an asset from a defaulting lessee, despite there not being a specific registry for lessors' security interests. A strong body of European case law has developed regarding taking security over leased assets and the ability of secured parties to enforce their security over relevant assets.

The insolvency provisions in Europe are also very well developed, notwithstanding the variations between countries and the use of common law in the UK and Ireland compared to civil codes in most of the rest of Europe. A significant reason for this has been the ongoing work of the European Commission to harmonize a number of provisions relating to undertaking business in Europe to provide a more level playing field across all of the EU's Member States.

In a number of jurisdictions the need to take possession of moveable property to perfect certain types of security such as pledges in Belgium, Germany and Italy has meant that these have not been available for property that the party granting the security needs to use in its normal course of business. Other security arrangements, such as security transfers (Germany) or general business charges (Belgium) are required to be executed. More recently the restrictions on use that would be caused by using pledges as the form of security have been questioned and a movement has started to modify the relevant security laws to provide for the registration of the resulting

security interest on a national (electronic) register which would permit the retention of the asset by the party granting the security. In Belgium, new legislation is being introduced to allow pledges to be registered on a national pledge register and for the pledgor to retain the use of the asset.⁴⁰ Although the registry is not specific to railway rolling stock, it will apply to the rail industry.

Romania has likewise revised its laws relating to movable assets.⁴¹ Movable property can be charged by the debtor and remain in the debtor's possession while the holder of the security interest registers the security with the Electronic Archive. The debtor is free to use the assets but the secured party's right to enforce the charged property in satisfaction of its outstanding secured debt remains, even where the debtor transfers the ownership of the charged asset to a third party, provided that the registration was made before the transfer of the charged property.

Other Member States have made no change to their existing security laws and have indicated that they have no current intention to do so. Where a market has been functioning well under existing legislation, such as the UK rail market, there are few economic drivers to push for a change in the status quo.

The adoption of the Luxembourg Protocol by the European Union will encourage Member States to consider adopting it into national law. However, in those countries where it is considered that there is a particularly efficient market in any event, such as the UK, there is a need to continue to sell the benefits of the Luxembourg Protocol to the Government and to the main rail businesses.

Although, as noted above, there are few registries for recording security interests in railway rolling stock in Europe, there are

⁴⁰ *Wet van 30 mei 2013 tot wijziging van het Burgerlijk Wetboek wat de zakelijke zekerheden op roerende goederen betreft en tot opheffing van diverse bepalingen ter zake/Loi du 30 mai 2013 modifiant le Code civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière*, unpublished, adopted on 30 May 2013.

⁴¹ Law No. 99/1999 regarding security interests in movable property.

³⁹ Directive 2004/49/EC.

national registries in each Member State which do identify both the owner and the operator of an item of rolling stock. The European Commission set up a requirement for all Member States to have in place a national vehicle register⁴² to record certain details of the rolling stock in use on the Community's railways. Each vehicle is assigned an identification code for safety reasons and this is entered into the national vehicle register for the country in which it is to be based.⁴³ There is a common specification for information contained in the national vehicle registries,⁴⁴ and this is currently required to set out amongst other compulsory information, the identity of the owner of the vehicle, the entity in charge of the maintenance of the vehicle and the vehicle's keeper (generally the party who is operating the vehicle on the railway).⁴⁵ While this means that the identity of the owner of the vehicle as well as the operator is set out on a public register, there is no place for a party to be able to record a security interest such as a fixed or floating charge which is secured on the vehicle.

Following the establishment of the European Rail Agency,⁴⁶ there has been a greater coordination of data with the European Rail Agency, being the organization which will link the information held on all of the national vehicle registries. It is intended that each national vehicle register is searchable by registered users, with the relevant National Vehicle Agency data being stored at a national level and being accessible via a web based search application. However, it is also intended that the national registries will be linked to a European Centralized Virtual Vehicle Registry which is the central search engine in the European Rail Agency.⁴⁷ As a result it will be possible

to search via the European Rail Agency for the identity of the owners and keepers of any vehicle recorded in a national vehicle registry in the EU. It should be noted that in the Annex to EU Commission Decision 2011/107/EU the European Rail Agency acknowledges that there will need to be a link between the European Centralized Virtual Vehicle Registry and the International Registry set up under the Luxembourg Protocol.

In the UK, the Secretary of State for Transport has allocated Network Rail Infrastructure Limited (the national infrastructure manager) as the appointed Registration Entity to establish and maintain the National Vehicle Register in respect of the UK.⁴⁸ In the Republic of Ireland it is managed by the Railway Safety Commission.⁴⁹

Africa

The majority of legal systems in Africa have been heavily influenced by the former colonial powers of Europe, notably France and the United Kingdom. This has resulted in there being few registries of security interests in specific moveable property. However, because of the influences of the former colonial powers, the systems for taking security do follow the pattern of the relevant European country and this provides a useful guide on the basic security that can be taken and how it is generally registered.

Within Africa, many of the railways were State-owned enterprises which in recent years have been the subject of privatization (mainly through concessioning). This has effectively been the State's method of dealing with the high cost of infrastructure repair and renewal. The other main railways are privately owned freight lines which are owned by the mining and mineral groups whose mines they serve. There has, therefore, been little need for these countries to have specific registries of interests

⁴² Article 14(4) and (5) of Directive 1996/48/EC, as amended.

⁴³ Recital (14) of Directive 2004/50.

⁴⁴ Article 21(2) Directive 2004/49/EC.

⁴⁵ Article 33(2) Directive 2008/57/EC.

⁴⁶ Regulation 881/2004 of the European Parliament.

⁴⁷ Annex to EU Commission Decision 2007/756/EU and amended by the Annex to EU Commission Decision 2011/107/EU.

⁴⁸ See para 1.2.3.5 Railway Group Standard GM/RT2453 (issue two).

⁴⁹ The Commission was established under the Railway Safety Act 2005.

in railway rolling stock. It has, however, been acknowledged that the lack of formal registries of security interests in mobile equipment has been detrimental to the development of business in these countries with lenders placing a much higher risk premium on the operation of the security systems than for similar systems in Europe. As a result there has been a movement in a number of African countries to consider adopting collateral registries for moveable assets.

The International Finance Corporation (IFC - World Bank), part of the World Bank group, has been working with a number of countries in Africa, notably Ghana, Liberia, Malawi, Rwanda, Zambia and Nigeria to develop schemes for introducing collateral registries. There is clear evidence that where such registries have been set up, the amount of finance available to borrowers, especially for SMEs, increases considerably.⁵⁰

Ghana established its electronic Collateral Registry in 2008 following the introduction of relevant legislation⁵¹ and this has been very successful in unlocking finance in the country. The registry was established by the Bank of Ghana and has since been updated in consultation with the IFC in order to align more with international best practice.⁵² A wide range of assets can be recorded on the Collateral Registry, with accounts receivable, other investment instruments such as shares, cash, bonds and household assets being the main types of collateral used by businesses and SMEs. Rail vehicles would also qualify as assets which could be recorded on the registry. The establishment of the Collateral Registry in Ghana has provided the IFC with a good model on which other countries in Africa are

able to base their own asset registries and asset security laws.

It should be noted, however, that those countries in Africa with a more developed legislative system, such as South Africa are likely to continue along the routes that they have been following for a number of years. The South African legal system has a well-developed system for taking security over tangible moveable property through the use of general and special notarial bonds which are required to be registered at the Deeds Registry.⁵³ The special notarial bond is a more recent development and relates to taking security over specifically identified tangible moveable security⁵⁴ and this is the type of security that could be applied to specific items of railway rolling stock.

Central Asia

Like Western Europe, Central Asia has had arrangements in place for a number of years to deal with international rail operations. The Organisation for the Collaboration of Railways (OSShD) came into being in 1957 to establish various agreements on the cross border operation of the railways of the Eastern Bloc and Northern Asia (China, North Korea, Mongolia and Vietnam).⁵⁵ In addition to rules in relation to the transport of good and passengers, rules on the reciprocal use of wagons in international traffic were established.⁵⁶

The area covered by the OSShD was also one where the political doctrine was very much for having assets in the ownership of the State (most of the countries being under either Marxist or communist governments) and therefore there was no need to have many laws relating to the ownership of significant assets and the giving of security in those assets. State-to-State issues were dealt with through sets of

⁵⁰ Collateral Registries for Movable Assets, World Bank Policy Research Working Paper 6477 (2013).

⁵¹ Borrowers and Lenders Act 2008.

⁵² International Finance Corporation website: http://www.ifc.org/wps/wcm/connect/776e280040e7cb2e90addb412e1cf4fc/StoriesOfImpact-WorldBankGroup_SME_Ghana_Collateral_Registries_WBG_FINA_REV-Enhanced.pdf?MOD=AJPERES, accessed 22 October 2014.

⁵³ Deeds Registry Act 1937.

⁵⁴ Security by Means of Moveable Property Act 57 of 1993.

⁵⁵ A Golaszewski, (1997) *Japan Railway & Transport Review No. 14*, 27-29.

⁵⁶ *Schienen der Welt*, 4, 1995.

rules and arrangements applying between them. It is only in recent years that individuals and non-state organizations have become involved in requiring finance for moveable assets such as railway rolling stock.

The most significant country in central Asia is Russia where until recently there was no legal classification of tangible moveable property. Such property was simply defined as being property which did not qualify as being immovable property, but with those assets which did constitute immovable property being suitably defined to identify them. Both aircraft and ships in Russia are considered to be immovable property.⁵⁷ Not unsurprisingly, there was no public register of security interests in mobile assets although where an entity did give security over its moveable assets a record had to be kept in an internal pledge book⁵⁸ which was available for inspection by third parties (*knigazapiseyzalogov*). However, these pledge books were often poorly kept creating a significant risk to lenders.⁵⁹

With the movement of Russia towards a more market-driven economy there have been a number of significant reforms of its civil legislation including a law⁶⁰ to establish a centralized register of security interests over mobile equipment and to establish rules to deal with competing security interests.⁶¹ The centralized electronic register is established and maintained by the Federal Notarial Chamber of Russia and it is intended to be publicly accessible and searchable via the internet.

The opening up of Central Asia in the direction of market-driven economies has

⁵⁷ Clifford Chance CIS Ltd, *Russian Business Law – The Current Issues* (Wolters Kluwer 2009).

⁵⁸ *Building Trust – Developing the Russian Financial Sector*, World Bank, 2002, 65.

⁵⁹ *Ibid* 66.

⁶⁰ Federal Law No. 166-FZ ‘On Amendments to Fundamentals of the Legislation of the Russian Federation on Notarial System and Certain Legislative Acts of the Russian Federation’.

⁶¹ Konstantin Konstantinov, Jeff Browne and Vladimir Firsov, ‘Russia’s new centralised register of security interests over movable property’, *IFLR1000*, 2 April 2014.

meant that other countries in the region have also begun to look at their own legislation which has often followed the general form of Russian legislation. They have begun to appreciate the need for the ability to clarify the taking of security over moveable assets and are looking at ways to bring such provisions within their national laws. A number of countries in Central Asia are working with the IFC-World Bank to develop their own collateral registries for moveable assets and these include Azerbaijan, Belarus and Uzbekistan.⁶²

East Asia and the Pacific

The use of specific registries for recording security interests in mobile assets is again lacking in the vast majority of countries in this region. However it has been acknowledged by a number of these countries that in order to improve funding to businesses in the region there is a need to introduce legislation to set up such registries. Both China and Vietnam have introduced legislation in recent years to establish centralized on-line registries.⁶³ While there has been progress towards setting up of registries and making them searchable electronically, in some instances there have been a number of “false dawns” which have seen the registries function less well than expected and an amount of subsequent legislation has been required to move towards achieving international best practice.

⁶² International Finance Corporation website <http://www.ifc.org/wps/wcm/connect/436a9d804140468da92cbb3a095bf773/Alejandro%2BAlvarez%2Bde%2Bla%2BCampa%2BThe%2BImportance%2Bof%2BSTR%2Bin%2BExpanding%2BAccess%2Bto%2BCredit.pdf?MOD=AJPERES>, accessed on 22 October 2014 (presentation by Alejandro Alvarez de la Campa to the Conference on Secured Transaction Reforms in Latin America and the Caribbean 18 September 2013, slide 20).

⁶³ International Finance Corporation website: <http://www.ifc.org/wps/wcm/connect/5a98b5804aebf045904cfa888d4159f8/Secured+Transactions+Project+in+China+Notes.pdf?MOD=AJPERES>, accessed 22 October 2014; and http://www.ifc.org/wps/wcm/connect/region__ext_content/regions/east+asia+and+the+pacific/news/vietnam+streamlines+regulations+and+unlocks+private+sector+opportunities, accessed 22 October 2014.

Vietnam first introduced legislation to establish a registry for interests in mobile equipment in 1999⁶⁴ and established a National Registration Authority for Secured Transactions in March 2002. However, a subsequent series of decrees somewhat reduced its effectiveness. The registry also suffered from being paper-based rather than electronic. The new Civil Code of 2005⁶⁵ brought the position closer to international best practice, although the registry remained paper based and difficult to search.⁶⁶ Through additional involvement of international organizations such as the IFC, there has been further legislation in Vietnam such as Circular 05 of February 2011⁶⁷ which has seen a new on-line registry for moveable assets launched in March 2012.⁶⁸

China has also been working with the IFC-World Bank and brought in new laws in 2007 to set up a collateral registry.⁶⁹ In addition to China and Vietnam, the IFC-World Bank has also been working with Cambodia, Lao PDR, the Philippines and Indonesia to bring forward legal reforms to recognize taking security over moveable assets and to set up electronic registries to record those interests.⁷⁰

⁶⁴ Decree 165 adopted November 1999.

⁶⁵ Law No. 33/2005/QH11 of the National Assembly and Decree 163 of the Government of December 2006 [163/2006/ND-CP].

⁶⁶ Vietnam, 'Increased Access to Credit Through Collateral (Secured Transactions) Reform', *IFC* (2007) 29.

⁶⁷ Circular No. 05/2011/TT-BTP of the Ministry of Justice.

⁶⁸ International Finance Corporation website: <http://www.ifc.org/wps/wcm/connect/436a9d804140468da92cbb3a095bf773/Alejandro%2BAlvarez%2Bde%2Bla%2BCampa%2BThe%2BImportance%2Bof%2BSTR%2Bin%2BExpanding%2BAccess%2Bto%2BCredit.pdf?MOD=AJPERES>, accessed 22 October 2014 (presentation by Alejandro Alvarez de la Campa to the Conference on Secured Transaction Reforms in Latin America and the Caribbean 18 September 2013, slide 24).

⁶⁹ World Bank, 'Collateral Registries for Moveable Assets', *Policy Research Working paper* 6477, June 2013.

⁷⁰ International Finance Corporation website: <http://www.ifc.org/wps/wcm/connect/436a9d804140468da92cbb3a095bf773/Alejandro%2BAlvarez%2Bde%2Bla>

In other parts of the Pacific region, countries with strong trade links with Europe, such as Australia and New Zealand have a lengthy history of taking security over movable assets without the use of specific registers for recording security interests. However, both New Zealand and Australia have more recently followed the pattern of other countries in the region in setting up specific registries for recording such information. A case in point is Australia with the establishment of the Personal Property Security Register as part of the Personal Property Securities Act 2009.⁷¹ It is also interesting to note that this Act looks at the underlying commercial effect of the taking of the security interest rather than the traditional 'English law' approach of using the legal form of the transaction to determine its consequences.

South Asia

In common with other parts of Asia, until recently there have been few countries that have had general registries for recording security interests in movable assets, let alone having a specific registry for railway rolling stock. Within the region there has been recognition that having a registry of security interests in movable equipment will provide a benefit to the economy of the countries in the region. A number of countries have either moved to enact legislation to set up registries or are considering the legislation required to do so. Often this activity is being undertaken in conjunction with the IFC-World Bank which is, inter alia, providing advice on international best practice for electronic asset registries.⁷²

<http://www.ifc.org/wps/wcm/connect/436a9d804140468da92cbb3a095bf773/Alejandro%2BAlvarez%2Bde%2Bla%2BCampa%2BThe%2BImportance%2Bof%2BSTR%2Bin%2BExpanding%2BAccess%2Bto%2BCredit.pdf?MOD=AJPERES>, accessed 22 October 2014 (presentation by Alejandro Alvarez de la Campa to the Conference on Secured Transaction Reforms in Latin America and the Caribbean 18 September 2013, slide 20).

⁷¹ Act No.130 of 2009.

⁷² International Finance Corporation website: http://www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Financial+Markets/Financial+Infrastructure/Collateral+Registries/, accessed 22 October 2014.

The status of Indian Railways as a state run organization (and one of the largest single employers in India) has meant that there has been no need, to date, for there to be legislation relating to recording security interests in railway rolling stock. However, as India is now entering a period of introducing tram and metro systems into its major cities there are arguments for the need to provide a facility for recording such interests. While it would be difficult to argue for a specific registry for railway rolling stock, the economic climate is such that a more general registry for recording security interests in moveable assets is required. While there is a central registry for security given by companies there is no single registry for security interests in moveable assets per se.

In contrast to India, Sri Lanka has recently introduced a Secured Transactions Register (maintained by the country's Credit Information Bureau) as part of legislation to allow secured creditors to give notice of their security interest in the moveable assets of enterprises or individuals.⁷³ This success of the registry and the potential unlocking of additional funding is likely to provide some guide as to whether this route would potentially form a model which India could follow.

As this survey of the development of State registries shows, a great many nations have been moving forward, albeit at varying speeds, toward adopting systems that allow for the registration of security interests in rail equipment. Sometimes it has been a leap forward, sometimes it has been a step or two. What is clear is that there is a need for commercial credit for the updating and expansion of rail systems and that rail registries will help accomplish this.

Issues Addressed in the Course of Negotiations

The initiation of negotiations of the Luxembourg Protocol represented the next significant step in the movement towards a unified, global registry system. Much of the

historical focus on local and regional concerns noted above was reflected in the early work and negotiations on the articles of the Luxembourg Protocol that dealt with registries. It took some years of negotiations to achieve full consensus that regional or national interests should bow to the primacy of an international regime. The process this followed is described in the discussion below.

1. Development of the International Registry for Rail

As negotiations began on the drafting of the Luxembourg Protocol, it was very apparent to the Conference of Governmental Experts that there were significant differences of opinion as to whether local registries had to give way or change their practices so to accommodate the envisaged Rail Registry. In part because rail systems are not global (unlike with aviation) but at most regional in nature, there was a not insignificant amount of interest in both creating a global registry, and allowing for local or regional ones that would interface with the global one.

Early in the process, there was a proposal by the North American members of the Rail Working Group to allow for states covered by a transnational rail network to participate in a registry that was autonomous from the International Registry.⁷⁴ This was incorporated into early drafts of the Protocol as Article XIV and was bracketed text as some members did not believe that such an approach was consistent with the basic tenets of the Cape Town regime. The note to this draft article explained it well:

Article XIV contemplates creating an autonomous local registry system when and where it exists in relation to a closed area (transnational rail network) and merely to provide a [n internet] link between the International Registry and such registry system operated by the relevant transnational registry authority, effectively delegating the

⁷⁴ OTIF/JGR/2 UNIDROIT 2000 Study LXXIIIH – Doc. 4, March 2001, Draft Protocol on Matters Specific to Railway rolling stock as reviewed by the Drafting Group at its first session held in Rome, 15 to 16, March 2001, 17.

⁷³ Secured Transactions Act No. 49 of 2009.

registration function to such authority and making the International Registry a portal into the local registry operated by the transnational registry authority. This has the consequence of effectively permitting the local existing rail registration procedures to remain in place undisturbed provided that they are accepted by all states within the network concerned but with the result of possibly losing the unified approach and also control of the application of the Protocol's provisions by the Supervisory Authority.⁷⁵

The Rail Registry Task Force ('RRTF'), a body comprised of interested States, industry and international organizations, was tasked with considering this and other questions. In its April 2003 Report, the RRTF noted that it looked at three options for establishing regional registries under the Convention and Luxembourg Protocol: (1) a regional registry whose data could be searchable through the International Registry but whose operation would be independent of the international registry system; (2) a regional registry that could be independent of the international registry system; and (3) a regional regime whose relationship to the International Registry and Supervisory Authority would be defined at a later time.⁷⁶ The Report noted that the first option was supported by a majority of the RRTF membership.⁷⁷

When the Third Session of the Committee of Governmental Experts convened later in 2003, there was a great deal of concern because it appeared that an impasse had been reached over whether autonomous registries should be permitted. After much discussion and recognizing the need to move on, a compromise was reached which was designed to provide assurances to regions that had their own registries that they would not have to change once an international registry was

⁷⁵ Ibid n 53.

⁷⁶ Rail Registry Task force, 'Report of the Rail Registry Task Force to the Committee of Governmental Experts for the Preparation of a Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Rail Rolling Stock', 13 April 2003.

⁷⁷ Ibid 2.

put in place. Consequently, the Third Session inserted language into the text that provided:

A decision of the Supervisory Authority that affects only the interests of a State Party or a group of State Parties shall be made if such State party or the majority of the group of State Parties also votes in favour of the decision. A decision 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 votes in favour of the decision.⁷⁸

The note to this paragraph is a bit cryptic but was understood by all participating that it was essential to keep the full substance of this language in order for the autonomous registry to be deleted from the text.⁷⁹ With one small non-substantive edit, the text decided at the Third Session was the text that was adopted by the diplomatic conference. The only change made at the diplomatic conference to this paragraph was to change 'decision of' to 'measure taken by'.⁸⁰

2. Vehicle Identification Criteria

Virtually all railway rolling stock will be subject to a numbering system allowing it to be identified by the user of the rolling stock and the operator of the network on which it runs. There are generally two numbers associated with railway rolling stock: the manufacturer's number and the operator's running number. The former is applied when the vehicle is constructed and the latter is often used to identify both the type of vehicle and its general number in the stock collection of the current operator of the vehicle. In both cases it is possible for the identification number of

⁷⁸ OTIF/JGR/12 UNIDROIT 2003 Study LXXIIIH – Doc. 14, June 2003, Preliminary Draft Protocol on Matters Specific to Railway Rolling Stock as adopted by the Committee of governmental experts at its third session held in Berne from 5 to 13 May 2003, Article XI (3), 15.

⁷⁹ Ibid n 35. The first sentence of this note reads: 'There was unanimous agreement within the Joint Committee of governmental experts that the full content of this paragraph would be maintained.'

⁸⁰ Luxembourg Protocol, Article XII (10).

the vehicle to change or not remain unique to that vehicle.

Taking the manufacturer's number first, depending on the prefixes and suffixes used it is quite possible for a manufacturer of one railway wagon to apply the same manufacture number as another manufacturer. There is not a worldwide convention on the application of manufacture numbers. Where external manufacturers construct railway vehicles, they will often include various references to identify it as being made by that particular manufacturer, but where a local railway builds its own vehicles in its local workshops it may apply a simple number to indicate the year of manufacture and its place in a run of vehicles built in that year. If that process is repeated at another vehicle works on a railway in a different country (or even in another part of the same country), were one to bring the vehicles together, simply using the manufacturing number would not identify one vehicle from the other.

Even where it can be argued that global commerce means that virtually all manufacturers will now be applying unique serial numbers to vehicles that they construct, this does not address what should be done with the millions of existing vehicles.

It is also possible for a manufacturer number to be changed in the event of a major rebuild of a vehicle. Significant parts of one vehicle are used but modifications are such that it effectively creates a new vehicle. One railway workshop may decide to retain the old number while another may decide that a new one should be applied to reflect the significant changes made. Again, as there is no consistency it cannot be argued that the number will be a guarantee of the identity of the vehicle.

The operator's identification number, or running number, is even more likely to change over time. While a country's railways are likely to have developed similar running numbers, this does not mean that all rail systems in that country will have adopted the same system. A tramway in one city may number its trams 1 to 20 and in an adjacent city the trams are numbered 1 to 30. Body design and livery

may be different but if you are looking for tram number 5 there will be two to choose from. Where a vehicle is modified, the number may also change to indicate the modification e.g. trams with space for two bikes are numbered in the sequence 1xxx but those which can take 8 bikes are numbered in the sequence 2xxx. For a route which is more popular for cyclists, trams in the range 2xxx would be more likely to be allocated to the route. If some of the 1xxx class of trams were converted to take 8 bikes, their numbers would be changed to the 2xxx range. Thus tram 1006 may become tram 2006. If you are looking for tram 1006 to enforce your security against, you may never find it! The operator's number may also change when the vehicle is sold to another operator, as is the practice in North America with respect to a vehicle's UMLER number.

A new operator of the vehicle may decide to renumber the vehicle into a numbering system which better suits what the operator is going to use the vehicles for or a vehicle is substituted into a specific number to replace, say, a damaged vehicle which is withdrawn. If tram 2006 is written off in an accident and a replacement is obtained, does it become the new tram 2006 or is its number the next number in a single sequence e.g. tram 2015? For the purposes of the Luxembourg Protocol, there is, therefore, a need for a unique identifier which will continue to apply to a single vehicle whether it is modified, transferred to a different operator or runs in a different country with a conflicting numbering system. It was for this reason that the URVIS number was developed in conjunction with the other work on the Luxembourg Protocol.

URVIS stands for 'Unique Rail Vehicle Identification System' and is a 20 digit numbering system which is applied to a rail vehicle on its first registration at the International Rail Registry and remains with the vehicle until the vehicle is destroyed. The number of digits involved in the URVIS number means that there will not be a duplication of numbers being applied to vehicles. The starting point is 0001 and each vehicle will get the next

number in the sequence. It will, however, be possible for a manufacturer to book out a set of numbers to be applied to vehicles as they are manufactured so that the URVIS number will already be allocated to that vehicle by the time of its first registration.

In developing the URVIS numbers, there has been pressure from some regional organizations to look to adopt the main vehicle numbering system available in their area, be that Europe or North America.⁸¹ However, in all cases there is no guarantee that a second vehicle would not at some point in time receive the same number as another vehicle. The possibility of having two vehicles with the same identification number cannot be allowed to occur under the Luxembourg Protocol, so URVIS has remained as the chosen methodology for numbering in the International Registry.

Conclusion

Legal traditions around the world have generally not been conducive to the creation of registries for security interests in rail equipment. This has often been due to most railway systems being in the ownership of the state and therefore funded through tax raising powers of the state rather than having their assets used as collateral to support third party finance. The main exception has been North America, where most of the US rail systems remained in private hands and there was, therefore, a need to access commercial credit in order to support the operation and development of the businesses. With this need came the development of the relevant supporting security structures from the legislature.

As it becomes more and more evident that commercial credit is needed in order to build the rail systems and rolling stock needed throughout the world, whether for state-owned railways or where a rail system has been privatized, economic realities are working to push nations to embrace legal reform that will allow for such systems. We are seeing a

significant number of countries undertaking structural reform to allow for easier access to commercial credit secured against a wide selection of moveable assets (rather than particular assets types) as this will provide them with the greatest benefits for the legislative time involved in changing existing systems. However, structural reform is not consistent between countries and this does leave an area of risk in the case of assets which often move across international borders.

Outside of North America, where there have been registries established for recording details of railway rolling stock it has generally been based on there being an operational or safety requirement rather than a financing need. With often limited access to the registries they have not shown themselves to be particularly suitable for expanding to cover the type of information required by lenders and financiers.

The advantage of the Cape Town regime is that it offers nations a global system that will provide for the registration and priority of interests in specific assets in a way that is consistent and transparent across different countries. With its assets identification system providing a unique number for each item of rolling stock, it also helps to reduce the risk in identifying the asset being claimed, which may occur where national asset registries are only focusing on how they record claims in their own countries. Overall, the Cape Town regime should provide significant assistance in fostering the provision of credit to the rail industry.

⁸¹ In early drafts of the Protocol, numbers allocated by regional systems were expressly recognized as one way to identify rolling stock.