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Luxembourg Protocol on Rail Equipment –
Putting Mexico’s Legal Framework at the
Forefront.

by Juan Manuel Estrada

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“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”

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by Juan Manuel Estrada.

1. Introduction

The rail industry has been, to this date, one of the most heavily regulated sectors in the world.¹ The reason behind such burdensome regulatory environment lays on the very nature of the industry, which has been deemed as a critical component of economic development for countries² In practice, rolling stock act as an essential linking factor of production by interconnecting producers and consumers, thus creating a more efficient division of production, while at the same time leveraging geographical comparative advantages and disadvantages through the connection of ports, boarders and key commercial settlements,³ ultimately providing the means to develop economies of scale and scope.⁴

Despite the importance of the rail industry, and unlike other relevant sectors such as aviation and shipping, historically, there had been no international legal regime that incentivizes the financing of rolling stock and, in particular.⁵ This, however, changed with the coming into being of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ('Rail Protocol'),⁶ to the Cape Town Convention on International Interests in Mobile Equipment ('Cape Town Convention'), adopted at a Diplomatic Conference held in Luxembourg in February 2007.

With the advent of the Rail Protocol, a sophisticated international legal framework which provides a mechanism for recognizing, securing and recording international security interests created in high-value rail equipment was created.⁷ However, notwithstanding the relevance and the inherent benefits of the Rail Protocol, to this date, it has not yet entered into force.

“Despite the importance of the rail industry, and unlike other relevant sectors such as aviation and shipping, historically, there had been no international legal regime that regulated the financing of rolling stock”.

This fact is particularly questionable if we take into account such cases like that of Mexico, who has refrained from enacting laws that secure the healthy financial development of the sector despite being a Member State

1.- Centro de Investigación Para el Desarrollo, A.C., 'Reformas al Servicio Ferroviario Mexicano', (2011) pag. 13.

2.- The World Bank, 'The Role of Transport in Economic Development', found in < https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/railways_toolkit/ch1_1_3.html > accessed 29 November 2017.

3.- 'Mexican Agency for the Regulation of Rail Transport: Peer Consultation on Regulatory Capacity'.

4.- Idem.

5.- Howard Rosen 'The Luxembourg Rail Protocol: a Major Advance for the Railway Industry', Uniform Law Review, NS – Vol. XII, 2007.

6.- Luxembourg Protocol to the Convention of International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (hereinafter: "the Luxembourg Protocol" or "Rail Protocol"), signed at a diplomatic Conference to adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment held, under the joint auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the Intergovernmental Organisation for International Carriage by Rail (OTIF), at the invitation of the Government of the Grand-Duchy of Luxembourg, from 12 to 23 February 2007

7.- Elizabeth Hirst and Nicolas Gavage, 'The International Rail Registry and The Luxembourg Rail Protocol to The Cape Town Convention—Global Registration of Mobile Assets', Uniform Commercial Code Law Journal [Vol. 46 #4].

to the Cape Town Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ('Aircraft Protocol'), since 2007.

With this in mind, the purpose of this article is to provide an overview of the implications and benefits of the adoption of the Rail Protocol in developing countries such as Mexico, whilst extending the reach of the Cape Town Convention to the railway sector.

2. Cape Town Convention and the Rail Protocol

In order to appreciate the effects and benefits of the Rail Protocol, one must first understand the Cape Town Convention, its context and objectives.

As the reader might be aware, the Cape Town Convention is aimed to cover asset-based financing.⁸ It establishes the set of rules required for the creation and perfection of rights in mobile equipment, which can be applied consistently across different legal and judicial systems.⁹ To do this, it creates an internationally recognized security interest, also referred to as "international interest"¹⁰ covering the rights of secured creditors, lessors and vendors, and provides for a system that enables such financiers to recover/enforce their credits by disposing of the asset placed as security (through what is known as 'default remedies').¹¹ As a consequence, it provides a higher rate of security to the private sector, which in turn helps reduce costs and enables facilitations, which otherwise would not be possible in the absence of burdensome or costly guarantees.¹²

"In order to appreciate the effects and benefits of the Rail Protocol, one must first understand the Cape Town Convention, its context and objectives."

Furthermore, and as stated in its explanatory report, the Cape Town Convention system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost.¹³

Pursuant to the dispositions of the Cape Town Convention, the Rail Protocol has clear economic implications in developing countries.¹⁴ While railway rolling stock financing has not been at the top of the list in the financing portfolios of emerging markets,¹⁵ it is hoped that the Rail Protocol will shift this tendency in the near future. In order to do so, the Rail Protocol provides, inter alia, the following provisions: (a) it provides a Definition of "railways rolling stock"; (b) it enunciates the requirements for the international registration of railways rolling stock and the interests thereof; and (c) it governs default remedies.¹⁶

8- The three principal forms of financing are: (1) a loan secured by a security interest in the object; (2) a sale under an agreement in which seller reserves ownership until payment in full (title reservation agreement); and (3) a lease, which may be either a finance lease or an operating lease and may or may not include an option to purchase.

9- Martin J Fleetwood, 'All tracks lead to Luxembourg: the Luxembourg Rail Protocol', *Butterworths Journal of International Banking and Financial Law*.

10.- Article 2 of the Cape Town Convention.

11.- Article 8 of the Cape Town Convention.

12.- Rafael Castillo-Triana, 'Protecting Rail Assets in Emerging Markets: The Luxembourg Protocol', *Journal of Equipment Lease Financing* •Spring 2010 • VOL. 28/NO. 2.

13.- Sir Roy Goode, "Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment." Rome: UNIDROIT, September 2002, p. 5.

14.- Supra 12.

15.- Howard Rosen, 'Why the Luxembourg Protocol will Boost Railway Investment in Africa', *Rail Ways Africa* ISSUE 5 // 2015.

16.- Supra 12.

Definition of “railways rolling stock”

Article I (2)(e) of the Rail Protocol defines ‘railway rolling stock’ as:

“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”.

This definition is particularly relevant as it broadens the spectrum of what classifies as ‘railway rolling stock’, which is said to include metro trains, trams, monorails, cable cars and even gantries and cranes amongst others.¹⁷

Registration

The Rail Protocol provides that a railway rolling stock shall be clearly identifiable by type and by item. In such regard, the registrar must allocate both the manufacturer serial numbers as well as national and/or regional identification numbers.

Default Remedies

In terms of remedies, the Rail Protocol not only kept the default remedies under Article 8 of the Cape Town Convention, namely the right of the secured lender to take possession of the asset, sell it or dispose of it, and/or collect revenues arising from use of such asset, but it additionally expands the first and second remedy with the right to *“procure the export and physical transfer of railway rolling stock from the territory in which it is situated”*.¹⁸

3. Further Considerations

In practice, the system provided for under the Rail Protocol has been effectively proven, particularly through the implementation and enforcement of the Aviation Protocol,¹⁹ which to this date, has been adopted in over sixty-eight countries.²⁰

Despite the fact that the Rail Protocol is not yet in force, when implemented, “it will facilitate efficient low-risk and low-cost private finance for rolling stock”.²¹ Such inherent benefits and opportunities thereof are sufficiently strong for the machinery to be steaming and gaining momentum, particularly after the ratification of the European Union.²² This can only lead us to believe that the Rail Protocol will gain more relevance in the years to come.

4. Conclusion

The adoption and implementation of the Rail Protocol and the extension of the applicability of Convention to the railway sector will, particularly in developing countries such as Mexico, should be seen as the solution to provide the required legal support, predictability and security to prospective lessors and lenders who intent to venture in this market. This in turn will result in significant capital investment in the rail sector resulting in substantial benefits for all stakeholders.

17.- Harold S. Burman, ‘2007 Luxembourg Protocol on international rail equipment concluded at Luxembourg February 23, 2007’.

18.- Article VII (1) of the Rail Protocol.

19.- Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, signed at Cape Town on 16 November 2001.

20.- UNIDROIT, ‘Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment’, found in <<http://www.unidroit.org/status-2001capetown-aircraft>> accessed 29 November 2017.

21.- Howard Rosen, ‘The Luxembourg Protocol – turning vision into reality’, found in <<http://www.railjournal.com/index.php/blogs/howard-rosen/the-luxembourg-protocol-%E2%80%93-turning-vision-into-reality.html?channel>> accessed 29 November 2017.

22.- UNIDROIT, ‘Status - Luxembourg Protocol to The Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007)’, found in <<http://www.unidroit.org/status-2007luxembourg-rail>> accessed 27 November 2017.

Mexico Discovers Its Richest Oil Field in 15 Years.

Mexico's Pemex Company reported that the new oil field is of great economic importance due to its location next to the existing oil production infrastructure. Mexico's President said that that oil will be produced at a low cost because of the convenient location of the oil field. <https://sputniknews.com/latam/201711041058808856-mexican-oil-field/> 04/11/2017.

Trump's trade negotiator says Nafta talks are not making headway.

Resident Donald Trump's chief trade negotiator issued a downbeat assessment Tuesday of efforts to rewrite the North American Free Trade Agreement, decrying "a lack of headway" and accusing Canada and Mexico of refusing to "seriously engage" on controversial U.S. proposals aimed at cutting the U.S. trade deficit. <https://www.marketwatch.com/story/trumps-trade-negotiator-says-nafta-talks-are-not-making-headway-2017-11-21> 21/11/2017.

Mexico to raise minimum wage...to \$4.70 a day.

Nearly 25 million Mexicans are getting a pay raise next week. From \$4.25 to \$4.70 -- a day. Mexican government and business leaders agreed on Tuesday to raise the country's minimum wage starting on December 1 to 88.36 pesos from 80.04 pesos. The 10% raise is good news for 24.7 million Mexicans who work either one or two minimum wage jobs. <http://money.cnn.com/2017/11/22/news/economy/mexico-minimum-wage/index.html> 22/11/2017.

Mexico's Finance Minister Resigns, Paving Way for Candidacy.

Mexico Finance Minister Jose Antonio Meade resigned on Monday, stoking speculation that he will become the ruling Institutional Revolutionary Party's candidate for president in 2018 elections. Meade emerged as an option for the presidential race after some of Pena Nieto's closest allies, and potential successors, were hit by allegations of a conflict of interest, as is the case for Foreign Minister Luis Videgaray, or faced criticism for surging violence, such as Interior Minister Miguel Angel Osorio Chong. <https://www.bloomberg.com/news/articles/2017-11-27/mexico-s-meade-said-to-resign-stoking-presidential-speculation> 26/11/2017.

Mexico names Diaz de Leon to replace Carstens as central bank chief.

Mexico's president on Tuesday named former finance official and central bank board member Alejandro Diaz de Leon to take over as the head of the central bank, to replace outgoing chief Agustin Carstens. Diaz de Leon is currently a member of the five-strong board of the bank and was one of the favorites to replace Carstens, who is stepping down on Nov. 30 to take charge of the Bank for International Settlements (BIS) in Switzerland. <https://www.reuters.com/article/us-mexico-cenbank/mexico-names-diaz-de-leon-to-replace-carstens-as-central-bank-chief-idUSKBN1DS33X> 28/11/2017.

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