



**DIPLOMATIC CONFERENCE FOR THE ADOPTION
OF THE DRAFT PROTOCOL TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT ON MATTERS SPECIFIC TO
SPACE ASSETS**

Berlin, 27 February / 9 March 2012

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DRAFT FINAL PROVISIONS

***capable of embodiment in the draft Protocol to the
Convention on International Interests in Mobile Equipment
on Matters specific to Space Assets***

with

EXPLANATORY NOTES

(prepared by the UNIDROIT Secretariat)

INTRODUCTION

1. As indicated in the footnote to Chapter VI of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *draft Protocol*) in DCME-SP – Doc. 3, draft Final Provisions capable of embodiment in Chapter VI of the draft Protocol have, in line with practice, been prepared for the diplomatic Conference by the UNIDROIT Secretariat, for the consideration of the plenipotentiaries who will be attending the Berlin diplomatic Conference. These draft Final Provisions, together with supporting explanatory notes, are set out below.

2. These draft final provisions are based on the Final Provisions contained in the Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Cape Town Convention*), and the Protocols to that Convention on Matters specific to Aircraft Equipment and on Matters specific to Railway Rolling Stock, opened to signature in Cape Town on 16 November 2001 and in Luxembourg on 23 February 2007 respectively, as, in certain respects, updated to reflect the Final Provisions contained in the Convention on Substantive Rules for Intermediated Securities, opened to signature in Geneva on 9 October 2009 (hereinafter referred to as the *Geneva Convention*), the most recent treaty prepared under the auspices of UNIDROIT to be adopted.

3. The UNIDROIT Secretariat has not considered it either appropriate or desirable to update all the Final Provisions contained in the Cape Town Convention and the two Protocols thereto opened to signature in Cape Town and Luxembourg, and in particular those dealing with declarations and

denunciations, to reflect those contained in the Geneva Convention. Its concern in this regard was not to place at risk the need for effective implementation, at the substantive level, of the Cape Town Convention and the future Space Protocol as a single instrument¹ and to safeguard the generally recognised need for uniformity among the various members of the Cape Town family of instruments, including the other Protocols already opened to signature, one of which is, moreover, already in force in a great many jurisdictions.²

**DRAFT FINAL PROVISIONS CAPABLE OF EMBODIMENT IN THE DRAFT PROTOCOL TO
THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO SPACE ASSETS**

CHAPTER VI – FINAL PROVISIONS

Article A – Signature, ratification, acceptance, approval or accession

1. – This Protocol shall be open for signature in Berlin on 9 March 2012 by States participating in the diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets held in Berlin from 27 February to 9 March 2012. After 9 March 2012 this Protocol shall be open to all States for signature at until it enters into force in accordance with Article C.
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.³
5. – A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

Notes

1. The provisions of this Article are virtually identical to those of Article 47 of the Cape Town Convention, Article XXVI of the Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) and Article XXI of the Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock (hereinafter referred to as the *Luxembourg Protocol*).

2. A propos of the space left blank in paragraph 1, it is appropriate to note that UNIDROIT was designated Depositary of the Cape Town Convention (under Article 62(1) of that Convention), of the Aircraft Protocol (under Article XXXVII(1) of that Protocol) and of the Luxembourg Protocol

¹ Pursuant to Article 6(1) of the Cape Town Convention.

² The Protocol to the Cape Town Convention on Matters specific to Aircraft Equipment was at the time of writing (29 July 2011) in force among 39 States and the European Union.

³ It is recommended that, in line with the practice established in the wake of the Cape Town diplomatic Conference for the Cape Town Convention and the Aircraft Protocol, a model instrument of ratification, acceptance, approval or accession of the future Protocol be drawn up by the Secretariat after the diplomatic Conference and circulated amongst all negotiating States.

(under Article XXXIV of that Protocol). It will, however, be for the plenipotentiaries at the Berlin diplomatic Conference to determine the appropriateness or otherwise of the blank space being completed by the words “the seat of the International Institute for the Unification of Private Law (UNIDROIT) in Rome”.

Article B – 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 in writing 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”, “Contracting States”, “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

Notes

1. The provisions of this Article are virtually identical to those of Article 48 of the Cape Town Convention, Article XXVII of the Aircraft Protocol and Article XXII of the Luxembourg Protocol, with the difference, however, that the words “in writing” have been added after the words “promptly notify the Depositary” in paragraph 2, in line with Article 41(2) of the Geneva Convention; it was felt that the addition of these words could not place at risk the effective implementation of the Cape Town Convention and the future Space Protocol, in so far as writing is already required for the notification of declarations, subsequent declarations or the withdrawal of declarations under Article 56(2) of the Cape Town Convention, Article XXXII(2) of the Aircraft Protocol and Article XXVIII(2) of the Luxembourg Protocol.⁴ Above all, the proposed change is intended simply to make explicit what was in any case already implied.

Article C – 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 [fifth] instrument of ratification, acceptance, approval or accession; and

⁴ See also DCME-SP – Doc. 4, §§ 45 (a) and 87.

(b) the date of the deposit by [the Supervisory Authority] 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 their instrument of ratification, acceptance, approval or accession; and

(b) the date referred to in sub-paragraph (b) of the preceding paragraph.

Notes

1. The provisions of this Article are modelled on those of Article 49 of the Cape Town Convention and Article XXVIII of the Aircraft Protocol as modified by Article XXIII of the Luxembourg Protocol, this modification being designed to ensure that the last-mentioned Protocol's entry into force be conditional not only on the deposit of a minimum number of ratifications, acceptances, approvals or accessions but also on the deposit with the Depositary of a certificate confirming that the future International Registry is fully operational.⁵

2. The number of ratifications, acceptances, approvals or accessions required to bring the Cape Town Convention into force was, in view of the commercial law character of the instrument, set as low as three (see Article 49(1) of that Convention). Eight ratifications, acceptances, approvals or accessions were, however, needed to bring the Aircraft Protocol into force (see Article XXVIII(1) of that Protocol). Only four, though, are needed to bring the Luxembourg Protocol into force (see Article XXIII(1)(a) of that Protocol) and, although the figure of five has tentatively been pencilled in, inside square brackets, in sub-paragraph 1(a) of this Article, it may, indeed, be questioned whether four might not also be deemed sufficient for the future Space Protocol's entry into force.

3. Under Article XXIII(1)(b) of the Luxembourg Protocol, it is incumbent on the Secretariat designated, under Article XII(6) of that Protocol, to assist the Supervisory Authority of the future international registration system for railway rolling stock in the discharge of its functions - namely the Intergovernmental Organisation for International Carriage by Rail (OTIF) - to deposit with the Depositary the certificate attesting to the operational readiness of the International Registry for railway rolling stock. In the case of the draft Protocol, on the other hand, a number of universal intergovernmental Organisations have been and are under consideration as candidates to assume the functions of Supervisory Authority and it is, therefore, assumed that the Berlin diplomatic Conference will be inviting one such Organisation to assume the functions of Supervisory Authority under the future Space Protocol. That being the case, it is proposed in sub-paragraph 1(b) of this Article, inside square brackets, that the duty of certifying with the Depositary the operational readiness of the future International Registry for space assets should be incumbent on the Supervisory Authority of that Registry itself.

Article D – Territorial units

1. – If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of signature, ratification, acceptance, approval or accession, make an initial declaration that this Protocol is to extend to all its territorial units or only to one

⁵ See also DCME-SP – Doc. 4, § 87.

or more of them and may modify its declaration by submitting another declaration at any time.

2. – Any such declaration 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. – In relation to a Contracting State with two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, any reference to the law in force in a Contracting State or to the law of a Contracting State shall be construed as referring to the law in force in the relevant territorial unit.

Notes

1. The provisions of this Article are modelled on those of Article 52 of the Cape Town Convention, Article XXIX of the Aircraft Protocol and Article XXIV of the Luxembourg Protocol, with one clarification and two differences, all drawn from Article 43 of the Geneva Convention.

2. To take the proposed clarification first, the words “two or more” have been added in line 1 of paragraph 1 and in line 1 of paragraph 5 before the words “territorial units”, to make explicit what was implicit, namely that this Article will only apply where a Contracting State has *at least* two territorial units in which different systems of law are applicable in relation to the matters dealt with in the draft Protocol.

3. The first difference proposed would be to make it possible for a Contracting State to declare that it intends the future Protocol to extend to all its territorial units or only to one or more of them *not only* at the time of ratification, acceptance, approval or accession, as under Article 52 of the Cape Town Convention, Article XXIX of the Aircraft Protocol and Article XXIV of the Luxembourg Protocol, *but also* at the time of signature and to treat such a declaration, whether made at the time of signature or at that of ratification, acceptance, approval or accession, as an “initial” declaration capable, as under Article 52 of the Cape Town Convention, Article XXIX of the Aircraft Protocol and Article XXIV of the Luxembourg Protocol, of being modified at any time by the lodging of another declaration.

4. The second change proposed under this Article is to be found in paragraph 5, which is modelled on the formulation found in Article 43(5) of the Geneva Convention. This formulation is designed to cover all the specific cases spelled out in Article 52(5) of the Cape Town Convention, Article XXIX(5) of the Aircraft Protocol and Article XXIV(5) of the Luxembourg Protocol which are relevant to the application of the draft Protocol.

5. Going back to what was said in paragraph 3 of the Introduction, the departures made in this Article from the language employed in the other members of the Cape Town family of instruments do not, it is believed, place at risk either the need for effective implementation, at the substantive level, of the Cape Town Convention and the future Space Protocol as a single instrument or the safeguarding of the generally recognised need for uniformity among the various members of that

family, all the more so since the number of States for which this Article is relevant is extremely small.

Article E – Transitional provisions

In relation to space assets 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 after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of the 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."

Notes

1. The provisions of this Article follow those of Article XXVI of the Luxembourg Protocol.

Article F – Declarations relating to certain provisions

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

(a) that it will not apply Article VIII;

(b) that it will apply either or both of Articles XXII and XXVI.

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

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 Alternative A, or the entirety of Alternative B of Article XXI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XXI.

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

Notes

1. The provisions of this Article are modelled on those of Article XXX of the Aircraft Protocol and Article XXVII of the Luxembourg Protocol.

Article G – Declarations under the Convention

Declarations made under the Convention, including those made under Articles 39, 40, 53, 54, 55, 57, 58 and 60 of the Convention, shall be deemed to have also been made under this Protocol unless stated otherwise.

Notes

1. The provisions of this Article are identical to those of Article XXXI of the Aircraft Protocol and Article XXIX(1) of the Luxembourg Protocol.

Article H – Reservations and declarations

1. – No reservations may be made to this Protocol but declarations authorised by Articles D, F, G and I may be made in accordance with these provisions.
2. – Any declaration, subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depository.

Notes

1. The provisions of this Article are identical to those of Article XXXII of the Aircraft Protocol and Article XXVIII of the Luxembourg Protocol.

Article I – Subsequent declarations

1. – A State Party may make a subsequent declaration, other than the declaration made in accordance with Article G 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 Depository 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 Depository. 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 Depository.
3. – Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

Notes

1. The provisions of this Article are identical to those of Article XXXIII of the Aircraft Protocol and Article XXX of the Luxembourg Protocol.
2. To quote from the Official Commentary on the Cape Town Convention and Aircraft Protocol, prepared by Professor Sir Roy Goode, “[o]nce made, a declaration under Article 60 may not be modified by a subsequent declaration or withdrawn , since this could affect vested rights”.⁶

Article J – Withdrawal of declarations

1. – Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article G 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 previous paragraph, this Protocol shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal of declaration.

Notes

1. The provisions of this Article are identical to those of Article XXXIV of the Aircraft Protocol and Article XXXI of the Luxembourg Protocol.
2. To quote again from the Official Commentary on the Cape Town Convention and Aircraft Protocol, prepared by Professor Sir Roy Goode, “[o]nce made, a declaration under Article 60 may not be modified by a subsequent declaration or withdrawn , since this could affect vested rights”.⁷

Article K – 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.

Notes

1. The provisions of this Article are identical to those of Article XXXV of the Aircraft Protocol and Article XXXII of the Luxembourg Protocol.

⁶ Cf. § 4.343 of the revised version of the Official Commentary.

⁷ *Idem.*

Article L – 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 regimen established in the Convention as amended by this 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 assets 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 Parties which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by [five] States Parties in accordance with the provisions of Article C relating to its entry into force.

Notes

1. The provisions of this Article are identical to those of Article XXXVI of the Aircraft Protocol and Article XXXIII of the Luxembourg Protocol.

2. The finalisation of the language appearing in square brackets in paragraph 3 will follow the decision on the same language, also within square brackets, in Article C(1)(a) to be taken by the plenipotentiaries at the Berlin diplomatic Conference.

Article M – Depositary and its functions

1. – Instruments of ratification, acceptance, approval or accession shall be deposited with, 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 entry into force of this Protocol;

(iii) each declaration made in accordance with this Protocol, together with the date thereof;

(iv) the withdrawal or amendment of any declaration, together with the date thereof; and

(v) 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.

Notes

1. The provisions of this Article follow those of Article XXXVII of the Aircraft Protocol and Article XXXIV of the Luxembourg Protocol.

2. In line with what has been noted under Article A, it will be for the plenipotentiaries at the Berlin diplomatic Conference to determine whether the blank space in paragraph 1 should or should not be completed by the word "UNIDROIT".