

# **LUXEMBOURG PROTOCOL**

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

**Signed in Luxembourg on 23 February 2007**

**COPY CERTIFIED AS BEING  
IN CONFORMITY WITH THE ORIGINAL**

**THE SECRETARY GENERAL**



**JOSE ANGELO ESTRELLA FARIA**



**LUXEMBOURG**

**23 FEBRUARY 2007**

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

**PREAMBLE**

**CHAPTER I                    SPHERE OF APPLICATION AND GENERAL PROVISIONS**

Article I	Defined terms
Article II	Application of Convention as regards railway rolling stock
Article III	Derogation
Article IV	Representative capacities
Article V	Identification of railway rolling stock in the agreement
Article VI	Choice of law

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

Article VII	Modification of default remedies provisions
Article VIII	Modification of provisions regarding relief pending final determination
Article IX	Remedies on insolvency
Article X	Insolvency assistance
Article XI	Debtor provisions

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

Article XII	The Supervisory Authority and the Registrar
Article XIII	Designated entry points
Article XIV	Identification of railway rolling stock for registration purposes
Article XV	Additional modifications to Registry provisions
Article XVI	International Registry fees
Article XVII	Notices of sale

**CHAPTER IV                JURISDICTION**

Article XVIII	Waivers of sovereign immunity
---------------	-------------------------------

**CHAPTER V                RELATIONSHIP WITH OTHER CONVENTIONS**

Article XIX	Relationship with the UNIDROIT Convention on International Financial Leasing
Article XX	Relationship with the Convention concerning International Carriage by Rail (COTIF)

## **CHAPTER VI**

## **FINAL PROVISIONS**

Article XXI	Signature, ratification, acceptance, approval or accession
Article XXII	Regional Economic Integration Organisations
Article XXIII	Entry into force
Article XXIV	Territorial units
Article XXV	Public service railway rolling stock
Article XXVI	Transitional provisions
Article XXVII	Declarations relating to certain provisions
Article XXVIII	Reservations and declarations
Article XXIX	Declarations under the Convention
Article XXX	Subsequent declarations
Article XXXI	Withdrawal of declarations
Article XXXII	Denunciations
Article XXXIII	Review Conferences, amendments and related matters
Article XXXIV	Depositary and its functions



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

THE STATES PARTIES TO THIS PROTOCOL

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

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

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

**Chapter I**

Sphere of application and general provisions

**Article I — Defined terms**

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.
2. In this Protocol the following terms are employed with the meanings set out below:
  - (a) "guarantee contract" means a contract entered into by a person as guarantor;
  - (b) "guarantor" means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;
  - (c) "insolvency-related event" means:
    - (i) the commencement of the insolvency proceedings; or
    - (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;
  - (d) "primary insolvency jurisdiction" means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;

- (e) "railway rolling stock " means vehicles movable on a fixed railway track or directly on, above or below a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto.

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

1. The Convention shall apply in relation to railway rolling stock as provided by the terms of this Protocol.
2. The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to railway rolling stock.

## **Article III — Derogation**

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

## **Article IV — Representative capacities**

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

## **Article V — Identification of railway rolling stock in the agreement**

1. For the purposes of Article 7(c) of the Convention and Article XVIII(2) of this Protocol, a description of railway rolling stock is sufficient to identify the railway rolling stock if it contains:
  - (a) a description of the railway rolling stock by item;
  - (b) a description of the railway rolling stock by type;
  - (c) a statement that the agreement covers all present and future railway rolling stock;  
or
  - (d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.
2. For the purposes of Article 7 of the Convention, an interest in future railway rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer.

## **Article VI — Choice of law**

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXVII.
2. The parties to an agreement or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.
3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

## **Chapter II**

### **Default remedies, priorities and assignments**

#### **Article VII — Modification of default remedies provisions**

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of railway rolling stock from the territory in which it is situated.
2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.
3. Article 8(3) of the Convention shall not apply to railway rolling stock. Any remedy given by the Convention in relation to railway rolling stock shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.
4. A chargee giving fourteen or more calendar days' prior written notice of a proposed sale or lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the "reasonable prior notice" specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.
5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.
6. A chargee proposing to procure the export of railway rolling stock under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:
  - (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and
  - (b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the export.

### **Article VIII — Modification of provisions regarding relief pending final determination**

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII and to the extent stated in such declaration.
2. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.
3. Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):
  - “(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”,and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.
  4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.
  5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.
6. With regard to the remedies in Article VII(1):
  - (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the creditor notifies such authorities that the relief specified in Article VII(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and
  - (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.
7. Paragraphs 2 and 6 shall not affect any applicable safety laws and regulations.

### **Article IX — Remedies on insolvency**

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII.
2. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.



*Alternative A*

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the railway rolling stock to the creditor no later than the earlier of:
  - (a) the end of the waiting period; and
  - (b) the date on which the creditor would be entitled to possession of the railway rolling stock if this Article did not apply.
4. For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
5. Unless and until the creditor is given the opportunity to take possession under paragraph 3:
  - (a) the insolvency administrator or the debtor, as applicable, shall preserve the railway rolling stock and maintain it and its value in accordance with the agreement; and
  - (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve the railway rolling stock and maintain it and its value.
7. The insolvency administrator or the debtor, as applicable, may retain possession of the railway rolling stock where, by the time specified in paragraph 3, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.
8. With regard to the remedies in Article VII(1):
  - (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
  - (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.
9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.
10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.
11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

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

*Alternative B*

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

- (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
- (b) give the creditor the opportunity to take possession of the railway rolling stock, in accordance with the applicable law.

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

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

6. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 3, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the railway rolling stock but fails to do so, the court may permit the creditor to take possession of the railway rolling stock upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

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

*Alternative C*

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

- (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
- (b) give the creditor the opportunity to take possession of the railway rolling stock in accordance with the applicable law.

4. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the "suspension period"). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.

5. If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the railway rolling stock pending an order of the court. If the application is not granted within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

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

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

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

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

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

- (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

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

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

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

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

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

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

## **Article X — Insolvency assistance**

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXVII(1).
2. 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.

## **Article XI — Debtor provisions**

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the railway rolling stock in accordance with the agreement as against:
  - (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention unless and to the extent that the debtor has otherwise agreed; and
  - (b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.
2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to railway rolling stock.

## **Chapter III**

Registry provisions relating to international interests in railway rolling stock

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

1. The Supervisory Authority shall be a body established by representatives, one representative to be appointed:
  - (a) by each State Party;
  - (b) by each of a maximum of three other States to be designated by the International Institute for the Unification of Private Law (UNIDROIT); and
  - (c) by each of a maximum of three other States to be designated by the Intergovernmental Organisation for International Carriage by Rail (OTIF).
2. In the designation of the States referred to in sub-paragraphs (b) and (c) of the preceding paragraph regard shall be had to the need to ensure broad geographical representation.
3. The term of appointment of the representatives appointed pursuant to sub-paragraphs (b) and (c) of paragraph 1 shall be that specified by the designating Organisations. The terms of those representatives serving on the date when this Protocol enters into force for the tenth State Party shall expire no later than two years after that date.

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

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

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

- (a) persons nominated by Signatory and Contracting States and having the necessary qualifications and experience; and
- (b) other experts as necessary

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

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

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

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

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

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

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

### **Article XIII — Designated entry points**

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

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

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

1. For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe a system for the allocation of identification numbers by the Registrar which enable the unique identification of items of railway rolling stock. The identification number shall be:
  - (a) affixed to the item of railway rolling stock;
  - (b) associated in the International Registry with the manufacturer's name and the manufacturer's identification number for the item so affixed; or
  - (c) associated in the International Registry with a national or regional identification number so affixed.
2. For the purposes of the preceding paragraph, a Contracting State may, by declaration, state the system of national or regional identification numbers that shall be used with respect to items of railway rolling stock subject to an international interest that is created or provided for, or is intended to be created or provided for, by an agreement entered into by a debtor situated in that Contracting State at the time of the conclusion of that agreement. Such a national or regional identification system shall, subject to agreement between the Supervisory Authority and the Contracting State making the declaration, ensure the unique identification of each item of railway rolling stock to which the system applies.
3. A declaration by a Contracting State according to the preceding paragraph shall include detailed information on the operation of the national or regional identification system.
4. A registration in respect of an item of railway rolling stock for which a declaration pursuant to paragraph 2 has been made shall, in order for the registration to be valid, specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol under Article XXIII(1) and the time during which each number has applied to the item.

#### **Article XV — Additional modifications to Registry provisions**

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by the regulations.
2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than ten calendar days after the receipt of the demand described in such paragraph.
3. Where a subordination has been registered and the obligations of the debtor to the beneficiary of the subordination have been discharged, the beneficiary shall procure the discharge of the registration no later than ten calendar days after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

5. The Registrar shall be liable under Article 28 (1) of the Convention for loss caused up to an amount not exceeding the value of the railway rolling stock to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.

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

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

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

#### **Article XVI — International Registry fees**

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

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

#### **Article XVII — Notices of sale**

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

### **Chapter IV**

#### Jurisdiction

#### **Article XVIII — Waivers of sovereign immunity**

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

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

## **Chapter V**

### Relationship with other Conventions

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

The Convention shall, to the extent of any inconsistency, prevail over the *UNIDROIT Convention on International Financial Leasing*, signed in Ottawa on 28 May 1988.

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

The Convention shall, to the extent of any inconsistency, prevail over the *Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999*.

## **Chapter VI**

### Final provisions

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

1. This Protocol shall be open for signature in Luxembourg on 23 February 2007 by States participating in the diplomatic Conference to adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment held at Luxembourg from 12 to 23 February 2007. After 23 February 2007 this Protocol shall be open to all States for signature at the Headquarters of UNIDROIT in Rome until it enters into force in accordance with Article XXIII.
2. This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.
3. Any State which does not sign this Protocol may accede to it at any time.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary.
5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.



## **Article XXII — Regional Economic Integration Organisations**

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a "Contracting State" or "Contracting States" or "State Party" or "States Parties" in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

## **Article XXIII — Entry into force**

1. This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:
  - (a) the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession, and
  - (b) the date of the deposit by the Secretariat with the Depositary of a certificate confirming that the International Registry is fully operational.
2. For other States this Protocol enters into force on the first day of the month following the later of:
  - (a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and
  - (b) the date referred to in sub-paragraph (b) of the preceding paragraph.

## **Article XXIV — Territorial units**

1. If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
2. Any such declarations are to be notified to the Depositary and shall state expressly the territorial units to which this Protocol applies.
3. If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

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

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

- (a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;
- (b) any reference to the location of the railway rolling stock in a Contracting State refers to the location of the railway rolling stock in a territorial unit to which the Convention and this Protocol apply; and
- (c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.

#### **Article XXV — Public service railway rolling stock**

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

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

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

- (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and
- (b) the market lease rental in respect of such railway rolling stock.

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

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

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

6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

#### **Article XXVI — Transitional provisions**

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

- (a) in paragraph 2(a), after "situated" insert "at the time the right or interest is created or arises";
- (b) replace paragraph 3 with the following:

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

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

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

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

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

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

### **Article XXVIII — Reservations and declarations**

1. No reservations may be made to this Protocol but declarations authorised by Articles XIII, XIV, XXIV, XXV, XXVII, XXIX and XXX may be made in accordance with these provisions.
2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

### **Article XXIX — Declarations under the Convention**

1. Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol unless stated otherwise.
2. For the purposes of Article 50(1) of the Convention, an "internal transaction" shall also mean, in relation to railway rolling stock, a transaction of a type listed in Article 2(2)(a) to (c) of the Convention where the relevant railway rolling stock is only capable, in its normal course of use, of being operated on a single railway system within the Contracting State concerned, because of track gauge or other elements of the design of such railway rolling stock.

### **Article XXX — Subsequent declarations**

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.
2. Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

### **Article XXXI — Withdrawal of declarations**

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXIX under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.
2. Notwithstanding the preceding paragraph, this Protocol shall continue to apply, as if no such withdrawal had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

### **Article XXXII — Denunciations**

1. Any State Party may denounce this Protocol by notification in writing to the Depositary.
2. Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.
3. Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

### **Article XXXIII — Review Conferences, amendments and related matters**

1. The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.
2. At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:
  - (a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;
  - (b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;
  - (c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and
  - (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.
3. Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by four States in accordance with the provisions of Article XXIII relating to its entry into force.

### **Article XXXIV — Depositary and its functions**

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

2. The Depositary shall:

(a) inform all Contracting States of:

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

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

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

(d) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

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

## EXPLANATORY MEMORUNDAM

Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the Protocol) is a multilateral treaty that establishes an international, asset-based, financing regime that will enable and reduce the cost of private financing for rail rolling stock. It is a Protocol to the Convention on International Interests in Mobile Equipment (Cape Town Convention) of 2001. South Africa is a party to the Cape Town Convention already and Aircraft Protocol and has incorporated them into South African law through the Convention on International Interests in Mobile Equipment Act, 2007 (Act No. 4 of 2007).

The Minister of Transport signed the Protocol on the 22 March 2022. Protocol must still be ratified by South Africa since the Protocol falls within the scope of section 231(2) of the Constitution of the Republic of South Africa, 1996 it requires Parliamentary approval before it is ratified.

The Protocol benefits South Africa by improving the availability and reducing the cost of private finance for rolling stock. The Luxembourg Protocol is aligned with the recommendations of the National Development Plan (NDP) and the Economic Reconstruction and Recovery Plan (ERRP), which call for greater private sector participation in key sectors of the economy and reinforces the need for Government to intensify efforts to attract private sector investment and skills in the delivery of operations. The two principal rail operators in South Africa's rolling stock is valued at over R84.9 billion (\$5 billion) with one of the key constraints for growth in the rail market being the availability of funding. The protocol is estimated to produce savings on refinancing of rolling stock in Africa will be of R33,9 billion (\$400 million).

The Protocol falls within the ambit of section 231(2) of the Constitution and binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.



# international relations & cooperation

Department:  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)  
Private Bag X 152, PRETORIA, 0001 · OR Tambo Building, 460 Soutpansberg Road, Rietondale, PRETORIA, 0084  
Telephone +27 (0) 12 351 0857 · Facsimile +27 (0) 12 329 1721 · www.dirco.gov.za

22kinge110901  
File: 10/16/22/3  
RO 200/2022

Ms M Daniel  
Directorate: Benelux and German Speaking Countries  
Route: danielm

## LEGAL OPINION ON THE ADDITIONAL DECLARATIONS ON THE LUXEMBOURG PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK

1. Your request for legal advice under reference 17/1/4/LUX/L5, refers.
2. Background:
  - 2.1 The Department of Transport previously opted for Form 27 of the Declaration, which was vetted by both the State Law Advisors at the Department of Justice and Constitutional Development and OCSLA (IL).
  - 2.2 The Department of Transport met with the Chairperson of the Railway Working Group from Switzerland, correspondent of UNIDROIT, and advised that South Africa should in addition to Form 27, make further 6 additional declarations on the Luxembourg Protocol. The further declarations to be made by South Africa are Form 6 (Annexure C), Form 11 (Annexure D), Form 18 (Annexure E), Form 19 (Annexure F), Form 21 (Annexure G) and Form 28 (Annexure H)
  - 2.3 The additional declarations will be added as an appendix to be approved by Cabinet.
3. Discussion:
  - 3.1 Our previous legal opinion under RO 406/2018, dated 04 December 2018 should also be read together with this opinion.
  - 3.2 We note that a legal opinion under reference 174/2022/23A+B, dated 2 September 2022 was obtained from the Department of Justice and Constitutional Development (DOJCD), which indicates that the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the agreement), which indicates that the agreement is not in conflict with South African law. DOJCD also indicated that it is of the opinion that the agreement must be dealt with in accordance with Section 231 (2) of the Constitution, 1996 (the Constitution).

**CONFIDENTIALITY NOTE:** This communication may contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the communication to the intended recipient you are hereby notified that any dissemination, distribution, copying, publication or consumption of the communication is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (International Law) immediately by telephone, and return the original communication and any copies thereof to the Office of the Chief State Law Adviser (International Law).

*Batho Pele – putting people first*



- 3.3. It is our view that the agreement is consistent with international law and South Africa's international obligations. The agreement is regarded as an international agreement that falls within the ambit of section 231(2) of the Constitution and Presidential approval is required before the agreement can be signed subject to ratification. The agreement must also be approved by resolution in both the National Assembly and the National Council of Provinces before it is considered binding on the Republic in accordance with section 231 (2) of the Constitution.
- 3.4. In order to obtain Parliamentary approval, the agreement needs to be certified by this Office. The documentation required for certification consists of:
- two copies of the text of the President's Minute indicating authority for signature subject to ratification;
  - two copies of the Explanatory Memorandum setting out the purpose of the agreement and proposed date of signature, as well as the beneficial impact of the agreement for South Africa and how it relates to the implementation of the National Development Plan and government priorities;
  - two copies of the finally agreed text of the agreement;
  - two copies of the certificate by the relevant Minister that certifies the text of a multilateral agreement supplied as a true version;
  - two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office;
  - completed certification checklist (attached herewith); and
- 3.5. The documents must be contained in the Z137 Folder and must **not** be stapled together. The certification checklist should also be completed and submitted at the time of certification. A copy of the checklist is enclosed for ease of reference. Once certification is complete, this Office will contact the responsible line function department for collection of the original documents before submission to the Presidency.
- 3.6. Following certification, the Presidency must be approached to obtain a President's Minute. A President's Minute is the instrument through which the National Executive (constituted by the President in conjunction with the responsible line function Minister) grants prior authorisation for a Minister to sign an international agreement. Failure to obtain the approval translates into Constitutional non-compliance, and no powers to authorise the retrospective or *ex post facto* creation of a President's Minute exists. If an international agreement was signed without the necessary domestic/Constitutional authorisations, it must be regarded as void in terms of South African law. It may also hold serious political and legal implications in that, contrary to the domestic law position, international law may regard the international agreement as binding.
- 3.7. Following the process to obtain the Presidential Minute, the agreement must be submitted to Parliament in the following manner:
- Approach the relevant cabinet portfolio committee:
- The line function department must prepare a Cabinet Memorandum. The various Cabinet Committees may have their own requirements for the format of Cabinet Memoranda. The usual headings required are: Subject; Purpose; Summary;

Discussion; Organisational and Personnel Implications; Financial Implications; Communication Implications, Constitutional Implications; Other Departments/Bodies consulted; Recommendations.

- The agreement must be considered by Parliament (National Assembly and National Council of Provinces):
    - (a) The line function department must prepare an Explanatory Memorandum setting out the history, objectives and implications of the agreement;
    - (b) The legal opinions from the State Law Advisors of both Departments (DOJ&CD and DIRCO) must be included;
    - (c) It must be stated whether the agreement contains any self-executing provisions in terms of section 231(4) of the Constitution;
    - (d) The projected financial and other costs of the agreement must be set out;
    - (e) The Explanatory Memorandum must contain all other information needed to take an informed decision.
- 3.8. The Instrument of Ratification must be deposited with the Depository:
- The Line Function Department must prepare the Instrument of Ratification and submit it to the South African Treaty Section within DIRCO;
  - The Minister of International Relations and Cooperation must sign the Instrument of Ratification.
  - DIRCO will send the Instrument of Ratification to the relevant depository through the diplomatic channels.
- 3.9. The agreement must be deposited with the Treaty Section at DIRCO. The documents required are:
- A certified copy of the agreement;
  - The President's Minute or Parliamentary authorisation; and
  - A Copy of the signed Instrument of Ratification.
- 3.10. Please ensure that the South African Treaty Section is kept involved in this process at all times, to ensure that our records remain accurate.
4. Legal Privilege and Confidentiality. Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely for the consumption of the client, desk or Department, and may not be freely disclosed to any third party, foreign State or international organisation without the express consent of the client, after taking legal advice from Departmental legal advisers. In the event that the client releases this opinion to a party that is legally entitled to it (e.g. auditors) the third party must be informed that they are under a legal obligation to maintain the confidentiality and legal privilege of the legal opinion, and also implement measures that will prevent unauthorised disclosure of the legal opinion.
5. It is trusted that you will find our comments of some assistance.



**ELLOUISE KING**  
**STATE LAW ADVISER (INTERNATIONAL LAW)**

**PRETORIA**  
**14 NOVEMBER 2022**

**GENERAL NOTE TO ALL CLIENTS:** Kindly factor no less than a 10-working day lead time into all requests for routine legal opinions in future, and for complex requests, kindly allow additional time as may be appropriate.



**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

**OFFICE OF THE CHIEF STATE LAW ADVISER**

18th Floor, The Box, 9 Riebeeck Street, Cape Town, 8001  
Tel (021) 441-4900 Fax (021) 421-7923

Ref: 174/2022/23A+B  
Enq: C Nicholson  
Tel: (021) 441-4933  
E-mail: [CNicholson@justice.gov.za](mailto:CNicholson@justice.gov.za)  
Website: [www.justice.gov.za](http://www.justice.gov.za)  
Date: 2 September 2022

Mr A Moemi  
Director-General  
Department of Transport  
Private Bag X193  
PRETORIA  
0001

Attention: Ms Nyembezi Letsoalo  
[Letsoalon@dot.gov.za](mailto:Letsoalon@dot.gov.za)

Dear Mr Moemi

**REQUEST FOR LEGAL OPINION ON THE ADDITIONAL DECLARATIONS ON  
THE LUXEMBOURG PROTOCOL TO THE CONVENTION ON INTERNATIONAL  
INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO RAILWAY  
ROLLING STOCK  
YOUR EMAIL DATED 23 AUGUST 2022**

**INTRODUCTION**

1. The Department of Transport ("the Department"), has on 23 August 2022 submitted to the Office of the Chief State Law Adviser ("OCSLA") copies of declarations made under the Convention on International Interests in Mobile Equipment, 2001 ("Convention") and the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ("the Protocol"), for scrutiny.
2. The Protocol was previously considered by OCSLA under reference 319/2018/19 dated 30 November 2018 ("initial legal opinion") in light of the Constitution of the Republic of South Africa, 1996 ("Constitution"), Chapter 5 of the

*Manual on Executive Acts of the President of the Republic of South Africa* ("Manual"), Chapter 5 of the *Constitutional Handbook for Members of the Executive*, relevant legislation and applicable legal prescripts.

3. OCSLA also previously considered draft Form No. 27 under reference 07/2022/23A+B dated 12 May 2022 ("our previous legal opinion") which provides for a declaration under Article XXVII(3) in respect of Article IX providing for the application of Alternative C of the latter to all types of insolvency proceeding.

4. The Department indicated that the Chairperson of the Railway Working Group, from Switzerland, correspondent of the International Institute for the Unification of Private Law ("UNIDROIT") as Depositary, requested the Department to make further additional declarations in addition to draft Form No. 27 as per our previous legal opinion.

5. Although the Protocol was signed on 22 March 2022, paragraph 5.2 of the Manual provides that the signature of a Protocol does not mean that the country is bound by the Protocol. The Protocol must still be ratified by the Contracting State in accordance with its own procedure for so agreeing to be bound by the Protocol.

6. The Department advised that they are in the process of submitting the Protocol to Cabinet for approval and thereafter to Parliament for ratification in terms of section 231(2) of the Constitution. The declarations will be added as addendum to the Protocol to be approved by Cabinet.

## **DISCUSSION**

7. We have considered our initial and previous legal opinion and we remain of the view that—

7.1 the Convention and the Protocol must be read and interpreted together as a single instrument;

7.2 the Protocol is a multilateral agreement;

7.3 alternative C under Article IX of the Protocol which is subject to Article VII of

the Protocol appears to be a perfection clause and is constitutionally sound;

7.4 the Protocol falls within the purview of section 231(2) of the Constitution and binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces;

7.5 since the Convention has been incorporated into South African domestic law by the Convention on International Interests in Mobile Equipment Act, 2007 (Act No. 4 of 2007) ("the Act"), it follows that the same would apply to the Protocol which would require the Act to be amended;

7.6 we are satisfied that draft Form No. 27 which provides for a declaration under Article XXVII(3) in respect of Article IX providing for the application of Alternative C of the latter to all types of insolvency proceeding is consistent with what is required under the Protocol to give effect to the declaration under Article XXVII(3) in respect of Article IX which provides for the application of Alternative C of the latter to all types of insolvency proceeding; and

7.7 the Protocol is consistent with the Constitution and the domestic laws of the Republic of South Africa.

8. The Memorandum of Declarations which provides for a system of declarations under the Convention on International Interests in Mobile Equipment as applied to Railway Rolling Stock<sup>1</sup> ("Memorandum of Declarations"), in paragraph 18 provides for the use of declaration forms, and state that Contracting States may lodge declarations in any form that complies with the requirements of the Convention and Protocol. However, UNIDROIT as Depositary, encourages all Contracting States to base their declarations on the declaration forms in the Memorandum of Declarations to ensure that their declarations comply with the requirements of the Convention and the Protocol.

9. The Memorandum of Declarations intends to ensure that Contracting States make their declarations in full compliance with the terms of the Convention and the Protocol and provides for certain forms to be used for declarations.

---

<sup>1</sup> Prepared by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) as Depositary, 2009, Memorandum of Declarations, DC 10/DEP Doc. 1.

10. Part II of the Memorandum of Declarations contain the Model Declaration Forms which are to be used by States under the Convention. Part III of the Memorandum of Declarations contain the Model Declaration Forms which are to be used by States under the Protocol.

11. Forms No. 6, 11, and 18 are Model Declaration Forms which are to be used by States under the Convention and Forms No. 19, 21 and 28 are Model Declaration Forms which are to be used by States under the Protocol.

12. For the purposes of this legal opinion we shall consider draft Forms No. 6, 11, 18, 19, 21 and 28 which provides for declarations under Articles 40; 53 and 60(1) of the Convention respectively; and declarations under Article XXVII(1) in respect of Articles VI and X; and Article XXVII(2) in respect of Article VIII providing for the application of the entirety of Article VIII of the Protocol respectively.

#### **Form No. 6**

13. Article 40 of the Convention provides for a declaration relating to registrable non-consensual rights or interests and reads as follows:

***“Article 40 – Registrable non-consensual rights or interests***  
*A Contracting State may at any time in a declaration deposited with the Depository of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.”.* (Our underlining)

14. A Contracting State may in terms of Article 40 of the Convention deposit with UNIDROIT as Depository of the Protocol list the categories of non-consensual right or interest which shall be registrable under the Convention as regards any category of object as if the right or interest were an international interest. In addition, a declaration made in terms of this Article may be modified from time to time.

15. Draft Form No. 6 which provides for a declaration under Article 40 of the Convention which was submitted by the Department for our consideration is a duplicate copy of Form No. 6 contained in the Memorandum of Declarations and complies with Article 40 of the Convention.

16. We are satisfied that draft Form No. 6 which provides for a declaration under Article 40 of the Convention relating to categories of non-consensual right or interest is consistent with what is required under Article 40 of the Convention.

#### **Form No. 11**

17. Article 53 of the Convention provides for a declaration relating to the determination of courts and reads as follows:

***“Article 53 – Determination of courts***

*A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of this Convention.* (Our underlining)

18. A Contracting State may in terms of Article 53 of the Convention declare the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of the Convention.

19. Draft Form No. 11 which provides for a declaration under Article 53 of the Convention which was submitted by the Department for our consideration is a duplicate copy of Form No. 11 contained in the Memorandum of Declarations and makes provision for the determination of courts for the purposes of Article 1 and Chapter XII of the Convention.

20. In terms of Article 1(h) of the Convention, *“court’ means a court of law or an administrative or arbitral tribunal established by a Contracting State.”* The Constitutional Court of South Africa is the highest court of the Republic and may in terms of section 167(3) of the Constitution decide on constitutional matters; and any other matter.

21. Section 167(6) and (7) of the Constitution reads as follow in this regard:

*“(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—*



*(a) to bring a matter directly to the Constitutional Court; or  
 (b) to appeal directly to the Constitutional Court from any other court.  
 (7) A constitutional matter includes any issue involving the interpretation,  
 protection or enforcement of the Constitution.”.*

22. We are therefor of the opinion that the Constitutional Court of South Africa should be included as one of the courts in the Declaration under Article 53 of the Convention (Form No. 11).

23. We are satisfied that draft Form No. 11 which provides for a declaration under Article 53 of the Convention relating to determination of courts is consistent with what is required under Article 53 of the Convention.

#### **Form No. 18**

24. Article 60 of the Convention provides for a declaration relating to transitional provisions and Article 60(1) reads as follows:

***“Article 60 – Transitional provisions***

*1. Unless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.”. (Our underlining)*

25. A Contracting State may in terms of Article 60(1) of the Convention which provides for transitional provisions declare that the Convention will apply to a pre-existing right or interest for the purpose of determining priority.

26. Draft Form No. 18 which provides for a declaration under Article 60(1) of the Convention which was submitted by the Department for our consideration is not identical to the version provided for in Form No. 18 of the Memorandum of Declarations, but does comply with Article 60(1) of the Convention.

27. We are satisfied that draft Form No. 18 which provides for a declaration under Article 60(1) of the Convention relating to a pre-existing right or interest is consistent with what is required under Article 60(1) of the Convention.

#### **Form No. 19**

28. Article XXVII of the Protocol provides for declarations relating to certain

provisions and Article XXVII(1) and XXVII(2) reads as follows:

***"Article XXVII – Declarations relating to certain provisions***

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

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

29. A Contracting State may, in terms of Article XXVII(1) of the Protocol declare that it will apply either or both of Articles VI and X of the Protocol.

30. Draft Form No. 19 which provides for a declaration under Article XXVII(1) in respect of Article VI of the Protocol which makes provision for the choice of law, which was submitted by the Department for our consideration is a duplicate copy of Form No. 19 contained in the Memorandum of Declarations and complies with the requirement in Article XXVII(1) of the Protocol.

31. We are satisfied that draft Form No. 19 which provides for a declaration under Article XXVII(1) relating to the application of Article VI is consistent with what is required under Article XXVII(1) of the Protocol.

**Form No. 21**

32. A Contracting State may, in terms of Article XXVII(2) of the Protocol declare that it will apply Article VIII, wholly or in part and specify the time-period required by Article VIII(2).

33. Draft Form No. 21 which provides for a declaration under Article XXVII(2) of the Protocol in respect of Article VIII providing for the application of the entirety of Article VIII which was submitted by the Department for our consideration is in line with Form No. 21 contained in the Memorandum of Declarations. Articles XXVII(2) and VIII(2) also corresponds with the declaration made under Article XXVII(2) of the Protocol.

34. We are satisfied that draft Form No. 21 which provides for a declaration under

Article XXVII(2) in respect of Article VIII providing for the application of the entirety of Article VIII is consistent with what is required under Article XXVII(2) of the Protocol.

**Form No. 28**

35. Draft Form No. 28 which provides for a declaration under Article XXVII(1) in respect of Article X of the Protocol that deals with insolvency assistance, which was submitted by the Department for our consideration is a duplicate of Form No. 28 contained in the Memorandum of Declarations and complies with the requirement in Article XXVII(1) of the Protocol.

36. We are satisfied that draft Form No. 28 which provides for a declaration under Article XXVII(1) in respect of Article X of the Protocol is consistent with what is required under Article XXVII(1) of the Protocol.

37. The Department has advised that they intend to submit the Protocol to the Department of International Relations and Cooperation to confirm whether or not the Protocol indeed fall within the ambit of section 231(2) of the Constitution as required in terms of paragraph 5.21 of the Manual.

Yours sincerely

A handwritten signature in black ink, appearing to be 'C. Nicholson', written in a cursive style.

**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER  
C NICHOLSON / S WILLIAMS / X MDLUDLU**

## EXPLANATORY MEMORUNDAM

Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the Protocol) is a multilateral treaty that establishes an international, asset-based, financing regime that will enable and reduce the cost of private financing for rail rolling stock. It is a Protocol to the Convention on International Interests in Mobile Equipment (Cape Town Convention) of 2001. South Africa is a party to the Cape Town Convention already and Aircraft Protocol and has incorporated them into South African law through the Convention on International Interests in Mobile Equipment Act, 2007 (Act No. 4 of 2007).

The Minister of Transport signed the Protocol on the 22 March 2022. Protocol must still be ratified by South Africa since the Protocol falls within the scope of section 231(2) of the Constitution of the Republic of South Africa, 1996 it requires Parliamentary approval before it is ratified.

The Protocol benefits South Africa by improving the availability and reducing the cost of private finance for rolling stock. The Luxembourg Protocol is aligned with the recommendations of the National Development Plan (NDP) and the Economic Reconstruction and Recovery Plan (ERRP), which call for greater private sector participation in key sectors of the economy and reinforces the need for Government to intensify efforts to attract private sector investment and skills in the delivery of operations. The two principal rail operators in South Africa's rolling stock is valued at over R84.9 billion (\$5 billion) with one of the key constraints for growth in the rail market being the availability of funding. The protocol is estimated to produce savings on refinancing of rolling stock in Africa will be of R33,9 billion (\$400 million).

The Protocol falls within the ambit of section 231(2) of the Constitution and binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.