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**Preliminary annotated first draft of a fourth protocol to the Cape Town Convention on matters specific to agricultural, construction and mining equipment (MAC Protocol)**

(prepared by the UNIDROIT Secretariat)

<i>Summary</i>	Options document to assist the Study Group in preparing a draft MAC Protocol.
<i>Action to be taken</i>	For amendment and discussion.
<i>Related documents</i>	UNIDROIT 2014 - 72K – SG1 – Doc. 2

***Introduction***

1. The purpose of this document is to provide the MAC Protocol Study Group with a preliminary annotated draft of the MAC Protocol that can be used as a basis of discussion at the first Study Group meeting. This annotated draft identifies different possible constructions of the draft Protocol, based primarily on the other existing Protocols to the Cape Town Convention. It explains why each option has been suggested, and where possible examines the strengths and weaknesses of the proposed text.
2. This draft is not comprehensive and is not intended to be directly adopted. It is envisaged that the Protocol is likely to diverge significantly from the draft provisions in this document.
3. This document utilises the following layout:
  - Draft provisions adopted directly from the language of one or more of the previous Protocols to the Cape Town Convention are in black.
  - Draft provisions that diverge from the language used in previous Protocols is marked in *italics*. They have been marked in *italics* as they may warrant additional scrutiny from the Study Group.
  - Annotations and comments on the draft provisions are contained in boxes and in a different font and refer to the draft Articles that directly precede them.

**PRELIMINARY DRAFT PROTOCOL TO THE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO MINING, AGRICULTURE AND CONSTRUCTION EQUIPMENT**

THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING it necessary to implement the UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*), as it relates to mining, agricultural and construction equipment, in the light of the purposes set out in the preamble to the Convention

MINDFUL of the need to adapt the Convention to meet the particular requirements of mining, agricultural and construction equipment and their finance,

HAVE AGREED upon the following provisions relating to mining, agriculture and construction equipment:

This suggested text for the preamble is taken from the almost uniform text used in the Air Protocol 2001 and the Rail Protocol 2007. In the second paragraph, the Railway Protocol shortens the phrase inside the parenthesis to ‘(the “Convention”)', however the Space Protocol subsequently readopted the original phrasing in the Aircraft Protocol ‘(hereinafter referred to as the *Convention*)’. It is unclear as to why the text in the Rail Protocol diverged in this respect.

The Space Protocol adopts a different approach, and contains a significantly longer preamble than the other Protocols:

*AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner, RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them, MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally, DESIRING to provide broad and mutual economic benefits for all interested parties, BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions, CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection, TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,*

The Official Commentary provides very little additional information on why this longer preamble was adopted.<sup>1</sup>

An extended Preamble to the MAC Protocol may provide a useful opportunity to signal the key divergences of the fourth protocol from the previous protocols, potentially in regards to:

- The heightened importance of MAC equipment to developing countries
- The ability of this protocol to open up emerging markets to better and more efficient technology
- The flexibility for countries to adopt any or all of the three types of equipment so as not to disturb national domestic secured transaction regimes
- Lesser emphasis on mobility, while still allowing the Protocol to provide the same economic and legal benefits for both creditors and debtors

<sup>1</sup> Goode (415).

**CHAPTER I**  
**SPHERE OF APPLICATION AND GENERAL PROVISIONS**

**Article I**  
Defined terms

1. In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. In this Protocol the following terms are employed with the meanings set out below:

These paragraphs are uniform across all three previous Protocols.

(a) *"agricultural/construction/mining equipment" means:*

*OPTION 1: any item listed in Annex 1/Annex 2/Annex 3 in the Regulations to the International Registry*

OR

*OPTION 2: any item fulfilling the requirements specified in the Regulations of the International Registry*

OR

*OPTION 3: [add description of equipment here]*

The definition of agricultural equipment will dictate the scope of the Protocol. This issue is discussed at pages 2 – 8 of the Legal Analysis (Study 72K – SG1 – DOC. 6). Options 1 and 2 use the Regulations to the International Registry to define MAC equipment. Option 3 defines the equipment specifically in the Protocol. A fourth option could be to use elements contained in both the Protocol and the Regulations to define the equipment.

(a) "guarantee contract" means a contract entered into by a person as guarantor

(b) "guarantor" means a person, who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance

(c) "insolvency-related event" means:

- i. the commencement of the insolvency proceedings; or
- ii. the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action

(d) "primary insolvency jurisdiction" means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise.

These definitions are uniform across all three previous Protocols.

## Article II

### Application of the Convention as regards to agricultural, mining and construction equipment

1. The Convention shall apply in relation to agricultural, mining and construction equipment as provided by the terms of this Protocol *and its annexes*.
2. The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to agricultural, mining and construction equipment.
3. *The Protocol does not apply to equipment merely because it is designed to be used in agriculture, mining or construction.*

Paragraphs one and two of Article II are identical in language and approach to all three prior Protocols.

Paragraph three of Article II is based upon the language of Article II (4) of the Space Protocol, which provides:

*This Protocol does not apply to an aircraft object merely because it is designed to be temporarily in space.*

The purpose of this additional suggested paragraph is to provide certainty that the MAC Protocol is not of general application, and only applies to the equipment prescribed in the Annexes. During initial consultations, several stakeholders commented that it was important to make this issue sufficiently clear to ensure that the MAC Protocol did not interfere with general secured transactions law unnecessarily, particularly in relation to the UNICTRAL Legislative Guide on Secured Transactions.

If further explicit exclusions in the application of the MAC Protocol are required, it would be sensible to add them as additional subparagraphs to this Article.

### **Article III**

#### Derogation from application of Protocol

The parties may, by agreement in writing, exclude the application of Article X and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article VIII (3) – (4).

This drafting is consistent with Article IV(3) of the Air Protocol, Article XVI of the Space Protocol and Article III of the Rail Protocol.

### **Article IV**

#### Representative capacities

A person may, in relation to agricultural, mining or construction equipment, enter into an agreement, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention in an agency, trust or representative capacity.

This drafting is consistent with the Air, Rail and Space Protocols.

### **Article V**

#### Identification of agricultural, mining or construction equipment

##### *OPTION A*

*A description of agricultural, mining or construction equipment that satisfies the requirements established in the Regulations is necessary and sufficient to identify the agricultural, mining or construction equipment for the purposes of Article 7(c) of the Convention.*

##### OPTION B

1. For the purposes of Article 7(c) of the Convention and Article XV(2) of this Protocol, a description of the agricultural, mining or construction equipment is sufficient to identify the agricultural, mining or construction equipment if it contains:

- (a) a description of the agricultural, mining or construction equipment by item;
- (b) a description of the agricultural, mining or construction equipment by type;
- (c) a statement that the agreement covers all present and future agricultural, mining or construction equipment; or
- (d) a statement that the agreement covers all present and future agricultural, mining or construction equipment except for specified items or types.

2. For the purposes of Article 7 of the Convention, an interest in future *agricultural, construction and mining equipment* identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the *agricultural, construction and mining equipment*, without the need for any new act of transfer.

The drafting of Article V will necessarily be different from the previous Protocols. Option A is based loosely on the drafting of Article V of the Aircraft Protocol. However, it differs in that it does not prescribe a serial number-based system as the method of identification.

Option B is modelled on the description based approach in Article V of the Rail Protocol. Article V of the Rail Protocol allows any method of description, which enables railway stock to be identified to the agreement creating or providing for the international interest, whether the description is by item, by type or by a statement that the agreement covers all present and future railway rolling stock. This description-based approach to identification partially overrides Article 2(2) of the Convention that requires that an object be uniquely identifiable.

### **Article VI**

#### Application of the Protocol to certain categories of equipment

1. *The Protocol will apply to all agricultural, construction and mining equipment as [identified in Article ??] OR [in the Annexes to the Regulations].*
2. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that the Protocol does not apply to one or more categories of equipment, being agriculture, construction or mining equipment.*
3. *A Contracting State may make further declarations excluding certain types of equipment contained in the relevant Annexes to the Regulations.*

This Article is a completely new Article that is not contained in any of the previous Protocols. It allows Contracting States to 'opt out' for the application of the Protocol to each category of equipment (agricultural, construction and mining). Paragraph three further allows Contracting States to further exclude the application of the Protocol to certain types of equipment (under a HS code) within a category that they have already opted into. For example, under Paragraph 2 a Contracting State can declare that the Protocol does not apply in relation to the Annex in the Regulations that contains the HS codes for agricultural equipment. Under paragraph 3, the Contracting State can also make further declarations to exclude certain types of equipment from a category that they have not opted out of under paragraph 2 (such as a certain type of crane listed in the Annex to the Regulations, if the Contracting State has not opted out of construction equipment).

### **Article VII**

#### Choice of law

1. This Article applies only where a Contracting State has made a declaration pursuant to Article XXIV(1).
2. The parties to an agreement, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.
3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

The Choice of Law Provisions are uniform across all three previous Protocols. The Study Group may wish to consider whether the choice of law provisions require altering for the MAC Protocol.

**CHAPTER II**  
**DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

**Article VIII**

Modification of default remedies provisions

OPTION A

*Remove this Article, thereby not modifying the default remedy provisions in the Convention.*

OPTION B

1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter, procure the export and physical transfer of agricultural, mining and construction equipment from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to agricultural, construction and mining equipment. Any remedy given by the Convention in relation to agricultural, mining and construction equipment shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving 14 or more calendar days' prior written notice of a lease to interested persons as provided by Article 8(4) of the Convention shall be deemed to satisfy the requirement of giving the "reasonable prior notice" specified therein. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

*5. Subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities expeditiously co-operate with and assist the creditor to the extent necessary for the exercise of the remedies specified in paragraph 1.*

6. A chargee proposing to procure the export of agricultural, construction and mining equipment under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed export to:

- (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and
- (b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the export.

The Study Group should consider whether it is necessary to modify the default remedy provisions contained in the Convention, as has occurred in the other Protocols. Option A is to remove Article VIII altogether.

Option B is adapted from the text of Article VII of the Rail Protocol. Paragraph 4 adopts the 14 calendar day written notice period adopted in the Rail and Space Protocols, rather than the 10 working days adopted in the Aircraft Protocol. This allows for greater certainty and to avoid the need to ascertain what are considered working days in the particular jurisdiction in which the remedy is to be exercised.

Paragraph 5 provides a general obligation on Contracting States to ensure that the relevant administrative authorities expeditiously assist a creditor exercise remedies under the Protocol. This is a departure from the Aircraft Protocol, which mandates a Contracting State to honour a request for de-registration and export if two conditions are satisfied. The Study Group may wish to discuss whether this paragraph is necessary for the MAC Protocol.

**Article IX**Modification of provisions regarding relief pending final determination

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXIV(2) and to the extent stated in such declaration.
2. For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of calendar days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.
3. Article 13(1) of the Convention applies with the following being added immediately after subparagraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale of the object and application of proceeds therefrom”,  
and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.
4. Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.
5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

Paragraphs 1 and 3-6 are uniform with the text across all three previous Protocols. It is suggested that Paragraph 2 could be added to clarify that the debtor does not need to agree to a creditor claiming either perseverance of the object, possession or control of the object, immobilisation of the object or management of the object under Article 13 of the Convention.
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**Article X**  
Remedies on Insolvency

1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXIV(3).<sup>2</sup>
2. References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

**Alternative A**

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the *agricultural, mining or construction equipment* to the creditor not later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the *agricultural, mining or construction equipment* if this Article did not apply.

4. For the purpose of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 3 :

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the *agricultural, mining or construction equipment* and maintain it and its value in accordance with the agreement ; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the *agricultural, mining or construction equipment* under arrangements designed to preserve the *agricultural, mining or construction equipment* and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the *agricultural, mining or construction equipment* where, by the time specified in paragraph 3, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement and related transaction documents. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article XI, paragraph (1) :

- (a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 3.

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<sup>2</sup> Article XXXII – „Declarations relating to certain provisions“

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

13. The Convention as modified by Article XI of this Protocol shall apply to the exercise of any remedies under this Article.

As consistent with the Aircraft Protocol, the MAC-Protocol should offer – at least – two alternative texts of the Article dealing with remedies on insolvency. Therefore, the subsequent provisions follow the Aircraft Protocol in providing an Alternative A as a “hard” or ruled-based version and an Alternative B as a “soft” or discretion-based version.

Alternative A is designed to meet the requirements of advanced structured financing. Paragraphs 3 and 7 of Alternative A require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State’s declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement and related transaction documents. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A, the creditor can apply for and is entitled to obtain an expedited court order requiring the insolvency administrator or the debtor to give possession of the equipment subject. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (see Alternative A, paragraph 9).

Paragraph 3, as it can be found in all previous protocols, requires the insolvency administrator or the debtor to give possession of (or control over) the equipment subject to the creditor.

The space protocol contains, in addition, a provision requiring the insolvency administrator or the debtor to give possession of or control over the debtor’s rights covered by a rights assignment to the creditor.

The term “related transaction documents” in paragraph 7 is not defined in previous protocols. According to the official commentary, the term “related transaction documents” is intended to cover “all documents, other the agreement itself, which impose obligations in respect of the transaction”.<sup>3</sup> Should this “definition” be included in the text as a separate paragraph?

### **Alternative B**

3. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXXII(3)<sup>4</sup> whether it will:

- (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
- (b) give the creditor the opportunity to take possession of the *agricultural, mining or construction equipment*, in accordance with the applicable law.

<sup>3</sup> Goode, Official Commentary of the Railway Protocol, (196)

<sup>4</sup> Presuming that Article XXVIII(3) deals with “Declarations relating to certain provisions”

4. The applicable law referred to in subparagraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

5. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

6. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 3, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the *agricultural, mining or construction equipment* but fails to do so, the court may permit the creditor to take possession of the *agricultural, mining or construction equipment* upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

7. The *agricultural, mining or construction equipment* shall not be sold pending a decision by a court regarding the claim and the international interest.

Alternative B requires the insolvency administrator or the debtor, as applicable, upon the creditor's request and within the period specified in the declaration of the Contracting State, to state whether it will cure all defaults and perform all future obligations under the agreement and related transaction documents or give the creditor the opportunity to take possession of the equipment subject in accordance with the applicable law (see Alternative B, paragraph 3).

Compared with Alternative A, in Alternative B the creditor's rights are qualified in three significant respects:

1. The insolvency administrator does not have to take action to cure all defaults or give the creditor an opportunity to take possession; it merely has to give notice to the creditor whether it will do either of these things.
2. If the insolvency administrator does not give the required notice or if, having declared it will give the creditor the opportunity to take possession, it fails to do so, the creditor cannot exercise self-help but must apply to the court for leave to take possession and if leave is granted conditions may be imposed. So the creditor's entitlement to take possession of the equipment subject under Alternative A is substituted in Alternative B by the court's discretion.
3. Alternative B contains no equivalent to paragraph 12 of Alternative A that no rights or interest, other than non-consensual rights or interests covered by a declaration under Article 39 (1) of the Convention, are to have priority over registered interests.

It is questionable whether there is actually a need for Alternative B in the MAC Protocol, given that out of 56 Contracting States to the Aircraft Protocol only one Contracting State (Mexico) has opted for Alternative B while 40 Contracting States have opted for Alternative A. However, a MAC Protocol offering only the "hard" or ruled-based version of Alternative A might be a reason States to refrain from ratifying the protocol at all.

It does not seem necessary to include Insolvency Alternative C from the Rail Protocol in the MAC Protocol.

## **Article XI**

### Insolvency assistance

1. This Article applies only in a Contracting State which has made a declaration pursuant to Article XXIV(1).

2. The courts of a Contracting State in which *agricultural, mining or construction equipment* is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XIII.

These two provisions are identical to the corresponding paragraphs of the Aircraft and Railway Protocols. It does not seem necessary to modify the text.

**Article XII**  
Debtor provisions

1. In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the *agricultural, mining or construction equipment* in accordance with the agreement as against:

(a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention or, in the capacity of buyer, Article XVI(1) of the Protocol, unless and to the extent that the debtor has otherwise agreed; and

(b) the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4)(a) of the Convention, but only to the extent, if any, that such holder has agreed.

2. Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to *agricultural, mining or construction equipment*.

The text of this article follows Article XXV of the Space Protocol which is consistent (though not identical) with the corresponding provisions in the Aircraft and Railway Protocol.
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**CHAPTER III**  
**REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AGRICULTURAL,  
MINING AND CONSTRUCTION EQUIPMENT**

**Article XIII**

The Supervisory Authority and the Registrar

1. The Supervisory Authority shall be designated at, or pursuant to a resolution of, the Diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Mining and Construction Equipment, provided that such Supervisory Authority is able and willing to act in such capacity.

This provision is adapted from Article XXVIII (1) of the Rail Protocol, which allows a degree of flexibility in designating a Supervisory Authority. This approach seems appropriate for the MAC Protocol.

2. The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity or otherwise.

3. The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.

Paragraphs 2 and 3 are identical in language and approach to the Aircraft and the Space Protocols. There appears to be no need to change the text in relation to the MAC Protocol. The Railway Protocol, in addition, contains several provisions listing the functions and the tasks of a Secretariat established in order to assist the Supervisory Authority. It is open for discussion whether it is necessary to include these provisions in the MAC Protocol.

4. The first Registrar shall operate the International Registry for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or reappointed at regular five-yearly intervals by the Supervisory Authority.

Paragraph 4 is identical with the corresponding provision in the Aircraft Protocol in suggesting an operation period of five years, which seems to be a reasonable solution for the MAC Protocol, too. Note: The Space Protocol does not contain a corresponding provision.

**Article XIV**

First regulations

The first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol.

The wording of this Article is consistent with the text of the corresponding provisions in the Air and Space Protocols.

## **Article XV**

### Identification of Agricultural, Mining and Construction Equipment for registration purposes

#### OPTION 1

1. For the purposes of Article 18(1)(a) of the Convention, the regulations shall prescribe a system for the allocation of identification numbers by the Registrar which enable the unique identification of items of agricultural, mining and construction equipment. The identification number shall be:

- (a) affixed to the item of agricultural, mining or construction equipment;
- (b) associated in the International Registry with the manufacturer's name and the manufacturer's identification number for the item so affixed; or
- (c) associated in the International Registry with a national or regional identification number so affixed.

2. For the purposes of the preceding paragraph, a Contracting State may, by declaration, state the system of national or regional identification numbers that shall be used with respect to items of agricultural, mining and construction equipment subject to an international interest that is created or provided for, or is intended to be created or provided for, by an agreement entered into by a debtor situated in that Contracting State at the time of the conclusion of that agreement. Such a national or regional identification system shall, subject to agreement between the Supervisory Authority and the Contracting State making the declaration, ensure the unique identification of each item of agricultural, mining and construction equipment to which the system applies.

3. A declaration by a Contracting State according to the preceding paragraph shall include detailed information on the operation of the national or regional identification system.

4. A registration in respect of an item of agricultural, mining or construction equipment; for which a declaration pursuant to paragraph 2 has been made shall, in order for the registration to be valid, specify all the national or regional identification numbers to which the item has been subject since the entry into force of this Protocol under Article XXIX and the time during which each number has applied to the item.

#### OPTION 2

*A description of an agricultural, mining or construction equipment subject in accordance with the criteria for identification provided by the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry.*

There are two different options regarding the text and structure of this article. The first option follows the approach of the Railway Protocol by setting up a detailed system regarding the identification of MAC-equipment for registration purposes. The second option follows the approach of the Space Protocol, which leaves it to the regulations to set up a system regarding the identification of MAC-equipment for registration purposes. It is suggested that the second option may be more appropriate in the context of the MAC Protocol.

## **Article XVI**

### Designated entry points

*1. A Contracting State may at any time designate an entity or entities as the entry point or entry points through which there may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or of a right or interest under Article 40 of the Convention in either case arising under laws of another State. The various entry points shall be operated at least during working hours in their respective territories.*

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of notices of sale.

The Study Group should consider whether designated entry points will be required in the MAC Protocol context. This may depend on how MAC equipment is currently registered under national registration systems. The text of paragraph 1 generally follows the wording of Article XV (1) of the Railway protocol. The Aircraft Protocol Official Commentary notes that the use of the entry point may be made optional or compulsory (except in relation to aircraft engines).

## **Article XVII**

### Additional modifications to Registry provisions

#### OPTION 1

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established in regulations.

#### OPTION 2

1. For the purposes of Article 19(6) of the Convention, the search criterion for *an object registered under the Protocol* shall be the name of its manufacturer, its manufacturer's serial number and its model designation, supplemented as necessary to ensure uniqueness. Such supplementary information shall be specified in the regulations.

Option 1 follows the wording of Article XV (1) of the Railway protocol. This approach allows the search criteria to be established in the Regulations, allowing for more flexibility in their determination. Alternatively, Option 2 is modelled on Article XX of the Aircraft Protocol. This approach specifically names the kind of information that should be specified in the regulations. The italicised in the second paragraph was changed as the original text referred to aircraft objects.

2. For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than [X] calendar days after the receipt of the demand described in such paragraph.

3. The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2) of the Convention.

4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

5. The insurance or financial guarantee referred to in Article 28(4) shall cover all liability of the Registrar under the Convention *to the extent provided by the regulations*.

Paragraphs 2 – 5 are in main parts consistent with the corresponding provisions in the previous protocols. Regarding paragraph 5, the text in italics is taken from the corresponding provision in the Space Protocol and can be considered as an optional amendment to this paragraph. The Railway Protocol contains an additional article on Registry Fees (see below). It is open for discussion whether to include these provisions in the MAC Protocol.

#### Article XVIII - International Registry fees

1. The Supervisory Authority shall set and may from time to time amend the fees to be paid in connection with registrations, filings, searches and other services the International Registry may provide, in accordance with its regulations.

2. The fees referred to in the preceding paragraph shall be determined so as to recover, to the extent necessary, the reasonable costs of establishing, implementing and operating the International Registry, as well as the reasonable costs of the Secretariat associated with the performance of its functions. Nothing in this paragraph shall preclude the Registrar from operating for a reasonable profit.
3. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.
4. The Registrar shall be liable under Article 28 (1) of the Convention for loss caused up to an amount not exceeding the value of the railway rolling stock to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.
5. The preceding paragraph shall not limit the Registrar's liability for damages for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees.
6. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the prospective liability of the Registrar.
7. Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

### **Article XVIII**

#### Waivers of sovereign immunity

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to agricultural, mining or construction equipment under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.
2. A waiver under the preceding paragraph must be in writing and contain a description of the agricultural, mining or construction equipment as specified in Article VII of this Protocol.

The wording of this Article is consistent with the text of the corresponding provisions in all previous Protocols.

## **CHAPTER IV**

### **RELATIONSHIP WITH OTHER CONVENTIONS**

#### **Article XIX**

##### Relationship with other International Instruments

1. The Convention as applied to agricultural, mining and construction equipment shall supersede the Unidroit Convention on International Financial Leasing in respect of the subject matter of this Protocol, as between States Parties to both Conventions.

This Article is consistent with the drafting in Article XXV of the Aircraft Protocol, Article XIX of the Rail Protocol and Article XXXIV of the Space Protocol. The Study Group may wish to discuss whether there are other international instruments specifically covering MAC equipment that may need to be considered (such as the Convention on the International Recognition of Rights in Aircraft Convention and the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft in the Aircraft Protocol context).

## **CHAPTER V FINAL PROVISIONS**

### **Article XX**

#### Signature, ratification, acceptance approval or accession

1. This Protocol shall be open for signature in \_\_\_\_\_ on \_\_\_\_\_ by States participating in the Diplomatic Conference to Adopt a Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Agricultural, Mining and Construction equipment held at \_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_. After \_\_\_\_\_, this Protocol shall be open to all States for signature at the Headquarters of the International Institute for the Unification of Private Law (UNIDROIT) in Rome until it enters into force in accordance with Article XXVI.
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.
5. A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

The wording of this Article is consistent with the text of the corresponding provisions in all previous Protocols.

### **Article XXI**

#### 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 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" or "Contracting States" or "State Party" or "States Parties" in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

The wording of this Article is consistent with the text of the corresponding provisions in all previous Protocols.

**Article XXII**  
Entry into force

OPTION A

1. This Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of the [third] instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.
2. For other States this Protocol enters into force 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.

OPTION B

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 fourth instrument of ratification, acceptance, approval or accession, and
  - (b) the date of the deposit by the Secretariat 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 its instrument of ratification, acceptance, approval or accession; and
  - (b) the date referred to in sub-paragraph (b) of the preceding paragraph.

OPTION C

1. This Protocol enters into force *in relation to a list of specified equipment under the Regulations* the first day of the month following the expiration of three months after the date of the deposit of the fourth instrument of ratification, acceptance, approval or accession *of that specified list of equipment*.
2. For other States this Protocol enters into force *in relation to a list of specified equipment under the Regulations* 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 *of that specified list of equipment*.

There are several possible approaches to Entry into Force. Option A follows the corresponding provisions in the Aircraft Protocol, which allows for entry into force three months after the third instrument of ratification. Alternatively, Option B follows the text of the Space and Rail Protocols, which enter into force either three months from the deposit of the fourth instrument of ratification or the date the International Registry becomes fully operational, whichever is later. Option C adapts Option A to allow for different dates of entry into force for the different lists of equipment under the Regulations. Under Option C, the Protocol would come into force in relation to Agricultural equipment three months after four instruments of ratification were deposited that had not 'opted out' for Agricultural equipment. However, the other lists of the Protocol (mining and construction) would not come into force until they each also received four instruments of

ratification that also had not ‘opted out’ of their use under the Protocol. This Option would only be appropriate if it is decided to list the categories of equipment separately and allow States to opt out of each list by declaration.

### **Article XXIII**

#### Territorial units

1. If a Contracting State has 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 ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
2. Any such declarations are to be notified to the Depository and 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.

#### OPTION 1

5. If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;

(b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which the Convention and this Protocol apply; and

(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.

#### OPTION 2

*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.*

The text of paragraphs 1 – 4 is identical with paragraphs 1 – 4 of the corresponding articles in the three previous protocols. Option 1 of paragraph 5 is taken from the Railway Protocol. Alternatively, Option 2 of paragraph 5 could follow the text of the corresponding provision in the Space Protocol.

**Article XXIV**Declarations relating to certain provisions

1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VII<sup>5</sup> and XI<sup>6</sup> of this Protocol.
2. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article IX<sup>7</sup> of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article IX(3).
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, B or C of Article X<sup>8</sup> and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A, B or C. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article X.
4. The courts of Contracting States shall apply Article X in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.
5. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare whether it does not apply the Protocol to any of the Annexes 1, 2 and 3 to the Protocol under Article VI of this Protocol.*

Paragraphs 1, 2 and 4 are consistent with the text of the corresponding provisions in all previous Protocols. Paragraph 3 is also consistent with the text of the corresponding provisions in all previous Protocols in relation to content, but the text has been shortened. Paragraph 5 reflects the 'opt out' approach, which would allow Contracting States to apply the Protocol to single lists of equipment (agricultural, construction and mining).

**Article XXV**Declarations modifying the Convention or certain provisions thereof

Declarations made under the Convention, including those made under Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60, shall be deemed to have also been made under this Protocol, unless stated otherwise.

This drafting is consistent with all previous Protocols.

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<sup>5</sup> „Choice of law“

<sup>6</sup> „Insolvency Assistance“

<sup>7</sup> „Modification of provisions regarding relief pending final determination“

<sup>8</sup> „Remedies on Insolvency“

**Article XXVI**Reservations and declarations

1. No reservations may be made to this Protocol but declarations authorised by Articles XXIII, XXIV, XXV, XXVII and XXXVIII may be made in accordance with these provisions.
2. Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

This drafting is consistent with all previous Protocols.

**Article XXVII**Subsequent declarations

## OPTION 1

1. A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXV 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 Depositary to that effect.

## OPTION 2

1. *A State Party may make a subsequent declaration at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.*

Option 1 for Paragraph 1 is consistent with the wording of Paragraph 1 of the corresponding article in the Aircraft and the Railway Protocols.

Paragraphs 1 and 3-6 are uniform with the text across all three previous Protocols. It is suggested that Paragraph 2 could be added to clarify that the debtor does not need to agree to a creditor claiming either perseverance of the object, possession or control of the object, immobilisation of the object or management of the object under Article 13 of the Convention.

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 Depositary. 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 Depositary.
3. Notwithstanding the previous paragraphs, this Protocol 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.

The drafting of paragraphs 2 and 3 is consistent with all previous Protocols.

**Article XXVIII**Withdrawal of declarations

## OPTION 1

1. Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXV 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.

## OPTION 2

1. Any State Party having made a declaration under this Protocol 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.

The first option for Paragraph 1 is consistent with the wording of Paragraph 1 of the corresponding article in the Aircraft and the Railway protocol. The second option for Paragraph 1 is taken from Paragraph 1 of the corresponding article in the Space Protocol. Unlike the Aircraft Protocol and Railway Protocol, which allow withdrawal of declarations except for a declaration made in accordance with Article XXXI (Aircraft Protocol) / Article XXIX (Railway Protocol) under Article 60 of the Convention, the Space Protocol allows withdrawal of declarations without any exceptions. It is open for discussion which option appears to be preferable for the MAC Protocol.

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.

The drafting of paragraph 2 is consistent with the Railway and the Space Protocol.

**Article XXIX**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.

This drafting is consistent with all previous Protocols.

**Article XXX**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 regime established in the Convention as amended by the 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 objects 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 ten States Parties in accordance with the provisions of Article XXIX relating to its entry into force.

This drafting is consistent with all previous Protocols.
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**Article XXXI**Depositary and its functions

1. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (Unidroit), which is hereby designated the Depositary.

2. The Depositary shall:

(a) inform all Contracting States of:

- (e) 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.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Protocol.

DONE at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, in a single original in the English and French languages, both texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the consistency of the texts with one another.

This drafting is consistent with all previous Protocols.
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