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Working Party on Rail Transport

Revisions Committee to the Model Rules on the Permanent Identification of Railway Rolling Stock

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Model Rules on the Permanent Identification of Railway Rolling Stock

Implementing the Model Rules: Transition issues, Proposal to the Model Rules Revisions Committee

Submitted by the Rail Working Group

I. Introduction

1. It is a condition of the Luxembourg Protocol to the Cape Town Convention on Mobile Equipment (the Luxembourg Rail Protocol or Protocol) that, in order to be registered at the international registry in Luxembourg, established under the Protocol, any security interest in rolling stock[1] created when the Protocol is in force in a contracting state (an international interest) must be uniquely identified and the unique identifier must be affixed to the rolling stock financed or associated with a manufacturer's serial number or national or regional number so affixed.[2] Since manufacturer's serial numbers or national or regional numbers can have many variations and may be duplicated, recycled or change, the practical solution, set out in the regulations to apply to the international registry (the regulations), is that a unique or URVIS[3] identifier is issued for each item of rolling stock, which will need to be permanently affixed to the item.

II. The Model Rules

2. The Working Party on Rail Transport of the Inland Transport Committee (ITC) of the United Nations Economic Commission for Europe adopted the Model Rules on the Permanent Identification of Railway Rolling Stock (hereafter the "Model Rules") on 15 November 2022. This was endorsed by the ITC on 24 February 2023. These rules create a new voluntary standard and responsibilities for permanently attaching the URVIS number

[1] Created under a lease, a secured credit agreement or a conditional sale agreement (Article 2 (2) of the Cape Town Convention (hereinafter referred to herein as a credit agreement).
[2] Article XIV (1).
[3] Unique Rail Vehicle Identification System.

or identifier to railway rolling stock (the URVIS marker). It is expected that the Model Rules will be operational at the time the Luxembourg Rail Protocol enters into force, anticipated towards the end of 2023.

3. Where we use capitalised terms below, they have the meaning set out in the Model Rules (unless the context dictates otherwise).

III. Transition Issues

4. The Model Rules apply to both new and rolling stock already in operation.

5. For rolling stock being financed which is new, i.e. rolling stock which has not yet entered into service for the first time, or rolling stock about to be admitted into service in a region (area of use) it is anticipated that the URVIS marker will be attached at the time the rolling stock first enters into service in a region.[4] It may also be integrated in the production process of certain manufacturers.

6. For rolling stock that is already in service in a region, it could be very difficult for a keeper to mark every item of a fleet of rolling stock immediately in accordance with the Model Rules. There will, however, most likely be a requirement to do this under the terms of a credit agreement, both in relation to any financing or refinancing of existing rolling stock.[5] In addition, creditors that have entered into secured financing agreements with a debtor prior to the entry into force of the Protocol in the relevant Contracting States will hold a "pre-existing right or interest" in the rolling stock concerned. A Contracting State may make a declaration under Article 60 (3) of the Cape Town Convention, as amended by the Protocol, whereby the priority of the pre-existing right or interest against subsequently registered international interests, created after the entry into force of the Protocol in the relevant Contracting State, is preserved if registered within a given interim period.[6] In such a case, a creditor may wish to register its pre-existing right or interest in order to retain its priority against subsequently registered international interests.[7] Under the regulations, it will have the right to do so unilaterally, without the consent of the debtor.[8]

7. It will usually be a condition[9] for registration of an international interest or a non-consensual right or interest, a pre-existing right or interest or a notice of sale that the Model Rules have been complied with. If the rolling stock therefore is not immediately marked, the respective interest or notice of sale may exist but cannot be registered.[10]

8. It is clear therefore that there need to be transitional provisions over a limited period to give operators and keepers time to permanently mark the rolling stock the subject matter of the financing with the URVIS marker.

IV. Transitional solutions

9. There are potentially a number of solutions to this requirement but they need to deal with four issues, namely:

- To what rolling stock do any transitional provisions apply?
- What should the transitional measures be?
- How long should any transition period be?

[4] "Admission" in the terminology of the Model Rules.
[5] And we assume that failure to comply with the Model Rules will constitute an event of default under the relevant credit agreement.
[6] Not less than 3 years and not more than 10 years. Spain has chosen 3 years in its declaration.
[7] The intention of Article 60 (3) is to assure parties searching the international registry that after the interim period, the search shows conclusively all interests which could affect any new international interest then being created.
[8] Section 5.12 of the regulations.
[9] Set out in section 5.3 (c) (i) of the regulations.
[10] Article XIV of the Protocol.

- Should there be derogations?

V. Applicability of any transitional provisions

10. Our recommendation is that any provision should only be applicable to equipment which is in service at the time the international interest is created (“qualified rolling stock”). This will need to be carefully defined; the purpose is to relieve operators of a burden of having to immediately permanently mark rolling stock already in operation in remote locations.

11. As already mentioned, for new rolling stock (whether or not provided directly from the factory) and rolling stock entering into service in a specific region it is reasonable to expect that the debtor or keeper can get to the rolling stock to mark it prior to Admission at or before the international interest is created, and for these purposes, the rolling stock should not be considered to be qualified rolling stock Accordingly, the keeper will need to ensure that the URVIS marker is affixed from the outset. In any event, the Admission of new rolling stock should not of itself allow a keeper to defer the marking of the rolling stock for the transition period. On the contrary, in respect of new rolling stock, a debtor or keeper would be required to have the URVIS marker affixed no later than Admission.

12. Considering that the Model Rules apply globally to all types of railway rolling stock, any transitional provisions also must take into account the fact that in some parts of the world, there may not be a formal Admission process by an authorised national or regional agency, either because of local law and practice or because of the type of equipment (for example trams or coal wagons inside mines) where the item will have an identification number allocated by the keeper and visible on the item. But we believe that the proposed definitions of “admitted” and “running number” in the annex to this document also covers this eventuality.

VI. What should the transitional measures be?

13. One solution could be to create a temporary plastic adhesive sticker on which the URVIS number is printed. Or the URVIS number could be applied to the rolling stock by a stencil. However, this has the disadvantage of requiring the rolling stock to be located and marked anyway (in which case, why not simply attach the permanent URVIS marker?) and represent an additional layer of cost since the rolling stock would ultimately have to be marked twice and would be more susceptible to damage.

14. An alternative solution would be to create a virtual marker by reference to the running number which is already marked on the rolling stock. Under the regulations, the registrar will create a voluntary field in the form to be completed, electronically, for the registration of an international interest or pre-existing right or interest. This would allow entry of the running number which would then be associated with the URVIS number in the registry. Priority searches will still only be able to be made by reference to the URVIS number and anyone searching the international registry will be able to conduct an informational search against the running number which would then show the URVIS number with which the running number is associated. Of course, the keeper of the rolling stock would have to commit not to permit any change of the running number during the transition period, to attach the URVIS marker at the first practicable opportunity and, in any event, immediately if, due to exceptional circumstances, the running number changes during the transition period. The running number associated with the URVIS number in the international registry on the date of registration cannot be changed.

15. But the Revisions Committee may have other suggestions.

VII. What should be the transition period?

16. The transitional provisions represent a risk for the creditor where the physical marking of the rolling stock is not permanent or reliable.[11] Risk for the creditor equates to cost for the creditor[12] that is then usually passed on to the debtor/operator.[13] The keeper or debtor has to have a reasonable period of time from the date of signature of a credit agreement within which to permanently mark the rolling stock, but to wait until the next overhaul (*revision*) of the rolling stock, which could be 6 or even 8 years, is too long. This would negate the benefits of the Protocol. Moreover, under the terms of the Protocol, a ratification only enters into force in a Contracting State not less than 3 months after the date of the deposit of the instrument of ratification,[14] so debtors and keepers will already be on notice for at least 3 months as to the requirements of the Model Rules (and be able to request URVIS identifiers), before they apply in a specific Contracting State. However, taking into account that a party will not be able to register as a user of the international register, and therefore will not be able to obtain an URVIS number, before the Protocol enters into force generally in Contracting States (expected before the end of 2023),[15] more latitude should be given to transactions involving debtors in the initial Contracting States. Accordingly, we consider that the transition period sufficient to mark the rolling stock with the permanent URVIS marker as foreseen in the Model Rules should be the period from the date of signature of the respective credit agreement until the later of 12 months from the date of signature or 18 months from the date the Protocol enters into force generally.[16]

VIII. Should there be derogations?

17. We consider that there should be no derogations from what constitutes qualified rolling stock or what needs to be done during any transition period. However, it must be recognised that there may be exceptional circumstances where an extended transition period is warranted. For example, a wagon could be inaccessible due to a *force majeure*. In such case, it may be acceptable that the transition period could be extended but with a backstop of not more than 3 years. Since any extension of the transition period represents incremental risk for the creditor, this derogation can only be granted by the creditor (which in this case would include a holder of a pre-existing right or interest and a non-consensual right or interest) on an exceptional basis for individual items of railway rolling stock and can only apply as between the creditor and the debtor.

IX. Proposal

18. We would like to propose that the Revisions Committee, at its meeting on 30 August 2023, considers the issue of transitional provisions and accepts the recommendations set out above. Draft text is attached for the consideration of the Committee.

[11] See above.

[12] It would potentially change the risk weighting requiring in turn more equity to be allocated against the credit under general (Basel) rules on prudential frameworks applicable to banks.

[13] Not just as a commercial matter but this may also be a function of needing to provide more capital against the credit under applicable capital adequacy rules under the agreement under the auspices of the Bank for International Settlements, known as Basel III.

[14] See Article XXIII (2). In practice this will be slightly longer.

[15] Pursuant to Article XXIII (1).

[16] Ibid.

Annex

Proposed Amendments to Model Rules (2023)

Article 3

Insert in Article 3 the following additional definitions:

> "Admitted" means the date an item of railway rolling stock is first authorised for entry into operational circulation in accordance with applicable law;
>
> "Credit agreement" shall be an agreement, as defined in the Convention, entered into following the entry into force of the Protocol in a Contracting State in which the debtor is situated;
>
> "Qualifying rolling stock" means railway rolling stock that has been admitted on the date of signature of the credit agreement relating thereto or, where there is no such credit agreement, in the case of an item which is subject to a unilateral interest, admitted on the date the debtor is notified thereof;
>
> "Running number" means the identification number allocated to an item of railway rolling stock by a national or regional agency authorising railway rolling stock on admission and visible on the item or, in the absence of such number, the identification number allocated by the keeper for, and visible on, the item;
>
> "Transition period" means the later of the period of (a) 12 months from the date of signature of a credit agreement or (b) 18 months from the date the Protocol enters into force in accordance with Article XXIII (1) of the Protocol;
>
> "Unilateral interest" means a non-consensual right or interest or a pre-existing right or interest.

Insert a new Article 7A as follows:

7A. Transition Rules

7A.1 Notwithstanding the provisions of Articles 5 and 6 if, on the signature of a credit agreement no URVIS marker is attached to an item of railway rolling stock, the keeper shall (a) use all reasonable efforts to affix the URVIS marker in accordance with Article 5 at the earliest possible opportunity, but in any event no later than the end of the transition period; and (b) immediately affix the URVIS marker in accordance with Article 5 if the running number on the item changes.

7A.2 Where there is no credit agreement entered into with respect to an item, Article 7A.1 applies in the case of a unilateral interest save that the transition period shall commence on the day the keeper is notified in writing by the holder of such interest.

7A.3 In exceptional cases where an item of railway rolling stock is physically inaccessible for the keeper and the debtor, a holder of a registrable interest may agree to extend the transition period to up to 3 years from the date of signature of the credit agreement or the date the debtor is notified of the unilateral interest, as appropriate, and if both apply, whichever is the earlier, provided that this derogation may only apply as between the holder and the debtor and shall not affect the rights of any other holder of a registrable interest.

7A.4 These transition rules only apply to qualifying rolling stock.