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**OTIF**



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INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL  
CARRIAGE BY RAIL

**DIPLOMATIC CONFERENCE TO ADOPT A  
RAIL PROTOCOL TO THE CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE  
EQUIPMENT**

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## **PROPOSAL TO INCLUDE CONTRACTS OF SALE IN THE DRAFT RAIL PROTOCOL**

(presented by the Rail Working Group (RWG))

Historically, the Cape Town Convention was not intended to deal with outright sales, only with security, title reservation and leasing agreements. However for various reasons the Convention was extended to contracts of sale in the Protocol to the Cape Town Convention on matters specific to aircraft equipment (the Aviation Protocol). Recently our members have indicated that state or bank owned lessors owning railway rolling stock, but financing such equipment without external secured finance, will be concerned that there is no possibility, in the current draft Rail Protocol, for them to have their sales to them registered at the international registry although the security interests and rights of conditional sellers and lessors in the same equipment will be registrable. Unlike the aviation industry, there are virtually no national registries registering transfers under contracts of sale.

To be as effective as possible, the Rail Protocol should, in our view, eventually cover as much of the world's rolling stock fleet as possible. Without the capacity or need to register outright sales, much of the fleet will be without the protection of the Protocol where it is held without security interests being created or conditional sale or leasing agreements being concluded. On the other hand, without such protection, it may be difficult, if not impossible, for an outright purchaser to protect its priority or safeguard itself against fraudulent sales, particularly if local law does not provide for registration of transfers under contracts of sale. Other unauthorised lessors and secured parties with interests in this equipment may also register interests in conflict with those of the owner because of the lack of notice of the true owner.

Accordingly, we propose to bring the Rail Protocol into line with the Aviation Protocol by making outright sales registrable as if they created international interests. Detailed suggestions for amendments are set out below but we wish to draw attention to the small variation in

Article III *bis* 4. where, unlike the Aviation Protocol, Article 60 is not excluded from the application of Chapter XIV of the Convention. Article 60, as modified by Article XXVI of the draft Rail Protocol, deals with the application of the [Rail Protocol] to interests pre-existing the date of the Protocol coming into force. The discussion on when pre-existing interests should need to be registered to retain priority is a separate issue but we would suggest that, in principle, Article 60 should also apply to transfers of title taking place prior to the Protocol coming into force.

The suggested change to Article IV shows also in square brackets wording which the Rail Working Group has proposed, in another submission (DCME-RP – Doc. 11), to be deleted.

One further point should be mentioned. In the United Kingdom, railway rolling stock was transferred by a government agency by statute rather than contract of sale and this could apply in other jurisdictions in the future. If it is not clear that the definition of “contract of sale” in the Convention would include transfers of title under statute, then we would ask for this to be made clear, with amendments to Article III *bis* proposed below as appropriate.

### **Proposed changes to the Draft Protocol**

#### **Preamble**

MINDFUL of the need to adapt the Convention to meet the particular requirements of railway rolling stock and their finance and to extend the sphere of application of the Convention to include sales and prospective sales of railway rolling stock,

**After Article III** add:

*Article III bis*  
*Application of Convention to sales*

1. For the purposes of this Protocol, a contract of sale is one which:
  - (a) is in writing;
  - (b) relates to an item of railway rolling stock of which the seller has power to dispose;  
and
  - (c) enables the item of railway rolling stock to be identified in conformity with this Protocol.
2. A contract of sale transfers the interest of the seller in the item of railway rolling stock to the buyer according to its terms.
3. Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.
4. The following provisions of the Convention apply as if references to an agreement creating or providing for an international interest were references to a contract of sale and as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a sale, a prospective sale, the seller and the buyer respectively:

Articles 3 and 4;  
Article 16(1)(a);  
Article 19(4);  
Article 20(1) (as regards registration of a contract of sale or a prospective sale);  
Article 25(2) (as regards a prospective sale); and  
Article 30.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XI *bis* (1)), Chapter X, Chapter XII (other than Article 43), Chapter XIII and Chapter XIV shall apply to contracts of sale and prospective sales.

**Article IV** to be modified as follows:

*Article IV*  
*Representative capacities*

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

**Article VI** to be modified as follows:

*Article VI*  
*Choice of law*

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

**After Article XI** add:

*Article XI bis*  
*Modification of priority provisions*

1. A buyer of an item of railway rolling stock under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

2. A buyer of an item of railway rolling stock under a registered sale acquires its interest in that item subject to an interest registered at the time of registration of the sale.

**Article XII** to be modified as follows:

*Article XII*  
*Debtor provisions*

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

(a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention or, in the capacity of buyer, Article XI bis (1) of this Protocol, unless and to the extent that the debtor has otherwise agreed; and

(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention or, in the capacity of buyer, Article XI bis (2) of this Protocol, but only to the extent, if any, that such holder has agreed.

**Article XVII (2)** to be modified as follows:

*Article XVII*  
*Additional modifications to Registry provisions*

2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest or the person in whose favour a prospective sale has been registered shall take such steps as are within its power to procure the discharge of the registration no later than 10 calendar days after the receipt of the demand described in such paragraph.

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