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**Meeting of UNIDROIT/OTIF Governmental Experts  
15/16 March 2001, Berne**

**for the UNIDROIT CONVENTION on International Interests in Mobile Equipment  
respectively a corresponding Protocol on Matters specific to Railway Rolling Stock**

**Welcoming speech of the Director General OCTI**

Dear delegates of 20 States and 5 international organizations,  
Ladies and Gentlemen,

It is a pleasure for me to welcome you here in Berne at the headquarters of **OTIF** - the Inter-governmental Organisation for international Carriage by Rail.

My special greetings go to the representatives coming from outside of the OTIF-area, from

Argentina,  
the United States of America  
Canada  
China  
Republic of Korea (represented by its Embassy in Berne)  
Russia  
South Africa (represented by its Embassy in Berne too)

You are cordially welcomed.

Your presence here makes sense:

- It makes sense to envisage a Protocol on Matters specific to Railway Rolling Stock as addition to the UNIDROIT Convention on International Interests in Mobile Equipment.
- It makes sense, for the necessary preparatory conference on expert level (and, if necessary, also following meetings), to make available or - in the other way - to profit from the services of the Secretariat of the OTIF.

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The railway reform process, which has been initiated in Europe and should lead to a significant «denationalization» and privatisation as well as to a liberalization of the railway sector, will inevitably imply new financing models for investments, which will be increasingly or completely based on the conditions of the private, global orientated capital market. Besides the financing of the infrastructure, where the state's influence will remain strong and where - if ever - private capital will enter by Public-Private-Partnership, free usable rolling stock will best suit in international traffic for a pure private financing of investments.

That means that the question of the necessary interests is a central topic, which has to be dealt under consideration of the characteristics of the present and in future emerging international railway transport.

Effective interests need an international applicable law on contracts, which inevitably imply corresponding Conventions and an international supporting organization.

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UNIDROIT fulfills this demand on global level. With regards to the railway sector, this could also be OTIF, however in a restricted geographical area centred on Western Europe.

OTIF's roots go back to the end of the 19th century when the first uniform international rules concerning international carriage of goods by rail were established.

OTIF has existed as an intergovernmental organization with the full status of an international organization since 1980 respectively since 1985 (the entry into force), when the present **COTIF** - Convention concerning international carriage by rail - has been created. For the time being, OTIF counts 40 Member States and its sphere of influence reaches from Portugal to the borders of the Russian Federation, but also into the Near East to Iran, and from the Nordic States to the Maghreb.

In 1999 a major revision of COTIF, which adapts the Convention to the process of the European railway reform, was accomplished. This means also competences, which legitimize OTIF to deal with all legislative needs on intergovernmental level in the field of international railway traffic. The new COTIF has not come into force yet. But the targets are set; time does not stand still. Obvious needs have to be taken into account when they appear.

As previously said, OTIF is a regional, essentially European institution. This cannot reduce its commitment (respectively, the commitment of its Secretariat) in the case of the worldwide orientated UNIDROIT Convention on International Interests in Mobile Equipment. It is especially the sphere of influence of COTIF, that means the area where the European railway reform is going ahead, which is interested in the Protocol on Matters specific to Railway rolling Stock as complementary instrument.

Of course, the importance of the OSJD (Organisation for cooperation of Railways), OTIF's «sister organization», created at the time of a communist economic order and anchored in the area of the important railway countries Russia and China, is not depreciated. The conditions there are, for the time being, still not the same as in the OTIF area. OTIF and OSJD will in future closely cooperate

in order to promote a realistic harmonization process for the good of the railway, whose future chances deeply depend on the economic development in the OSJD area.

And at this conference an even broader view is involved. Except Australia all continents are represented although there exists no worldwide connected railway network. This shows that all over the world we find similar needs and that at least for parts of the railway sector a global view is more and more required.

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The language used at this meeting is English. This happens principally for reasons of costs with view on a preliminary meeting of experts for which it was at the beginning difficult to evaluate if, and if so, with how many participants it would take place.

I know that this decision has led to criticism. «OTIF» means traditionally French and German as working languages - and both languages will maintain their importance. On the other hand, the reality is reflected in this decision. A worldwide scale calls for a worldwide language. This is, without doubt, English. That's why it is intended to introduce it rapidly as third working language in the traditionally French and German speaking railway world in Western Europe.

Despite the well prepared documents, the one or the other linguistic problem will occur during these two days. You will certainly be able to handle it in order to come to a good result which is useful to the further decisions within the different States.

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It is not yet decided if we will really have a Protocol on Matters specific to Railway Rolling Stock and, if so, how it will look like. This meeting should, if possible, prepare a good decision basis. I wish you a successful work.

And I wish you a pleasant stay in the almost a 1000 years old town of Berne - the capital of Switzerland, which is a true railway country.

**Speech of Herbert Kronke, Secretary-General of UNIDROIT  
to the first Joint Session of Governmental Experts,  
Berne, 15 and 16 March 2001**

Dear Mr Isliker, Excellencies, Ladies and Gentlemen,

On behalf of UNIDROIT, its President and Governing Council I should like to welcome you, distinguished delegates and observers, to the first Joint Session of Governmental Experts for the preparation of a Protocol on Matters Specific to Railway Rolling Stock within our broad exercise on asset-based financing. We are grateful to our colleagues at OTIF who are hosting this meeting and who have joined us in this effort. Both Organisations made sacrifices to bring about this meeting which is to reach out globally. Among other things, while UNIDROIT sacrificed only one of our working languages (French), OTIF sacrificed two (French and German) to make this meeting possible at acceptable cost.

Work which UNIDROIT, at the invitation of the Government of Canada, started 13 years ago and which will come to fruition later this year at a diplomatic Conference in Cape Town (South Africa), has entered the stage of intergovernmental consultation in the area of space objects (such as telecommunication and meteorological satellites) and indeed railway rolling stock.

The Aircraft Protocol has taken the lead and will be adopted, together with the base/umbrella/mother Convention at the diplomatic Conference in Cape Town, but a number of countries had indicated from the very outset that other high-value mobile infrastructure equipment such as railway rolling stock was equally, and in some cases more, important than aircraft.

UNIDROIT is happy to provide, in co-sponsorship with OTIF and in close co-operation with governments and private industries of those of our member States who are not members of OTIF but who do have a stake in modern financing in railway rolling stock, this marketplace for innovative ideas and discussion.

Today, it is universally accepted that two factors made this work necessary and that these two factors will make our future *Convention* and the *Aircraft* Protocol almost inevitably a success:

- the first factor is legal - : the private international law-rule (conflict-of-laws-rule) that property rights and security interests are governed by the *lex rei sitae*, the law of the place where the aircraft or the wagon or locomotive are located at any given point in time. And that law changes all the time due to the very nature of these objects which are constantly crossing national borders in the ordinary course of business. This makes security interests insecure and renders credit expensive.
- the second factor is economic - : to the extent that taxpayers' money will no longer be available for the purchase of new fleets, new aircraft, there will be more and more need for asset-based financing – the equipment to be purchased itself will be the collateral – in many cases the only collateral the purchaser/operator is able to provide.

Mr Howard Rosen, expert consultant on international rail finance and co-ordinator of the RailWorking Group, to whom the two intergovernmental Organisations owe so much in the pursuit of this project, in an article published in 1999 asked the question whether private and

asset-based financing of railway rolling stock was «An idea ahead of its time». We believe the answer is no. It is an idea which needs to be developed now. Every regular reader of the international financial press knows that. A few months ago I read an article in a Singaporean daily newspaper on the tapping of capital markets by certain Asian transportation authorities. Just a couple of weeks ago the Financial Times published an article on one Eastern European country whose railway system is desperately looking for private finance. Unfortunately, that country is not represented here today.

We believe – and economic studies are supporting this view – that it is an idea for our time. But it is for you, Ladies and Gentlemen, and your colleagues from some countries who indicated their strong interest but who were unable to join us today to judge.

I mentioned Mr Rosen and his contribution. But there are two more persons in the room who have served their countries and the international Organisations so far involved (UNIDROIT since 1988 and ICAO since 1997) in the ongoing consultation process making invaluable contributions without which we would not be where we are: Professor Karl Kreuzer, member of the UNIDROIT Study Group, member of the German delegation and Chairman of the Drafting Committee of the three UNIDROIT/ICAO Joint Sessions. The second person I wish to mention is Professor Sir Roy Goode, Chairman of the UNIDROIT Study Group, member of the UK delegation and Rapporteur to the UNIDROIT/ICAO Joint Sessions . His intellectual (and physical) contribution to the project and his dedication are unparalleled. Thank you both.

Not only is access to asset-based finance for railway rolling stock money, but time too. Therefore, I shall stop here and I wish us all two days of a fruitful sighting exercise, an exchange of ideas on the current draft of the Railway Protocol and further insight into how we can provide a legislative framework for less expensive railway finance, more value for the users of transportation services and growth and prosperity in those areas of the world dependent on railway transportation.

**PRELIMINARY DRAFT PROTOCOL TO THE DRAFT UNIDROIT CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS  
SPECIFIC TO RAILWAY ROLLING STOCK**

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**PRELIMINARY DRAFT PROTOCOL TO THE DRAFT CONVENTION ON  
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS  
SPECIFIC TO RAILWAY ROLLING STOCK**

(as established by Mr H. Rosen, expert consultant on international rail finance matters to the UNIDROIT Study Group for the preparation of uniform rules on international interests in mobile equipment and co-ordinator of the Rail Working Group, on the basis of the discussions of the Steering and Revisions Committee which met in Rome on 16/17 March 2000 and reflecting changes agreed in the Draft UNIDROIT Convention in August 2000)

**THE STATES PARTIES TO THIS PROTOCOL**

CONSIDERING it necessary to implement the Convention on International Interests in Mobile Equipment, 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:

**CHAPTER I  
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) [“autonomous transnational registry authority” means a transnational registry authority which has been designated as an autonomous transnational registry authority pursuant to Article XIV herein];

(b) “local personal property register” means a registry in a Contracting State, whether national or local in a jurisdiction forming part of a state, in which an interest in railway rolling stock governed by the Convention may be registered;

(c) “primary jurisdiction” means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be the place of the debtor’s seat or domicile unless proved otherwise;

(d) “railway rolling stock” means vehicles moveable on or confined to movement on or directly above a fixed railway track or guideway, or superstructures or racks installed or designed to be installed on such vehicles, including all traction systems, engines, brakes, axles, bogies, and pantographs, and in each case including accessories and other components equipment and parts installed or incorporated therein or attached thereto and all operating and technical data manuals, notebooks and other records relating to all or part of any of the foregoing;

(e) “transnational registry authority” means the authority, or authorities acting collectively, maintaining a local personal property register (or a number of such registers acting collectively) designated pursuant to Article 17(4) of the Convention and as provided for in Article[s] XIII (2) [and XIV] herein;

(f) “transnational rail network” means a geographical area out of which it is not possible for railway rolling stock to move on, or directly above, rails;

(g) “unique identification criteria” means any of the following namely

(i) the manufacturer's serial number or works number and its manufacturer's model designation;

(ii) a description of railway rolling stock that includes reporting marks, road numbers or similar identification conforming to the description of railway rolling stock in the transnational rail network in which the relevant railway rolling stock is located, approved or accepted by a transnational registry authority as sufficient to enable railway rolling stock to be uniquely identified; or

(iii) such other identification criteria as the Supervisory Authority may prescribe or approve from time to time in regulations which identification marks in each case are embossed or otherwise affixed to the relevant railway rolling stock.

## 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 read and interpreted together as one single instrument and shall be known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock.

## Article III

### *Sphere of application*

In their relations with each other, the parties may by agreement in writing, derogate from or vary any of the provisions of this Protocol except, Articles IV and VI – VIII<sup>1</sup>.

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<sup>1</sup> May require further consideration.

Article IV  
*Description of railway rolling stock*

1. A description of railway rolling stock that includes the unique identification criteria is necessary and sufficient to identify the object for purposes of Articles 6 (c) and 30 (2) (b) of the Convention.
2. Any change to such description shall be notified by debtor to the Registrar on or before such change takes place but any claim of a creditor in relation to railway rolling stock where its description has been changed, shall be subject to any prior right registered in favour of a creditor in relation to the previous description or descriptions. In the event that railway rolling stock moves out of a transnational rail network such relocation shall be notified by debtor to the Registrar immediately such change takes place, specifying the unique identification criteria appropriate to the new location.
3. Any modification, renewal or alteration to railway rolling stock shall not affect the rights of creditors.

Article V  
*Representative capacities*

A person may enter into an agreement and register an international interest in railway rolling stock created or provided for by the agreement in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention to the exclusion of the person or persons represented.<sup>2</sup>

**CHAPTER II**  
**DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

Article VI  
*Modification of default remedies*

1. In addition to the remedies specified in paragraph 1 of Article 7 and in Article 9 and 12 (1) of the Convention, the creditor may obtain an order from the court in the jurisdiction in which the railway rolling stock is physically located, directing immediate delivery of the railway rolling stock to a location within or outside of such jurisdiction where thereafter the creditor can move the railway rolling stock into the relevant transnational rail network where the railway rolling stock is then located without the need of traction to be provided by the defaulting debtor or any party related to or acting in concert with it.

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<sup>2</sup> May be moved into the Convention.

2. The creditor may 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. For the purposes of Article 7 (2) of the Convention an agreement between a debtor and a creditor as to what is commercially reasonable shall be conclusive.

4. For the purposes of Article 7 (3) of the Convention, the chargor and chargee may agree in writing a notice period which shall be deemed to be reasonable if not less than 14 calendar days<sup>3</sup>.

## Article VII *Choice of Law*

1. The parties to an agreement may agree on the law to govern their contractual rights and obligations, wholly or in part. The agreement and transaction referred to therein need not bear a relationship to the selected body of national law.

2. 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.

## Article VIII *Speedy judicial relief*

1. Notwithstanding the provisions of Article 12(1) of the Convention, relief shall not be dependent upon the agreement of the debtor.

2. Relief given under Article 12(1) (a) of the Convention may specifically include directions as to normal maintenance and other necessary repair or modification of the object.

3. Judicial relief under Article 12(1) of the Convention may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another [Contracting] State unless its application would contravene an international instrument binding on either Contracting State.

## Article IX *Remedies on Insolvency*

1. For the purposes of this Article, “insolvency date” means the earliest date on which one of the events specified in paragraph 2 shall have occurred.

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<sup>3</sup> The AWG has suggested 10 days but the rail working group considers this as being too short.

2. This Article applies where:
  - (a) any insolvency proceedings against the debtor have been commenced by the debtor or another person in a Contracting State which is the primary insolvency jurisdiction of the debtor; or
  - (b) the debtor is located in a Contracting State and has declared its intention to suspend, or has actually suspended, payment to creditors generally.
3. Within a period not exceeding sixty days from the insolvency date (the “cure period”) the debtor or an insolvency administrator, shall:
  - (a) cure all defaults, and agree to perform all future obligations under the agreement and related transaction documents; or
  - (b) give possession of the railway rolling stock to the creditor save where otherwise previously agreed in writing and otherwise in accordance with, and in the condition specified in the agreement and related transaction documents.
4. Unless and until the creditor is given 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.
5. 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.
6. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, during the cure period, it has cured all defaults and has agreed to perform all future obligations under the agreement. A second cure period shall not apply in respect of a default in the performance of such future obligations.
7. No exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.
8. No obligations of the debtor under the agreement and related transactions may be modified in the insolvency proceedings without the consent of the creditor.
9. 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].
10. No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 38 of the Convention, shall have priority in the insolvency over registered interests<sup>4</sup> [and no doctrine of reputed ownership shall defeat registered interests].
11. Nothing in this Article shall operate to modify Article 29(3) of the Convention to

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<sup>4</sup> See also comment below on Article XXV.

which this Article shall be subject.

12. Article VI of this Protocol and Article 7 of the Convention as modified by Article VI of this Protocol, shall apply to the exercise of any remedies under this Article.

Article X  
*Insolvency assistance*

The courts of a Contracting State in which railway rolling stock is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article IX.

**CHAPTER III**  
**RAILWAY ROLLING STOCK REGISTRY PROVISIONS**

Article XI  
*Supervisory Authority and the Registrar*

1. The initial Supervisory Authority shall be [the Intergovernmental Organisation of Carriage by Rail or such successor organisation or other body as it may appoint]. [Subject to paragraph 2 below,] the Supervisory Authority shall appoint a Registrar.

2. [The initial Registrar hereby designated to operate the International Registry shall be Eurofima European Company for the Financing of Railroad Rolling Stock]. The Registrar shall subject to paragraph 4 below, create an independent special purpose affiliate or division for the purpose of operating the International Registry to be known as the Registry Operating Entity.

3. The Registry Operating Entity shall be organised in consultation with the Supervisory Authority. Its constitutive documents shall contain provisions which:

- (a) restrict it to acting as Registrar and performing ancillary functions;
- (b) ensure that it has no greater duties (fiduciary or otherwise) to its members than to any other person or entity in the performance of its functions as Registrar<sup>5</sup>.

4. In relation to the initial Registrar or any successor Registrar, the appointment shall be subject to regulations made by the Supervisory Authority from time to time and to an operations agreement entered into with the Supervisory Authority setting out the basis on which the registry should function.

5. The initial Registrar shall operate the International Registry for a period [of ten years

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<sup>5</sup> In the operations agreement with the Registrar there should be a requirement that it operates under a general duty of fairness and impartiality.

from the date of entry into force of this Protocol][that the Supervisory Authority considers appropriate but in any event not exceeding ten years]. Thereafter, the Registrar shall be appointed or re-appointed for such period that the Supervisory Authority considers appropriate (but in any event not exceeding ten years)<sup>6</sup>.

6. Notwithstanding the foregoing, the Supervisory Authority (a) shall, as soon as is reasonably possible, appoint a replacement Registrar in the event that the Registrar (i) shall resign (ii) shall become insolvent or generally be unable to pay its debts (iii) shall be dissolved and (b) shall be entitled to appoint a replacement Registrar in the event that the Registrar does not [materially] comply with its obligations herein, under the operations agreement or under regulations set out by the Supervisory Authority.

7. The Registrar shall be entitled to contract out its duties to a third party “service provider” subject to the identity of the service provider [and to the conditions under which the service provider carries out duties on behalf of the Registrar] being accepted by the Supervisory Authority by a declaration in writing prior to such contracting out. Contracting out of its duties shall not relieve the Registrar of its obligations hereunder or under the regulations but the service provider shall become an additional party to the operations agreement entered into between the Supervisory Authority and the Registrar.

## Article XII *First Regulations*

The initial regulations shall be issued no later than the date that is [three months] prior to the entry into force of this Protocol. Prior to issuing regulations, the Supervisory Authority shall publish draft regulations in good time for review and comment and thereafter consult with representatives of manufacturers, operators and financiers thereon.

## Article XIII *Access to Registry*

1. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

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<sup>6</sup> This allows some discretion bearing in mind the investment in training and software which will be required by the Registrar.

2. All states in the area covered by a transnational rail network, provided that they act jointly and are all Contracting States, may designate one or more (acting jointly) local personal property registers as a transnational registry authority for the entire relevant transnational rail network subject to the terms of this Protocol. Any designation, to be effective, shall be subject to written notice, given to the Supervisory Authority by the relevant Contracting States advising it thereof; and [unless a designation is made pursuant to Article XIV,] a written undertaking, given to the Supervisory Authority from the transnational registry authority, agreeing to comply with the obligations of a transnational registry authority as set out herein. The registration facilities provided by a transnational registry authority shall be operated and administered during working hours in its territory.

3. [Except where it has been designated as an autonomous transnational registry authority pursuant to Article XIV below,] any transnational registry authority designated pursuant to this paragraph 2 shall

(a) be the exclusive access (for the purposes of registration of an international security interest) to the International Registry in relation to the transnational rail network covered by it and

(b) ensure that registration through it shall automatically result in delivery of information to the International Registry as the Registrar shall reasonably require. If it comprises more than one registry facility, the transnational registry authority shall provide equal access and full co-ordination between the respective facilities but, subject to paragraph 5 below, shall otherwise conduct its affairs and shall be free to set such requirements as to form and nature of filings made through it as it as it considers appropriate.

4. For the purposes of Article IV (2) herein, notification shall [also] be given to any relevant transnational registry authority which is effectively designated hereunder where the railway rolling stock is located in the transnational rail network.

5. The Supervisory Authority shall by regulations accept the unique identification criteria proposed by the transnational registry authority [where they comply with the rules of a uniform and unique system of identification of railway rolling stock in the relevant transnational rail network, apply exclusively within such network and are sufficient to comply with the basic informational requirements of the Registrar in operating the International Registry].<sup>7</sup>

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<sup>7</sup> It is suggested that if Article XIV is accepted, the words in square brackets should be removed. But this is not an automatic corollary and this modification would effectively not just grant autonomy to a transnational registry in operational issues but also remove the oversight obligation of the Supervisory Authority.

Article XIV  
*[Autonomous Transnational Registries*<sup>8</sup>

1. Notwithstanding Article XIII above, all states in the area covered by a transnational rail network, provided that they act jointly and are all Contracting States, may declare that a designated transnational registry authority shall be autonomous from the International Registry and accordingly shall not be subject to the jurisdiction, rules and regulations of the Supervisory Authority, Registry Operating Entity or the Registrar provided that such declaration is included in the written notice required under in Article XIII paragraph 2.

2. In the event a transnational registry authority is designated pursuant to paragraph 1 above, the undertaking to the Supervisory Authority set out in Article XIII paragraph 2 shall not be required and in respect of railway rolling stock located in the transnational rail network relating thereto, registration of an international security interest shall only be at such authority.

3. At the request of the Supervisory Authority, registration information at an autonomous transnational registry authority may be obtained by the International Registry. In such instance, the Supervisory Authority shall have the obligation of ensuring that such registration information at an autonomous transnational registry authority shall be received by and be available for search at the International Registry either directly or through an internet or other similar electronic link. Said obligation shall include, but not be limited to, ensuring that, if and where appropriate, the Registrar establish and fund all systems necessary to transmit registration information by the autonomous transnational registry authority and to receive, at the International Registry, registration information transmitted from such an autonomous transnational registry authority in the form required by the Registrar. The autonomous transnational registry authority shall be required to finance its operation [as required by this Protocol] but shall not be required to incur any investment or operating costs or expenses relating to the transmission of registration information to the International Registry.]

Article XV

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<sup>8</sup> This Article XIV is proposed by the North American members of the RWG and relates to an alternative approach in relation to the operation of the protocol in practice. The RWG's starting point has been to create a system which permits all locally created security interests to be registered in one centralised international registry, using any local industry specific registry as a portal *into the International Registry*. The Aviation Working Group has adopted this approach in relation to Aircraft Equipment although it should be noted that aircraft can move virtually anywhere whereas rolling stock is unlikely to move outside of a transnational rail network. However 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 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.

*Additional Modifications to Registry provisions*

1. For purposes of Article 18 (5) of the Convention, the identification criterion for railway rolling stock shall be the description required to identify the equipment set forth in Article IV (1) herein and the search criterion at the International Registry shall be established by the Supervisory Authority. In the event that railway rolling stock has different unique identification criteria depending on which transnational rail network it is located in, the Registrar [shall] [may], at its expense, maintain a lexicon showing the equivalent descriptions, which shall be open to inspection.

2. For purposes of Article 22 of the Convention, the categories of preferred non-consensual creditors shall be searchable by the name of the declaring Contracting State.

3. For the purposes of Article 24 (2) of the Convention, and in the circumstances there described, the holder of a registered prospective international security interest or a registered prospective assignment of an international security 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.

4. For purposes of Article 20 of the Convention, registration of an international security interest shall, unless discharged or unless otherwise agreed, remain effective for an indefinite period of time.

5. Article 24 (1) of the Convention shall also apply in respect of a subordinating party mutatis mutandis as if it was a debtor and the registration related to the subordination of an interest.

6. The regulations shall prescribe the manner in which the following provisions of the Convention shall apply:

Article 16 (2) (e);  
[Article 17;  
Article 20;]<sup>9</sup>  
Article 21 (1) and (2);  
Article 22; and  
Article 23.

7. Notwithstanding Article 27 (1), [there shall be no liability of the Registrar for consequential loss]<sup>10</sup> and in respect of any loss arising from an error or omission by a transnational rail registry, the transnational registry authority shall assume the liability of the Registrar thereunder.

8. The insurance referred to in Article 27 (2) shall be [full insurance].<sup>11</sup>

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<sup>9</sup> To review if these are needed.

<sup>10</sup> This should remain open for discussion although it may be difficult to insure for loss if consequential loss is included.

<sup>11</sup> The term “full insurance» will need to be defined more precisely.

Article XVI  
*International Registry Fee*

1. By way of modification of Article 16 2 (h) of the Convention, the Registrar shall, subject to the approval of the Supervisory Authority, set and may from time to time amend:

(a) the fees to be paid on filing of an international security interest with the International Registry directly [or through a transnational registry authority];

(b) the fee schedule to be paid by the users of the International Registry; and

[(c) the annual fees to be paid as compensation for the operation and administration of the International Registry and the registration facilities.]

2. The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to recover the costs of establishing and implementing (amortised over ten years), operating [and regulating] the International Registry-] as well as the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 16(2) of the Convention provided that nothing herein shall preclude the service provider operating for profit.<sup>12</sup> [Except where it is an autonomous transnational registry authority] if filings are made through a transnational registry authority, such authority shall collect such fees and shall account to the Registrar therefor]<sup>13</sup>.

3. The fees and amounts referred to in paragraph 1 of this Article XVI may be amended by the Registrar taking into account changed economic conditions provided that any increase of the fees and amounts by more than [ten] per cent shall require the approval of the Supervisory Authority. Amounts payable relating to the Supervisory Authority's costs shall be amended on the same basis when required by the Supervisory Authority. Amounts collected relating to the Supervisory Authority's costs shall be remitted by the Registrar to the Supervisory Authority after collection thereof as agreed between them.

Article XVII  
*Modification of assignment provisions*

[Article 32(1) of the Convention applies with the omission of sub-paragraph (c)].

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<sup>12</sup> If the duties are outsourced, it is unrealistic to stipulate that the service is provided without profit. The charges will however be monitored by the Supervisory Authority and we leave it open for Contracting States to decide as a policy issue as to whether the Registrar should be permitted to offer its services at a profit.

<sup>13</sup> This will not be appropriate if Article XIV applies since in that case the transnational registry authority will only need to recover its own costs [but *quare* if the Supervisory Authority's costs need to be recovered by them].

## **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 Articles 41, 42 or 44 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 a[n authenticated] written form that contains a description of the railway rolling stock in the terms as specified in Article IV of this Protocol.

## **CHAPTER V RELATIONSHIP WITH OTHER CONVENTIONS**

### **Article XIX**

#### *Relationship with other Conventions*

The Convention shall, for Contracting States which are parties to it, in the event of any conflict, take precedence over

- (a) the Rome Convention on the Law Applicable to Contractual Obligations 1980;
- (b) the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 (as amended from time to time);
- (c) the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1988;
- (d) the Inter-American Convention on the Law Applicable to International Contracts 1994;
- (e) the Convention Concerning International Carriage by Rail 1980 as modified by the Protocol of modification of 3 June 1999; [and]
- (f) the UNIDROIT Convention on International Factoring and International Financial Leasing of 1988[; and
- (g) the Hague Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 2001]

as they relate to railway rolling stock, to the extent that convention is in force among them and that convention's terms are inconsistent with the provisions of the Convention.<sup>14</sup>

## **CHAPTER VI**

### **[OTHER] FINAL PROVISIONS**

#### Article XX *Adoption of Protocol*

1. Procedures for the adoption of this Protocol shall be determined in accordance with Article 49 of the Convention.
2. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

#### Article XXI *Entry into force*

1. This Protocol enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. For each Contracting State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that Contracting State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

#### Article XXII *Territorial units*

1. If a Contracting State has two or more 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 substitute its declaration by another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which this Protocol extends.

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<sup>14</sup> Generally subject to review by UNIDROIT Secretariat. Each convention will be reviewed to ensure that under their respective terms, Contracting States which are parties or subject thereto may agree to this Article. Possible conflicts with EU Regulations should also be reviewed.

3. If a Contracting State makes no declaration under paragraph 1, this Protocol is to extend to all territorial units of that Contracting State.

Article XXIII  
*Temporal application*

This Protocol applies in a Contracting State to rights and interests in railway rolling stock created or arising on or after the date on which this Protocol enters into force in that Contracting State.<sup>15</sup>

Article XXIV  
*Declarations and reservations*

No declarations or reservations are permitted except those expressly authorised in this Protocol.

Article XXV  
*Declarations modifying the Protocol or certain provisions thereof*<sup>16</sup>

1. A Contracting State at the time of ratification, acceptance, approval of, or accession to this Protocol

(a) may declare that this Protocol shall not apply in the case of a purely internal transaction, namely in relation to railway rolling stock so long as it is only capable, in its normal course of use, of being operated on a single railway system within that Contracting State because of track gauge, other elements of the design of such railway rolling stock, or lack of connection to other railway systems;

(b) may declare that it will impose other conditions on the application of Articles VII to IX as specified in its declaration.

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

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<sup>15</sup> Subject to rules outstanding regarding the priority of security interests in equipment created prior to the Protocol entering into force in a Contracting State (unregistered prior interests). The RWG favours a system whereby there is a significant transition period (e.g. 10 years) during which unregistered prior interests are accorded priority under the Protocol of the date of creation of the interest.

<sup>16</sup> There remains an open question as to whether the overreaching powers and rights of persons or entities appointed under statute and acting under public law (e.g. Franchising Director in the UK) will need to be specifically acknowledged in the Protocol (and Convention) or whether this is the case anyway under general principles concerning application of a private law convention.

Article XXVI  
*Subsequent declarations*

1. A Contracting State may make a subsequent declaration at any time after the date on which the Protocol enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

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 deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

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

4. Declarations made pursuant to Article 38 of the Convention shall be subject to this Article XXVI.

Article XXVII  
*Withdrawal of declarations and reservations*

Any Contracting State which makes a declaration under, or a reservation to this Protocol may withdraw it at any time by a formal notification in writing addressed to 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 the receipt of the notification by the depositary.

Article XXVIII  
*Denunciations*

1. This Protocol may be denounced by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with 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 deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with 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 that denunciation.

Article XXIX  
Review of the Protocol

[At the request of not less than twenty-five per cent of the Contracting States, conferences of the Contracting States shall be convened from time to time,] [A standing conference of Contracting States shall be established pursuant to this Protocol] to consider:

- (a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of railway rolling stock;
- (b) the judicial interpretation given to the terms of the Convention, this Protocol and the regulations;
- (c) the functioning of the international registration system and the performance of the Registrar and its oversight by the Supervisory Authority; and
- (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable

and shall, after expiry of [ten] years after this Protocol is first adopted by a Contracting State, be entitled to replace the Supervisory Authority by resolution [agreed to by two thirds of the Contracting States at that time], such resolution giving not less than one year notice of replacement to the Supervisory Authority.

Article XXX  
*Depositary arrangements*

1. This Protocol shall be deposited with the [UNIDROIT] [Supervisory Authority].
2. The [Supervisory Authority] [UNIDROIT] shall:
  - (a) inform all Contracting States which have signed or acceded to this Protocol and [...] of:
    - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
    - (ii) each declaration made in accordance with this Protocol;
    - (iii) the withdrawal of any declaration;
    - (iv) the date of entry into force of this Protocol; and
    - (v) the deposit of an instrument of denunciation of this Protocol together with the date of its deposit and the date on which it takes effect;
  - (b) transmit certified true copies of this Protocol to all signatory Contracting States, to all Contracting States adopting the Protocol in accordance with Article 49 of the Convention and to [...];

(c) provide the Registrar with the contents of each instrument of ratification, acceptance, approval, accession, declaration or withdrawal of a declaration so that the information contained therein may be made publicly accessible; and

(d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Protocol.

**SPEECH OF HOWARD ROSEN  
CO-ORDINATOR OF THE RAIL WORKING GROUP  
TO A MEETING OF GOVERNMENTAL EXPERTS  
CONSIDERING THE RAIL PROTOCOL TO THE  
DRAFT UNIDROIT CONVENTION ON INTERNATIONAL  
INTERESTS IN MOBILE EQUIPMENT**

**BERNE 15<sup>th</sup> MARCH 2001**

A few months ago I was at a reception and was talking to someone who I knew reasonably well socially. He asked me (as often people do ask) "Howard, what exactly do you do?" I told him that I worked as an international asset finance lawyer with a particular focus on the rail industry. "Ah", he responded, "so you work in a sunset industry?" I have to add that the remark was made in the days when the NASDAQ was comfortably above 2,000 and telecommunications, media and technology were seen as progressive "sunrise" industries. My friend was very puzzled by my strong reaction to his remark. If any industry was going to blossom in the 21<sup>st</sup> Century, I told him, it would be the railway sector. The overcrowding of the roads and of the skies, growing populations and, in particular, the social and environmental benefits that would arise and that would be demanded. But in one respect my friend was right to be sceptical. Despite considerable improvements over the last few years, the railway systems of the world are generally still quite inefficient. In many countries, the railway system is seen as a "national treasure", to be cosseted and protected and, outside of North America, funded predominately by the State directly or via the financial markets with Government guarantees. However, Government budgets get tighter by the year and capital expenditure is the first to suffer any reduction in public spending. One only needs to look at the sad catalogue of disasters that have occurred in the UK over the past few years, which are, as most agree, due to decades of under-investment in both rolling stock and infrastructure. You see the inefficiencies elsewhere. In Europe freight traffic by rail has hardly increased over the last 20 years whereas by road it has grown exponentially.

As I have already mentioned, the reason for this sorry state of affairs has been that most capital investment by the railways has been almost exclusively from shrinking state budgets. Whatever money is made available is often spent with a political rather than an economic agenda, greater efficiencies are not encouraged and if the State runs out of money, the investment is simply postponed.

But it need not be like this. If we can open up the railway sector to more private sector investment, it will reduce the strain on Government budgets and at the same time make more resources available. It will also (and governments will need to recognise that this will be resisted initially by state rail monopolies) permit the entrance of new operators into the market, placing existing operators under direct competitive pressure to be more customer responsive. This in turn should deliver major efficiencies and deliver significant benefits to the taxpayer. There will also be a significant economic impact, for example by facilitating new faster train sets which therefore

can be used more often on a specific route in a day, wagons with state of the art braking systems which can then travel considerably faster on a restricted track capacity, not only getting freight from A to B more quickly but also allowing more efficient use of track capacity, financing locomotives (both passenger and freight) with new multi-voltage and multi-signaling capabilities, allowing them to cross various borders in Europe). A Wall Street Journal article printed some months ago, estimated the average speed of freight on rail across Europe between 12 - 13 km/h. It is no wonder that the sun is still struggling to rise on the railway sector.

Today, we are part of an historic move forward to change that state of affairs. For the last 8 years, I, together with colleagues from the railway industry, have been working to create an international legal framework to encourage private sector investment in the railway sector. We have made considerable progress and hopefully, with your assistance, at the end of this week we will have created a very strong platform for the future.

There is both a political and an economic case for pursuing this objective of facilitating private investment in rolling stock. Politically, the project provides a framework under which the private financial markets not only provide resources for the railway sector in a secure manner but also exercise control of the way that those funds are utilised in a way that will benefit the industry as a whole. Moreover, it also opens up the prospect of private sector funding into less credit worthy regions. There are railways at the moment in Central Europe which are desperate to renew their rolling stock fleet. The manufactures are desperate to manufacture the rolling stock and to supply to the railways, but there is no money. Railway infrastructure is fundamental to the economic development of these countries. By facilitating this development, the world community can reap huge rewards. Similarly in other transitional or developing countries, either in Africa or Asia, where, oftentimes, a railway infrastructure already exists, the possibility of rolling stock being upgraded would make an enormous difference not just to the specific industry but also to the overall development of those countries. At the moment, much funding comes from fiercely fought over aid budgets allocated by more developed countries and it is never enough. How much easier is it for those countries just to underwrite a legal framework and let the private sector carry the financial burden rather than dig deeper in the pockets of their taxpayers and transfer resources which could also be used at home or elsewhere abroad. Moreover, by involving the private sector, a dynamic is created for proper targeting and monitoring of the use of the funding without cost, in money or people, to governments.

And there is also an overwhelming economic case. At the moment, the RailWorking Group has commissioned a study by the Center for Economic Analysis of Law in Washington. The study at the moment is at preliminary stage but will be published later this year. Already however, the figures coming out from the study are stunning. By facilitating more investment, not only are there direct economic benefits to various economies through the more efficient use of the railway system, but there are considerable knock-on effects both in the road and other transportation sectors as well as in the manufacturing side. In the latter the expertise to build the rolling stock exists but is being lost because of insufficient orders and therefore significant consolidation (and redundancies) in the manufacturing sector. By creating a more secure framework for the private sector to lend, it will reduce the cost to borrowers (as the risks diminish) and at the same time, by bringing in new entrants into the market, create more competition for borrowers, which should also drive down funding rates considerably. Moreover, not only do the number of lenders increase, but the type of debt available also expands. Securitisation – effectively issuing bonds backed by receivables, purchased mainly by institutions and pension funds – becomes a more realistic option. Even extrapolated over current procurement plans in the railway sector, this can

obviously save many billions of dollars. If, however, it encourages the development of the railway sector and increased procurement, then of course the economic benefits will be magnified. Looking to the UK again, on the more positive side, investment in rolling stock has boomed since the operators were allowed, indirectly, to access the financial markets for funding.

So I would like to thank you for all being here today and being part of a movement which promises enormous benefits in the coming decades. The RailWorking Group values all of your opinions and I am sure that we will have some animated discussions over particular issues. Hopefully, there will be no political agendas and we can work together constructively, private sector and public sector, to fashion solutions and compromises as necessary to make this whole idea work. We have had to wait a long time to be able to look at the railway sector again as a revived and valued part of economic development worldwide but in the next two days we can make a considerable contribution to stimulating a long awaited renaissance of the railway industry. There is a light at the end of the tunnel even it is the headlights of the privately financed locomotive hurtling towards us.

Howard Rosen

## ATTACHMENT B

### List of working papers

Provisional Agenda

OTIF/JGR/1

UNIDROIT 2000  
CGERail/Int.Int./Agenda

Draft UNIDROIT Convention on International Interests  
in Mobile Equipment

UNIDROIT 2000

Study LXXIIIH - Doc. 3

Preliminary Draft Protocol on Matters specific  
to Railway Rolling Stock

OTIF/JGR/2

UNIDROIT 2000

Study LXXIIIH - Doc. 4

## ATTACHMENT C

### Agenda

1. Election of a Chairman
2. Adoption of the agenda
3. Presentation of the draft UNIDROIT Convention on International Interests in Mobile Equipment
4. Examination of the preliminary draft Protocol on Matters specific to Railway Rolling Stock (preliminary draft Rail Protocol)
5. Future work
6. Miscellaneous