



**DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT  
CONVENTION AND AN AIRCRAFT PROTOCOL**

(Cape Town, 29 October to 16 November 2001)

**DRAFT FINAL PROVISIONS  
CAPABLE OF EMBODIMENT IN THE DRAFT [UNIDROIT]  
CONVENTION ON INTERNATIONAL INTERESTS  
IN MOBILE EQUIPMENT  
WITH EXPLANATORY NOTES**

(drawn up by the UNIDROIT Secretariat)

**I. INTRODUCTION**

1.- The Final Provisions set out in Chapter XIV of the draft [UNIDROIT] Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) submitted for adoption to the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol (hereinafter referred to as *the diplomatic Conference*) are not intended to be “comprehensive” but rather to enunciate “only those provisions needed to show the relationship between the Convention and the Protocol and to address the special issues arising in relation to interests in mobile equipment”<sup>1</sup>

2.- As indicated at various stages of the intergovernmental negotiations on the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Aircraft Protocol*),<sup>2</sup> it is not UNIDROIT practice to prepare draft final provisions, except in respect of such special matters as those dealt with in Chapter XIV, until such time as a draft Convention is ready for transmission to a diplomatic Conference. This reflects the fact that the preparation of final provisions is traditionally the prerogative of the plenipotentiaries gathered at a diplomatic Conference, and in the first place of the Final Clauses Committee of such a Conference. The reason for this practice is self-evident: it is not possible to see which final provisions will be necessary until such time as the relevant intergovernmental negotiations have reached their final stage.

3.- In the case of the draft Aircraft Protocol, it is true that this practice has not been followed. UNIDROIT was not, however, involved in the preparation of the draft Final Provisions set out in Chapter VI of the draft Aircraft Protocol: these were prepared by a working group

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<sup>1</sup> Cf. Explanatory Report and Commentary on the draft Convention and the draft Aircraft Protocol, § 32.

<sup>2</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/3 ICAO Ref. LSC/ME/3-WP/3, § 58, footnote 5.

external to UNIDROIT, invited by the President of UNIDROIT in February 1997 to prepare a preliminary draft Protocol - to the then preliminary draft Convention in the final stages of preparation by a UNIDROIT study group - on Matters specific to Aircraft Equipment<sup>3</sup> and were transmitted by the UNIDROIT Governing Council to Governments in 1998 as an *addendum* only to the text of the then preliminary draft Aircraft Protocol, specifically with a view to signalling that they were not “intended to prejudge”<sup>4</sup> the draft Final Provisions to be prepared at the appropriate time by those whose prerogative it was to prepare such provisions “but simply to indicate the suggestions of the Aircraft Protocol Group on this matter as developed by the Joint Session.”<sup>5</sup> It was in this form that the draft Aircraft Protocol was approved as ready for transmission to a diplomatic Conference by the UNIDROIT Governing Council at its 79<sup>th</sup> session, held in Lisbon from 10 to 14 April 2000.

4.- Subsequently, however, the status of the draft Final Provisions set out in Chapter VI of the draft Aircraft Protocol was changed, during the 31<sup>st</sup> Session of the ICAO Legal Committee, held in Montreal from 28 August to 8 September 2000. As a result, these draft Final Provisions no longer appear as an Addendum to the draft Aircraft Protocol but as an integral part thereof. In so far as no authority for this change of status is however to be gleaned from the Report on that session (Doc 9765-LC/191), it is submitted, therefore, that, at least as far as these draft Final Provisions as approved by the UNIDROIT Governing Council are concerned, they are to be understood as indicating simply “the suggestions of the Aircraft Protocol Group ... as developed by the Joint Session”.

5.- They have nevertheless provided the main source of inspiration for the companion draft Final Provisions capable of embodiment in the draft Convention, which, as drafted by the UNIDROIT Secretariat, are set out hereunder with summary explanatory notes. The Final Provisions set out in Chapter XIV of the draft Convention have been incorporated in these draft Final Provisions.

6.- In accordance with the specific request addressed to it by the Space Working Group at its most recent session, held in Evry Courcouronnes on 3 and 4 September 2001, the UNIDROIT Secretariat has however also sought, where borrowing ideas from the draft Final Provisions featuring in the draft Aircraft Protocol, to make the appropriate amendments necessary to bring them into line with the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as the *Vienna Convention*).

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<sup>3</sup> The members of this working group, known as the *Aircraft Protocol Group*, were ICAO, the International Air Transport Association (I.A.T.A.) and the Aviation Working Group.

<sup>4</sup> Cf. UNIDROIT CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report, Appendix II, Addendum, footnote 8.

<sup>5</sup> *Idem*.

**UNIDROIT SECRETARIAT PROPOSALS  
FOR THE FINAL PROVISIONS  
TO BE EMBODIED IN  
THE DRAFT [UNIDROIT] CONVENTION  
ON INTERNATIONAL INTERESTS  
IN MOBILE EQUIPMENT**

Article A

***Adoption, signature and ratification, acceptance, approval or accession of the Convention***

1. – This Convention is open for signature at the concluding meeting of the diplomatic Conference to adopt a Mobile Equipment Convention and an Aircraft Protocol and will remain open for signature by all negotiating States at [...] until [...].

2. – This Convention is subject to ratification, acceptance or approval of those States which have signed it.

3. – This Convention is open for accession by all States which have not signed it, at any time from the date it is open for signature.

4. – Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.<sup>6</sup>

*Notes*

1.- The provisions of this Article are modelled on those of Article XXV of the draft Aircraft Protocol, which themselves followed precedents to be found in recent UNIDROIT Conventions, namely the 1988 UNIDROIT Convention on International Financial Leasing (hereinafter referred to as the ***UNIDROIT Leasing Convention***), the 1988 UNIDROIT Convention on International Factoring (hereinafter referred to as the ***UNIDROIT Factoring Convention***), and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter referred to as the ***UNIDROIT Cultural Objects Convention***).

2.- In the interest of bringing the language of Article XXV of the draft Aircraft Protocol into line with the Vienna Convention, the term “negotiating States”<sup>7</sup> has been substituted for the term “Contracting States”<sup>8</sup> in paragraph 1, although, should the diplomatic Conference choose to broaden the category of States that may sign the future Convention, then it is submitted that a formula along the lines of that employed in Article 81 of the Vienna Convention<sup>9</sup> might be considered. With the same concern in

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<sup>6</sup> It is recommended that a resolution be adopted by, and contained in the Acts and Proceedings of the diplomatic Conference, contemplating the use by negotiating States of a model instrument for ratification, acceptance, approval or accession that would standardise *inter alia* the format for the making and/or withdrawal of declarations and reservations.

<sup>7</sup> “[N]egotiating State” is defined in Article 2(1)(e) of the Vienna Convention to mean “a State which took part in the drawing up and adoption of the text of the treaty.”

<sup>8</sup> “[C]ontracting State” is defined in Article 2(1)(f) of the Vienna Convention to mean “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.”

<sup>9</sup> Article 81 of the Vienna Convention provides that: “The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention...”

mind, the term “Contracting States” employed in Article XXV(2) of the draft Aircraft Protocol has been replaced in paragraph 2 by the term “those States.” In order to bring Article XXV(3) into line with Article XXV(2), the words “not signatory States” have been replaced in paragraph 3 by the words “States which have not signed it.” Finally, it should be noted that the heading of this Article is somewhat broader than that of Article XXV of the draft Aircraft Protocol in order to highlight the fact that it indeed covers more than just “adoption.”

3.- It is submitted that the future Convention should be subject to ratification, acceptance, approval or accession independently from a given Protocol and notwithstanding the controlling nature of each Protocol in relation to the Convention.<sup>10</sup> First, the draft Convention is designed to apply to at least three different categories of equipment (cf. Article 2(3) of the draft Convention) and, later, potentially to other categories of equipment (cf. Article 50(1) of the draft Convention). The fact that its application with regard to a particular category of equipment is only to be triggered by entry into force of the Protocol covering that category of equipment does not alter the fact that it at the same time both provides the infrastructure for the extension of the application of the Convention to other categories of equipment via Protocols, in particular by enunciating the procedure to be complied with for their completion and adoption (cf. Article 49 of the draft Convention), and embodies the authority for UNIDROIT’s preparation, completion and adoption of Protocols on matters other than those encompassed by Article 2(3) of the draft Convention (cf. Article 50(1) of the draft Convention).<sup>11</sup> Secondly, whilst it is clear that the basic principle informing the relationship between the draft Convention and each of its Protocols is that a Protocol can amend any or all terms of the future Convention in relation to the category of equipment covered by such Protocol (cf. Article 47(1)(b) of the draft Convention), the converse of this rule must be that, wherever on a given issue the relevant Protocol is silent or refers to the Convention alone (as in Article VI of the draft Aircraft Protocol), then the Convention’s provisions alone apply. Thirdly, and flowing from, as well as closely related to this first consideration, given that it is envisaged that any State Party to the future Aircraft Protocol is to be free to denounce the Protocol (cf. Article XXXI(1) thereof), it would seem reasonable to deduce therefrom that such a State would nevertheless still need to continue to be bound by the Convention, were it only for the purpose of acknowledging the continuing operation of the international registration system and in particular the International Registry established under its terms or of the Convention’s application with regard to categories of equipment governed by other Protocols to which such a State subsequently becomes a Party.

## Article B

### *Entry into force*

1. – This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [third/fifth] instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:

- (a) as from the time of entry into force of that Protocol;
- (b) subject to the terms of that Protocol; and

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<sup>10</sup> This is a matter that has been expressly left open by the intergovernmental negotiations that preceded the submission of the draft Convention and the draft Aircraft Protocol to the diplomatic Conference (cf. UNIDROIT CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report, § 38).

<sup>11</sup> It is worthy of note that representatives of the oil industry in different parts of the world have already communicated to UNIDROIT their interest in participating in the early preparation of a preliminary draft Protocol on Matters specific to Mobile Oil Rigs and that the UNIDROIT Secretariat already has plans in hand for the creation of an appropriate working group to begin such work just as soon as the diplomatic Conference has completed its work.

(c) as between States Parties to this Convention and that Protocol.

2. – For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the [third/fifth] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that Contracting State on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession, but only as regards a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of subparagraphs (a), (b) and (c) of the preceding paragraph.

3. – This Convention and the Protocol shall be read and interpreted together as one single instrument.

#### *Notes*

1.- Paragraphs 1 and 3 of this Article reproduce the provisions of Article 47 of the draft Convention, with two small changes in sub-paragraph 1(c), namely the replacement of the term “Contracting States Parties” by the term “States Parties,”<sup>12</sup> to bring its terminology into line with that of the Vienna Convention, and, from the moment that the future Convention is to be subject to independent ratification, acceptance, approval or accession, the addition of the requirement that such States must be Parties to both the Convention and the relevant Protocol, and one small change in paragraph 3, involving the replacement of the word “a” by the word “one,” in order to emphasise the intention of this provision.

2.- Subject to two minor amendments, paragraph 2 of this Article is, on the other hand, modelled on the provisions of Article XXVI(2) of the draft Aircraft Protocol, which themselves followed precedents to be found in recent UNIDROIT Conventions, namely the UNIDROIT Leasing Convention, the UNIDROIT Factoring Convention and the UNIDROIT Cultural Objects Convention. The two minor amendments involve the omission of the word “Contracting” in the first line before the word “State” and the addition of the proviso at the end of the paragraph necessary to bring it into line with the preceding paragraph.

3.- It is submitted that the principle enunciated in paragraph 3, in so far as its provisions are not limited to the entry into force of the draft Convention, is not one that should feature among the Final Provisions of the draft Convention but rather among the General Provisions thereof.<sup>13</sup>

### Article C

#### ***Internal transactions***

1. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State.

2. – Such declarations are to be notified in writing to the depositary.

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<sup>12</sup> “[P]arty” is defined by Article 2(1)(g) of the Vienna Convention to mean “a State which has consented to be bound by the treaty and for which the treaty is in force”.

<sup>13</sup> Cf. Comments presented to the diplomatic Conference by the Space Working Group (DCME Doc No. 14, pp. 4/5).

3. – Notwithstanding paragraph 1, the provisions of Articles 7(3) and 8(1), Chapter V, Article 28, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

*Notes*

1.- This Article reproduces the text of Article 48 of the draft Convention, amended, first, by the relocation of the parenthetical phrase now placed between the words “may” and “declare” – made as part of a general co-ordination of the language featuring in the draft Final Provisions – and, secondly, by the addition of a new paragraph 2, designed to bring this Article into line with Articles F(2) and L and for the purposes of clarification.

2.- It is submitted that, in so far as the provisions of this Article go beyond the normal scope of final provisions and also concern substance, the elements of the Article that touch on substance might usefully be moved from the Final Provisions of the draft Convention to the General Provisions thereof.

[Article D

***Protocols on Railway Rolling Stock and Space Property***

1. – The International Institute for the Unification of Private Law (UNIDROIT) shall communicate the text of any preliminary draft Protocol, relating to a category of objects falling within Article 2(3)(b) or (c) and prepared by a working group convened by UNIDROIT, to all States Parties to this Convention, all Member States of UNIDROIT and all Member States of any intergovernmental Organisation represented in that working group. Such States shall be invited by UNIDROIT to participate in intergovernmental negotiations for the completion of a draft Protocol on the basis of such a preliminary draft Protocol.

2. – UNIDROIT shall also communicate the text of any preliminary draft Protocol prepared by a working group to relevant non-governmental Organisations as UNIDROIT considers appropriate. Such non-governmental Organisations shall be invited to submit comments on the text of the preliminary draft Protocol to UNIDROIT or, as appropriate, to participate as observers in the preparation of a draft Protocol.

3. – Upon completion of a draft Protocol, as provided by the preceding paragraphs, the draft Protocol shall be submitted to the Governing Council of UNIDROIT for approval with a view to adoption by the General Assembly of UNIDROIT and such other intergovernmental Organisations as may be determined by UNIDROIT.

4. – The procedure for the adoption of Protocols covered by this Article shall be determined by the States participating in their preparation.]

*Notes*

1.- This Article reproduces Article 49 of the draft Convention, amended in paragraph 1, first, by the replacement of the term “Contracting States Parties” by “States Parties” – designed to bring it into line with the Vienna Convention – secondly, by the deletion of the words “through their adherence to any existing Protocol,” which could lend themselves to confusion and which may, in any case, be considered superfluous in view of Article B(1), and, thirdly, by the addition of the words “by UNIDROIT” – which would seem to be a logical consequence of the first sentence of this paragraph – in the penultimate line.

2.- Its placing in square brackets goes back to the Third UNIDROIT/ICAO Joint Session, held in Rome from 20 to 31 March 2000, when one delegation queried its place in the draft Convention but the Secretary-General of UNIDROIT indicated its importance in the context of the work underway on the preliminary draft Protocols to the draft Convention on Matters specific to Railway Rolling Stock and Space Property.<sup>14</sup>

3.- Since that time, however, work has proceeded apace on such preliminary draft Protocols. Indeed, the preliminary stage, that consisted in the preparation of preliminary draft Protocols by industry working groups created at the invitation of the President of UNIDROIT, has already been completed in respect of both preliminary draft Protocols.

4.- Following consideration by the UNIDROIT Governing Council at its 79<sup>th</sup> session, held in Lisbon from 10 to 13 April 2000, the preliminary draft Protocol on Matters specific to Railway Rolling Stock prepared by the Rail Working Group organised, at the invitation of the President of UNIDROIT, by Mr H. Rosen, has been transmitted to Governments and a first session of a UNIDROIT/OTIF Committee of governmental experts – open to member Governments of both UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail (OTIF) – to finalise a draft Protocol on the basis of the preliminary draft Rail Protocol has already taken place – in Berne on 15 and 16 March 2001 – and a second session of that Committee is due to be held in Rome next May. It is anticipated that a draft Rail Protocol will be ready for adoption in 2003.

5.- Following consideration by the UNIDROIT Governing Council at its 80<sup>th</sup> session, held in Rome from 17 to 19 September 2001, the preliminary draft Protocol on Matters specific to Space Property prepared by the Space Working Group organised, at the invitation of the President of UNIDROIT, by Mr P. D. Nesgos, is shortly to be transmitted to UNIDROIT member Governments – it is already before member Governments of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS), pursuant to the decision taken by U.N./COPUOS at its 43<sup>rd</sup> session, held in Vienna from 7 to 16 June 2000 – and a first session of a UNIDROIT Committee of governmental experts to finalise a draft Protocol on the basis of the preliminary draft Space Protocol will take place in Rome next June or September. Pursuant to the decision taken by the UNIDROIT Governing Council at its 80<sup>th</sup> session, member Governments of U.N./COPUOS that are not member Governments of UNIDROIT will also be invited to participate in this Committee, as well as the United Nations Office for Outer Space Affairs.

6.- In these circumstances, it behoves the diplomatic Conference to consider not only the implications of these developments for the drafting of paragraphs 1 and 2 of this Article but also the most appropriate procedure to be put in place, under paragraphs 3 and 4, for the approval and adoption of the two preliminary draft Protocols.

7.- Regarding the development of Protocols other than the draft Aircraft Protocol, it will be recalled that the Public International Law Working Group set up by the Second UNIDROIT/ICAO Joint Session, held in Montreal from 24 August to 3 September 1999, was agreed that UNIDROIT, in view of its central role in the inception of the overall multi-equipment project and in the development of the preliminary draft Rail and Space Protocols, should play a co-ordinating role and be intimately involved in the development of future Protocols, in conjunction with the relevant intergovernmental Organisations and the non-governmental Organisations representing the professional interests concerned.<sup>15</sup> It was suggested by the Public International Law Working Group that such a policy statement might usefully form the subject of a resolution to be adopted at the diplomatic Conference.<sup>16</sup>

8.- Regarding the approval and adoption of Protocols other than the draft Aircraft Protocol, the Public International Law Working Group considered different options. In addition to the traditional

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<sup>14</sup> Cf. UNIDROIT CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report, § 263.

<sup>15</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/3 - ICAO Ref. LSC/ME/3-WP/3, § 12.

<sup>16</sup> *Idem.*

diplomatic Conference procedure, it also looked at both a fast-track opting-in procedure and an expedited form of the traditional diplomatic Conference procedure. Whilst one delegation supported the fast-track approach for the future draft Rail and Space Protocols, others recorded their reservations, indicating their preference for the traditional diplomatic Conference procedure.<sup>17</sup>

## Article E

### ***Other future Protocols***

1. – UNIDROIT may create working groups to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.

2. – The Protocols referred to in the preceding paragraph shall be prepared and adopted in accordance with the procedures provided for under Article 49.

### *Notes*

1.- This Article reproduces Article 50 of the draft Convention.

2.- In relation to this Article, it is important to bear in mind the conclusions reached by the Public International Law Working Group regarding additional future Protocols referred to above.<sup>18</sup>

3.- As has been indicated above,<sup>19</sup> plans are already in hand for the creation of an industry working group for the preparation of a fourth Protocol and it accordingly behoves the diplomatic Conference to consider the most appropriate procedures to be put in place for the approval and adoption of such a Protocol.

4.- In this connection, it will be recalled that there was general agreement among those participating in the work of the aforementioned Public International Law Working Group, when discussing the merits of a fast-track opting-in procedure or an expedited diplomatic Conference procedure - as opposed to the traditional diplomatic Conference procedure - as regards the need to draw a distinction between the preliminary draft Rail and Space Protocols, on which work was already at quite an advanced stage, and such an additional new future Protocol.<sup>20</sup>

## Article F

### ***Territorial units***

1. – If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them and may substitute its declaration by another declaration at any time.

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<sup>17</sup> Cf. UNIDROIT CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report, §§ 30-32.

<sup>18</sup> Cf. Note 7 *sub* Article D, *supra*.

<sup>19</sup> Cf. Footnote 11, *supra*.

<sup>20</sup> Cf. UNIDROIT CGE/Int.Int./3-Report ICAO Ref. LSC/ME/3-Report, § 31.

2. – Such declarations are to be notified in writing to the depositary and are to state expressly the territorial units to which this Convention extends.

3. – If a State Party to this Convention has not made any declaration under paragraph 1, this Convention is to extend to all territorial units of that State.

#### *Notes*

1.- In so far as the draft Convention provides for its ratification, acceptance, approval or accession, it seemed opportune to introduce a provision, along the lines of the corresponding provision of the draft Aircraft Protocol, to deal with the difficulties sometimes experienced by States with federal systems of Government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

2.- Subject to four minor amendments, the provisions of this Article are modelled on the provisions of Article XXVII of the draft Aircraft Protocol, which themselves followed precedents to be found in recent UNIDROIT Conventions, namely the UNIDROIT Leasing Convention, the UNIDROIT Factoring Convention and the UNIDROIT Cultural Objects Convention. The four minor amendments involve the omission of the word “Contracting” before the word “State” in the first line of paragraph 1, the replacement of the word “[t]hese” by the word “[s]uch” at the beginning of paragraph 2, the addition of the words “in writing” in the same paragraph – to bring this provision into line with the requirement of writing specified in Article L – and the replacement of the term “Contracting State” by the term “State Party” in paragraph 3 and some minor consequential redrafting in order to bring it into line with the Vienna Convention.

3.- It will be noted that, as at present drafted, this Article sets forth only those typical elements of the federal State *extension* clause to be found in the aforementioned precedents. Thus it does not set forth a federal State *interpretation* clause of the type contained, for instance, in the UNIDROIT Cultural Objects Convention.<sup>21</sup> It will be recalled that the aforementioned Public International Law Working Group expressed concern at the scale of the federal State interpretation clause proposed by Canada and noted that most States had not experienced particular problems in practice with the more concise federal State clauses that had to date featured in international private commercial law Conventions.<sup>22</sup> It further took the view that unnecessary disparity between one such instrument and another of the same kind should be avoided.<sup>23</sup> It was therefore suggested that greater consistency should be sought between the federal State clauses to be included in the draft Convention and the draft Aircraft Protocol and the more concise formula employed in Article 35 of the draft Convention on the Assignment of Receivables in International Trade prepared under the auspices of the United Nations Commission on International Trade Law.<sup>24</sup> While recognising that such clauses would clearly be subject to negotiation at the diplomatic

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<sup>21</sup> Article 14(3) of the UNIDROIT Cultural Objects Convention reads as follows:

“If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:

(a) the territory of a Contracting State in Article 1 shall be construed as referring to the territory of a territorial unit of that State;

(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;

(c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;

(d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and

(e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.”

<sup>22</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/18 - ICAO Ref. LSC/ME/3-WP/18, § 37.

<sup>23</sup> *Idem*.

<sup>24</sup> Article 35 of said draft Convention reads as follows:

Conference, the Public International Law Working Group suggested that those States for which they will be necessary should start discussing with one another the minimum number of provisions that would absolutely need to be included in the federal State interpretation clauses to be included in the draft Convention and the draft Aircraft Protocol.<sup>25</sup> Finally, it should be noted that one member of the Public International Law Working Group expressed his concern that the operation of the federal State clauses to be incorporated in the draft Convention and the draft Aircraft Protocol should not give federal States an advantage over unitary States.<sup>26</sup>

## Article G

### *Determination of courts*

1. – 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.

2. – Such declarations are to be notified in writing to the depositary.

#### *Notes*

Apart from the same small drafting change made to Article C and the addition of a new paragraph 2, along the lines of the new paragraph 2 introduced in Article C, this Article reproduces Article 51 of the draft Convention.

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“1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may at any time declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State.

5. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.”

However, Articles 36 and 37 of the same draft Convention, as they emerged from the 34<sup>th</sup> session of the United Nations Commission on International Trade Law, held in Vienna from 25 June to 13 July 2001, provide as follows:

#### “Article 36

If a person is located in a State which has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State.

#### Article 37

Any reference in this Convention to the law of a State means, in the case of a State which has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State.”

<sup>25</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/18 - ICAO Ref. LSC/ME/3-WP/18, § 37.

<sup>26</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/18 - ICAO Ref. LSC/ME/3-WP/18, § 38.

Article H

***Declarations regarding remedies***

1. – A Contracting State may, at the time of signature, ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2. – A Contracting State shall, at the time of signature, ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

3. – Such declarations are to be notified in writing to the depositary.

*Notes*

Apart from the same small drafting change – in paragraph 1 – made to Articles C and G and the addition of a new paragraph 3, along the lines of the new paragraph 2 introduced in Articles C and G, this Article reproduces Article 52 of the draft Convention.

Article I

***Declarations regarding relief pending final determination***

1. – A Contracting State may, at the time of signature, ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 12, wholly or in part.

2. – Such declarations are to be notified in writing to the depositary.

*Notes*

Apart from the same small drafting change made to Articles C, G and H and the addition of a new paragraph 2, along the lines of the new paragraph 2 introduced in Articles C, G and H, this Article reproduces Article 53 of the draft Convention.

Article J

***Reservations, declarations and non-application of reciprocity principle***

1. – No reservations are permitted except those expressly authorised in this Convention and the Protocol.

2. – No declarations are permitted except those expressly authorised in this Convention and the Protocol.

3. – The provisions of this Convention subject to any reservation or declaration validly made shall be binding on the States Parties that do not make such reservations or declarations in their relations vis-à-vis the reserving or declaring State Party.

*Notes*

With two amendments to paragraph 3, involving the replacement of the terms “Contracting States” and “Contracting State” by “States Parties” and “State Party” respectively – designed to bring this paragraph into line with the Vienna Convention – and the addition of the words “validly made,” which would seem logical in view of the enunciation of the principle stated in paragraphs 1 and 2, this Article reproduces Article 54 of the draft Convention.

Article K

***Subsequent declarations***

1. – A State Party may make a subsequent declaration at any time after the date on which this Convention has entered into force for it, by the deposit of an instrument to that effect with the depositary.

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 deposit of the instrument in which such declaration is made with the depositary. Where a longer period for that declaration to take effect is specified in the instrument in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. – Notwithstanding the previous paragraphs, this Convention 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.

*Notes*

1.- In so far as the draft Convention provides for the making of a certain number of declarations, it seemed opportune to introduce a provision, along the lines of the corresponding provision of the draft Aircraft Protocol, on subsequent declarations.

2.- Subject to the replacement of the term “Contracting State” by “State Party” in paragraph 1 – in order to bring it into line with the Vienna Convention – some minor drafting changes in paragraph 3 – involving the replacement of the word “declaration” by “declarations” in line 2 and the replacement of the word “that” by the words “any such” in line 3, this Article reproduces the provisions of Article XXIX of the draft Aircraft Protocol, which themselves are loosely modelled on precedents to be found in recent UNIDROIT Conventions, namely the UNIDROIT Leasing Convention, the UNIDROIT Factoring Convention and the UNIDROIT Cultural Objects Convention.

3.- It is submitted that the diplomatic Conference may care to consider the case for extending the application of this Article, dealing with *subsequent declarations*, to both the Convention and each Protocol, in the same way as has been done in Article J, given in particular that that Article deals with the question of *declarations*.

## Article L

### ***Withdrawal of declarations and reservations***

Any State Party having made a declaration under, or a reservation to this Convention may withdraw it at any time by a formal notification in writing addressed to 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 the receipt of the notification by the depositary.

#### *Notes*

1.- In so far as the draft Convention provides for the making of a certain number of declarations and addresses the question of reservations, it seemed opportune to introduce a provision, along the lines of the corresponding provision of the draft Aircraft Protocol, on the withdrawal of such declarations and reservations.

2.- Subject to the replacement of the term “Contracting State” by “State Party,” in order to bring it into line with the Vienna Convention, this Article essentially reproduces the provisions of Article XXX of the draft Aircraft Protocol, which themselves are modelled on precedents to be found in recent UNIDROIT Conventions, namely the UNIDROIT Leasing Convention, the UNIDROIT Factoring Convention and the UNIDROIT Cultural Objects Convention.

3.- It is submitted that the diplomatic Conference may care to consider the case for extending the application of this Article, dealing *inter alia* with *withdrawal of reservations*, to both the Convention and each Protocol, in the same way as has been done in Article J, given in particular that that Article deals with the question of *reservations*.

## Article M

### ***Denunciations***

1. – This Convention may be denounced by any State Party at any time after the date on which it has entered into force for it, by the deposit of an instrument to that effect with the depositary.

2. – Any such denunciation shall take effect on the first day of the month following the expiration of [six/twelve] months after the date of deposit of the instrument of denunciation with the depositary. Where a longer period for that denunciation to take effect is specified in the instrument of denunciation, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. – Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciations had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

*Notes*

1.- In so far as the draft Convention provides for its ratification, acceptance, approval or accession, it seemed opportune to introduce a provision, along the lines of the corresponding provision of the draft Aircraft Protocol, on denunciation.

2.- Subject to the replacement of the term “Contracting State” by “State Party” in paragraph 1, in order to bring it into line with the Vienna Convention, and some minor drafting changes in paragraph 3 – involving the replacement of the word “denunciation” by “denunciations” in line 2 and the replacement of the word “that” by the words “any such” in line 3 – this Article essentially reproduces the provisions of Article XXXI of the draft Aircraft Protocol, which themselves are basically modelled on the precedent to be found in the UNIDROIT Cultural Objects Convention.

Article N

***Transitional provisions***

*Alternative A*

[This Convention does not apply to a pre-existing right or interest, which shall retain the priority it enjoyed before this Convention entered into force.]

*Alternative B*<sup>27</sup>

1. – Except as provided by paragraph 2, this Convention does not apply to a pre-existing right or interest.

2. – Any pre-existing right or interest of a kind referred to in Article 2(2) shall retain the priority it enjoyed before this Convention entered into force if it is registered in the International Registry before the expiry of a transitional period of [10 years] after the entering into force of this Convention in the State Party under the law of which it was created or arose. Where such a pre-existing right or interest is not so registered, its priority shall be determined in accordance with Article 28.

3. – The preceding paragraph does not apply to any right or interest in an object created or arising under the law of a State which has not become a Party to this Convention.]

*Notes*

1.- With two amendments – involving the replacement in paragraph 2 of Alternative B of the term “Contracting State” by “State Party” and the replacement of the words “Contracting State” by “Party to this Convention” in paragraph 3 – designed to bring these paragraphs into line with the Vienna Convention, this Article reproduces Article 55 of the draft Convention.

2.- It should be noted that, as at present drafted, neither Alternative A nor Alternative B apply to a Protocol, which would thus require its own transitional provisions, unless the diplomatic Conference should decide to bring it under the scope of this Article by amending the same.

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<sup>27</sup> The ICAO Legal Committee, while maintaining both Alternatives A and B, expressed the view that in the event that Alternative B were selected, the fees charged with respect to these transactions should be nominal.

Article O

***Review Board and Review Conferences***

1. – A five-member Review Board shall promptly be appointed by ..., in order to prepare yearly reports for the States Parties, Contracting States and negotiating States, addressing the matters specified in sub-paragraphs (a)-(d) of paragraph 2. The composition of the Review Board, its terms of reference and its organisation and administration shall be determined, in consultation with other relevant interests, by ... .

2. – At the request of not less than twenty-five per cent of the States specified in the preceding paragraph, Review Conferences of those States shall be convened from time to time to consider:

(a) the practical operation of this Convention and the Protocol and their effectiveness in facilitating the asset-based financing and leasing of the objects covered by their terms;

(b) the judicial interpretation given to, and the application made of the terms of this Convention, the Protocol and the regulations;

(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority; and

(d) whether any modifications to this Convention and the Protocol or the arrangements relating to the International Registry are desirable.

*Notes*

1.- This Article essentially reproduces the provisions of Article XXXII of the draft Aircraft Protocol, amended, first, to bring it into line with the Vienna Convention – as seen in the replacement of the term “Contracting States” in paragraph 1 by the terms “States Parties, Contracting States and negotiating States” – secondly, to reflect the application of the draft Convention to different categories of equipment – as seen in the concluding words of sub-paragraph 2(a) – thirdly, to reflect the fact that it contemplates not only a Review Board but also Review Conferences – as seen in its heading – and, fourthly, by the addition of the words “by ..., in order” after the word “appointed” in the first sentence of paragraph 1 and of a second sentence in that paragraph, designed to raise the important question of by whom, how and with what terms of reference the Review Board should be set up.

2. - It is designed to give the diplomatic Conference cause to reflect on the desirability of the establishment of a review procedure not only for each Protocol but also for the future Convention itself. The aforementioned Public International Law Working Group was agreed that, in recognition of the controlling nature of Protocols under the Convention/Protocol system, the fundamental and only binding review mechanism for the future Convention/ Protocol in relation to a particular category of equipment should be via the Protocol relating to that category of equipment so that only a Review Conference of States Parties, Contracting States and negotiating States in respect of a given Protocol should have the power to propose amendments binding on such States.<sup>28 29</sup>

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<sup>28</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/3 - ICAO Ref. LSC/ME/3-WP/3, § 14.

<sup>29</sup> Such amendments would not therefore affect the rights and obligations of States Parties, Contracting States and negotiating States in respect of other Protocols (cf. UNIDROIT CGE/Int.Int./3-WP/3 - ICAO Ref. LSC/ME/3-WP/3, § 14.

3. – It will be recalled however that the Public International Law Working Group was also agreed as to the desirability of States Parties, Contracting States and negotiating States in respect of the future Convention having the power periodically to call general Review Conferences, although with any amendments that might be proposed by such Conferences only being able to be implemented in relation to a particular category of equipment following confirmation by the States Parties, Contracting States and negotiating States in respect of the Protocol concerned.<sup>30</sup> It was agreed that it would not be desirable to give States Parties, Contracting States and negotiating States in respect of the future Convention – which might well include States that were not States Parties to a particular Protocol – the power to determine on their own the review of such a Protocol without such States being given an opportunity to confirm whether such an amendment was satisfactory for the particular category of equipment concerned.<sup>31</sup> This also reflected the fact that the future Convention/Protocol were to be read as a single instrument in respect of any given category of equipment.<sup>32</sup> The Public International Law Working Group nevertheless recognised that such general Review Conferences, whilst in practice only having an advisory function, could play an important part in filtering the latest developments regarding international commercial finance through the Convention/Protocol system.<sup>33</sup>

4. - It is submitted that the rightful place of this Article would not be among the Final Provisions but rather in a separate substantive Chapter of its own that might usefully appear just before the Chapter containing the Final Provisions.

#### Article P

##### *Functions of the depositary*

1. – This Convention shall be deposited with the [...].
2. – The [depositary] shall:
  - (a) inform all negotiating States and [...] of the adoption of this Convention and 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 Convention;
    - (iii) each declaration made in accordance with this Convention;
    - (iv) the withdrawal of any declaration; and
    - (v) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;
  - (b) transmit certified true copies of this Convention to all those States specified in sub-paragraph (a) and to [...];
  - (c) provide the Registrar with a copy of each instrument of ratification, acceptance, approval or accession and of each declaration or withdrawal of a declaration, so that the information contained therein is easily and fully available; and
  - (d) perform such other functions customary for depositaries.

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<sup>30</sup> Cf. UNIDROIT CGE/Int.Int./3-WP/3 - ICAO Ref. LSC/ME/3-WP/3, § 15.

<sup>31</sup> *Idem.*

<sup>32</sup> *Idem.*

<sup>33</sup> *Idem.*

*Notes*

1. - This Article reproduces the substance of Article XXXIII of the draft Aircraft Protocol, which was in turn modelled on precedents to be found in recent UNIDROIT Conventions, namely the UNIDROIT Leasing Convention, the UNIDROIT Factoring Convention and the UNIDROIT Cultural Objects Convention. It has however been found opportune slightly to amend certain parts of its drafting.

2. - As elsewhere in these draft Final Provisions, some of these amendments are designed to bring Article P into line with the Vienna Convention. This is the case with the substitution of the term “Contracting States” by “negotiating States” in sub-paragraph 2(a). In this connection, it is worth recalling what was stated above *sub* note 2 to Article A, namely that, should the diplomatic Conference choose to broaden the category of States that may sign the future Convention beyond negotiating States, then it is submitted that it might be considered worthwhile replacing this term by a formula along the lines of that employed in Article 81 of the Vienna Convention.

3. - In other places, amendments have been introduced to make the language of this Article correspond more accurately to what would seem to be its purpose. Thus, the words “Depositary arrangements” in the heading of the Article have been replaced by the words “Functions of the depositary,” since it is precisely this with which the Article is concerned. Again, in sub-paragraph 2(a) the words “and [...] of the adoption of this Convention” have been added, since it is legitimate to expect that the States that are to receive certified true copies of the Convention under sub-paragraph 2(b) should, in the event that the diplomatic Conference should decide to broaden the scope of sub-paragraph 2(a), also be informed of its adoption. Thirdly, in sub-paragraph 2(b) the words “signatory States, to all States acceding to the Convention” have been replaced by the words “those States specified in sub-paragraph 2(a),” in order to reflect the fact that the purpose of transmitting certified true copies to States is to enable them to start the internal procedure for them to become Parties to the future Convention and that it is therefore important for them to receive such certified true copies as early as possible, and certainly well before their acceding thereto. Fourthly, the words “the contents” have been replaced in sub-paragraph 2(c) by the words “a copy,” since if the information contained in each instrument is to be made “publicly accessible” it would seem preferable for the Registrar to be acquainted with the exact contents of such instruments. Fifthly, with a view to reinforcing this idea, the words “publicly accessible” in the same sub-paragraph have been replaced by the words “easily and fully.” In another place, finally, one of the sub-clauses of sub-paragraph 2(a), that dealing with “the date of entry into force of this Convention,” has been moved up to a position that appears more logical in the context of the order of the items covered in these sub-clauses.

4.- It has always been the custom with UNIDROIT Conventions in the past for the member State on the territory of which the diplomatic Conference for their adoption has been convened to exercise the functions of depositary. Thus the Government of Canada agreed to exercise the functions of depositary under the UNIDROIT Leasing Convention and the UNIDROIT Factoring Convention, adopted at a diplomatic Conference held in Ottawa, and the Government of Italy the functions of depositary under the UNIDROIT Cultural Objects Convention, adopted at a diplomatic Conference held in Rome. In the case of the draft Convention and the draft Aircraft Protocol the Government of South Africa has however already made it known that it has no particular desire to exercise the functions of depositary under the future Convention and the future Aircraft Protocol. In these circumstances, the UNIDROIT Secretariat judged it opportune to consult the UNIDROIT Governing Council at its aforementioned 80<sup>th</sup> session. On that occasion the Governing Council authorised the Secretary-General of UNIDROIT to exercise such functions of depositary under the future Convention and Aircraft Protocol as it might be called upon to exercise by the diplomatic Conference. The UNIDROIT Secretariat has in the meantime had the opportunity to discuss the matter with the ICAO Secretariat and would, in the light of these discussions, like to serve notice of its willingness to exercise the functions of depositary under the future Convention and, with the ICAO Secretariat, jointly to exercise such functions under the future Aircraft Protocol, should such a course of action commend itself to the diplomatic Conference. It believes that what has been stated above regarding the desirability of UNIDROIT playing a co-ordinating role in the development

of additional future Protocols <sup>34</sup> only serves to reinforce the case for its serving as depositary under the future Convention, whereas ICAO's experience as depositary under international civil aviation Conventions is only too well-known. The UNIDROIT Secretariat believes moreover that the joint exercising by UNIDROIT and ICAO of depositary functions under the draft Aircraft Protocol would provide an excellent institutional model to be considered in the context of additional future Protocols.

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<sup>34</sup> Cf. Note 7 *sub* Article D, *supra*.