



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

(Cape Town, 29 October to 16 November 2001)

### **COMMENTS ON ARTICLE 49 OF THE DRAFT CONVENTION**

(Presented by the Rail Working Group (RWG))

The “architecture” of the proposed Convention, with certain basic rules in a Convention and detailed industry related provisions in industry Protocols, recognises that the various industries have common objectives but with different circumstances. The Rail Working Group fully supports this, arguably, unorthodox but highly pragmatic approach. In this note, supplemental to our submission of 4 October 2001 (DCME Doc No. 15), we propose to address the issue of the adoption of the Protocols relating to Railway Rolling Stock and Space Assets (the “follow-on protocols”) and would respectfully suggest that the Conference should also adopt an innovative approach in relation thereto.

As mentioned in our submission of 4 October 2001, we believe that it is very important that follow-on protocols are adopted expeditiously. This is because:

- 1• Every year that passes without the follow-on protocols has a significant negative financial effect on the rail and space sectors and will, in many countries, curtail capital investment in those sectors;
- 1• There is some competition (as well as co-operation) between the aviation and the other two sectors; a long time period between the implementation of the Aircraft Protocol and the other Protocols will result in a competitive disadvantage for the other industries; and
- 1• Once additional Protocols are in force, this will open up the possibility of combined financing of transportation assets, which have common funders and/or common manufacturers.

The proposed Article 49 of the Convention is based on the premise that progress on the follow-on protocols is well advanced (differentiating them from possible protocols initiated pursuant to Article 50) and that therefore they can be adopted through a streamlined procedure. The current Article 49 was placed in square brackets at the third Joint Session 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 Assets. The RWG considers that Article 49 should remain in the Convention, subject to a more specific indication in the Convention as to how the follow-on protocols may be adopted.

The current working draft of Article 49 is not, as we read it, intended to subvert the sovereignty of Contracting States but merely to provide a mechanism for approval of the follow-on protocols. Indeed it gives UNIDROIT authority to move forward the follow-on protocols quickly and to involve States, which are not members of UNIDROIT. Nonetheless, UNIDROIT's role is solely to facilitate speedy consideration of the protocols concerned and does not limit any Contracting State to the Convention from declining to sign a specific protocol or signing with reservations or derogations. Article 49 is, moreover, appropriate, as Article 50 is not pertinent since the conditions stated therein have been fulfilled in relation to the rail and space industries.

The streamlined procedure in Article 49 also is logical. We know already that many of the provisions in the respective protocols are similar and it should not be necessary to begin the whole approval process *de novo*. Rather we should be able to utilise to the maximum the considerable investments in time and money made by Contracting States taking advantage of the fact that the follow-on protocols represent an extension of the work being done at this Conference. A streamlined procedure is appropriate for the following reasons:

- (a) it is a natural conclusion from the "Convention plus protocols" architecture, since the bulk of the work has already been concluded in consideration of the Convention and the protocols only seek to apply the basic rules to specific industry conditions;
- (a) it is considerably more cost effective than waiting for a detailed approval through a full scale diplomatic conference;
- (a) it permits the reference to discussions and conclusions at the Conference and avoids unnecessary repetition; and
- (a) it will facilitate speedy implementation with the consequent benefits listed above.

If the concept of Article 49 is accepted for the follow-on protocols, how should it be structured? The RWG broadly supports the current draft of the Article and the proposed minor changes proposed by the UNIDROIT secretariat and set out in their submission of 10/10/01 (DCME Doc No. 16). But we do have some comments on Article 49 (and which, where relevant, are implemented in the annexed proposed revised Article 49):

1. In their submission of 10/10/01, the UNIDROIT secretariat recall that the Public International Law Working Group meeting in 1999 suggested 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." It was also suggested at the meeting that the diplomatic Conference might usefully adopt a resolution making a policy statement to this effect. We endorse this suggestion.

1. The class of States with which UNIDROIT should communicate texts is, in our view, too limited. UNIDROIT should be empowered to involve all States accredited or invited to the current diplomatic Conference. This is especially important in our view so that as many African countries as possible are involved in the project which, as relates to rail, will be especially beneficial to the development of their economies. Article 49(1) should be modified appropriately and we ask that such countries, which are not members of UNIDROIT or OTIF, nonetheless are

invited to the future meetings of Government Experts considering the follow-on protocols.

3. We consider that there should be a more extensive Article 49(4) *et seq.* determining the procedure for adoption. Considerable discussion has already taken place as to what this should be. See in particular the report of the Public International Law Working Group of 1999 and the valuable paper from Professor Chinkin of last year. There are two key questions, namely, should the rules on adoption of a protocol be set out in that protocol or in the Convention and secondly, if not sent down to the protocols, what is the correct approach in the Convention?

We consider that it would be easy to place the issue in the respective protocols but this would be a mistake. The follow-on protocols are effectively an iteration of the Convention and therefore it is appropriate for the Convention to govern their adoption. Moreover, it is surely correct to legislate at the level of the Convention for consistency in the adoption procedure. This would result in a seamless integration of the respective protocols and also facilitate for Contracting States the adoption process by eliminating a variable between the protocols.

If it is accepted that Convention should contain the provisions regulating adoption of the follow-on protocols, what should these provisions contain? In her analysis mentioned above, Professor Chinkin set out three options, namely:

- (a) an opt out system whereby UNIDROIT adopted a protocol and this would apply to Contracting States if they did not opt out within a pre-set period;
- (a) an opt in system whereby Contracting States would need to opt –in to an agreed formulation of the protocol; or
- (c) a conventional structure, whereby the protocol is adopted by diplomatic Conference in the same way as for the Convention itself and the aviation protocol.

We consider that the solution lies between (b) and (c). Option (a) is highly desirable in terms of the speed of adoption process but we doubt many States would agree in advance even to risk being bound by an instrument to which they are not a directly consenting party. This approach raises sovereignty issues unnecessarily as well as presenting some significant organisational issues. We accept also that some type of diplomatic meeting will be necessary since it must be correct that Contracting States review the protocol's content and influence it in a plenary and diplomatic forum as opposed to doing so informally through meetings of government experts. We are mindful of the fact also that although the protocols do merely seek to apply the Convention to a specific industry, on the other hand they each will modify the basic provisions of the Convention in certain cases. But we remain concerned as to the time that will be required as well as the expense for governments. We propose therefore a compromise where UNIDROIT will be required to call a diplomatic meeting (we deliberately avoid the word "conference") expeditiously with the clear understanding that it will be short and that Contracting States may elect not to attend but to opt in to the protocol after the meeting. This proposal is elaborated in more detail in the text annexed.

In conclusion, the RWG appreciates the considerable work already done at the Conference which has direct application to the rail and space industries. It is very important that this work is converted into direct benefits for these industries as soon as possible and this should be effected through a standardised methodology in the body of the Convention for adoption of the follow-on protocols. However the adoption process should be inclusive and not exclude States which are not members of UNIDROIT or the international organisation(s) involved with the project. The process should be speedy with a modest diplomatic meeting taking place for the purposes of adoption of the protocol(s) shortly after formal adoption of the protocol by the UNIDROIT General Assembly and also contain a clear mechanism for States to adopt the protocol without needing to attend the diplomatic meeting.

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**APPENDIX**

**PROPOSED CHANGES TO ARTICLE [49] AS MODIFIED  
BY THE UNIDROIT SECRETARIAT AND SET OUT IN THEIR SUBMISSION  
OF 10/10/01 (DCME DOC NO. 16)**

Article [49]

*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, such other Member State of the United Nations as UNIDROIT considers appropriate 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 such relevant non-governmental Organisations as UNIDROIT considers appropriate. Such non-governmental Organisations shall be invited to submit promptly 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. – Upon approval by its Governing Council, UNIDROIT shall expeditiously convene a short diplomatic meeting for adoption of the draft Protocol and shall invite all States specified in Article 49 (1) above and such States shall also be notified of the adoption of the Protocol at such meeting. The procedure for the adoption of Protocols covered by this Article shall be determined by the States participating in their preparation.

5. – State Parties not attending the diplomatic meeting may ratify the Protocol by deposit of an instrument of ratification, acceptance, approval or accession with the depositary thereof.

6. – Any non-State Party may accede to the Protocol by deposit of an instrument of accession with the depositary thereof as from the date it is open for signature. Such State shall become a State Party to the Convention and the Protocol so accepted. It shall not be bound by any earlier Protocol.