



**MAC Protocol  
Study Group  
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**Second preliminary annotated 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>	<a href="#"><u>UNIDROIT 2014 - 72K - SG1 - Doc. 3</u></a>  <i>UNIDROIT 2015 – Study 72K – SG2 – Doc. 4</i>

**Introduction**

1. This document is an updated version of the initial draft of the MAC Protocol circulated to the Study Group in advance of the first Study Group meeting in December 2014. This draft has been amended to reflect the conclusions from the first Study Group meeting.
2. This document follows the approach of the Draft Protocol considered at the first Study Group, whereby a draft Article is proposed, with alternative options where applicable, and the comments/annotations are contained in a text box immediately succeeding the draft Article.
3. Where an Article has been changed from the first draft Protocol, or where an draft Article requires further explicit consideration from the Study Group, it has been *italicised*.
4. Changes to the the first draft Protocol include:
  - (a) Addition and deletion of Articles, as per the recommendation of the first Study Group meeting
  - (b) A major overhaul of the Protocol's approach to the making of declarations
  - (c) Clearer explanations as to how the draft Articles compare to the corresponding Articles of the Aircraft, Rail and Space Protocols
  - (d) Revision of minor numbering and drafting errors contained in the first draft
  - (e) Addition of a table of contents for ease of reference
  - (f) Additional Articles that the Study Group may wish to consider inserting into the Draft Protocol are contained at the end of the paper

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**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> Official Commentary to the Space Protocol, page 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:
  - (a) *“agricultural equipment” means any item listed in [Annex 1 to the Regulations of the International Registry]*
  - (b) *“construction equipment” means any item listed in [Annex 2 to the Regulations of the International Registry]*
  - (c) *“guarantee contract” means a contract entered into by a person as guarantor*
  - (d) *“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*
  - (e) *“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
  - (f) *“mining equipment” means any item listed in [Annex 3 to the Regulations of the International Registry]*
  - (g) *“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.*

This Article is consistent with all previous Protocols, except for subparagraphs 2(a), (b) and (f), which deals with the definitions of agricultural, construction and mining equipment.

It was decided at the first Study Group meeting that the classes of equipment should be defined with reference to the list of Harmonised System codes Annexed to the Regulations. It was suggested that the rules governing the criteria for including HS codes under the Regulations (including amending the list) could be also be set in the Regulations themselves. Thus, any restrictions on the types of HS codes that could be included in the Annexes to the Regulations, or any restrictions on equipment *within* a certain HS code (if this is indeed possible) would also be contained in the Regulations. While this approach is sensible in terms of having flexibility for updating the list to accommodate improvements in technology and amendments to the HS system, it may be necessary to include further provisions in the actual Protocol regarding process and authority for changes, to prevent criticism on the basis that the Protocol has a potentially unlimited scope without appropriate checks and balances.

## 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 [Annexes 1, 2 and 3 to the Regulations of the International Registry]*.
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. *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, [as listed in the Annexes to the Regulations of the International Registry].*
4. *Where a an interest in a piece of equipment is capable of registration under both this Protocol and the the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment and the debtor is situated in a Contracting State that has ratified both Protocols, any interest in that piece of equipment shall be registered under this Protocol.*

Paragraphs one and two of Article II are identical in language and approach to all three prior Protocols. Paragraph three is a completely new paragraph 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). As an ‘opt out’ provision, on ratifying the Protocol a State will be applying it to all three categories of equipment, unless a specific declaration is made in relation to this Article. In the first draft Protocol, the provision was contained in a separate Article VI, which has now been removed after relocating this provision to Article II.

It was decided at the first Study Group meeting to delete an additional subparagraph based upon the language of Article II (4) of the Space Protocol: *This Protocol does not apply to equipment merely because it is designed to be used in agriculture, mining or construction.* The purpose of this additional suggested paragraph was to provide certainty that the MAC Protocol is not of general application, and only applies to the equipment prescribed in the Annexes. It was decided at the first Study Group meeting that this additional clarification was unnecessary in the MAC Protocol context.

Subparagraph four deals with the potential overlap of the scopes of the MAC Protocol and the Rail Protocol. At the first Study Group meeting it was decided that this issue could be dealt with here or in an additional Article in Chapter V, which deals with the MAC Protocol’s relationship with other international instruments. It is likely that this paragraph will require redrafting, as this is a complex issue. The Study Group is invited to consider how best to deal with this issue at its second session.

If further explicit exclusions in the application of the MAC Protocol are required, it would 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

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.

At the first Study Group meeting, it was decided to follow 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.

In following the Rail Protocol approach, Article V distinguishes the identification requirements for the constitution of an agreement from the more stringent requirements required for registration under Article XV. This more flexible approach will allow a security interest to be created over a fleet of new MAC equipment without the need for a new agreement every time an additional item under the agreement is acquired.

**Article VI\***  
Choice of law

*Option 1*

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

*Option 2*

1. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply this Article.*

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.

Option 1 is the status quo in relation to how declarations are made under the Protocol. Option 2 has been altered to allow for Contracting States to make a declaration specifically under this Article, as part of a Protocol-wide option to simplify the making of declarations (see Article XXIV). The Study Group is invited to consider how best to deal with declarations under the Protocol.

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\* Previously Article VII in the first draft Protocol.

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

**Article VII\***

Modification of default remedies provisions

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.

This Article 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. The first Study Group meeting agreed with the adoption of the approach from the Rail Protocol.

At the first Study Group meeting, the appropriateness of the phrase 'commercially reasonable manner' was discussed in its application to the agricultural sector, which in some jurisdictions would be considered a civil rather than commercial sector. It was agreed that it was important to continue using the phrase, to keep it consistent with the terminology in the previous Protocols.

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

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\* Previously Article VIII in the first draft Protocol.

mandates a Contracting State to honour a request for de-registration and export if two conditions are satisfied. Given there may be various administrative authorities responsible for the regulation of MAC equipment, this general obligation seems appropriate for inclusion in the MAC Protocol.

### **Article VIII\***

#### Modification of provisions regarding relief pending final determination

##### *Option 1*

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.*

##### *Option 2*

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

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.

6. *With regard to the remedies in Article VII(1):*

*(a) they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the creditor notifies such authorities that the relief specified in Article VII(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor 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.*

7. *Paragraphs 2 and 6 shall not affect any applicable safety laws and regulations.*

This Article is consistent with the drafting of Article VIII of the Rail Protocol.

Option 1 is the status quo in relation to how declarations are made under the Protocol. Option 2 has been altered to allow for Contracting States to make a declaration specifically under this Article, as part of a Protocol-wide option to simplify the

\* Previously Article IX in the first draft Protocol.

making of declarations (see Article XXIV). The Study Group is invited to consider how best to deal with declarations under the Protocol.

Paragraphs (6) and (7) have been added, as they were erroneously omitted from the first draft Protocol.

**Article IX\***  
Remedies on Insolvency

*Option 1*

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.*

*Option 2*

1. *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 this Article 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 this Article.*
2. *References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.*
3. *The courts of Contracting States shall apply this Article in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.*

*Alternative A*

4. 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.
5. 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.
6. 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.
7. 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.
8. 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

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\* Previously Article X in the first draft Protocol.

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

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.

9. With regard to the remedies in Article VII, 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.

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

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

12. 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.

13. 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.

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

#### *Alternative B*

4. 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)~~ this Article 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.

5. 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.

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

7. 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.

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

*Alternative C*

4. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall within the cure period:

(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 railway rolling stock in accordance with the applicable law.

5. Before the end of the cure period, the insolvency administrator or the debtor, as applicable, may apply to the court for an order suspending its obligation under sub-paragraph (b) of the preceding paragraph for a period commencing from the end of the cure period and ending no later than the expiration of the agreement or any renewal thereof, and on such terms as the court considers just (the "suspension period"). Any such order shall require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate or by the debtor as they become due and that the insolvency administrator or the debtor, as applicable, perform all other obligations arising during the suspension period.

6. If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the railway rolling stock pending an order of the court. If the application is not granted 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, the application will be deemed withdrawn unless the creditor and the insolvency administrator or the debtor, as applicable, otherwise agree.

7. 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 railway rolling stock 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.

8. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the railway rolling stock under arrangements designed to preserve and maintain it and its value.

9. Where during the cure period or any suspension period the insolvency administrator or the debtor, as applicable, cures all defaults other than a default constituted by the opening of insolvency proceedings and agrees to perform all future obligations under the agreement and related transaction documents, the insolvency administrator or debtor may retain possession of the railway rolling stock and any order made by the court under paragraph 4 shall cease to have effect. A second cure period shall not apply in respect of a default in the performance of such future obligations.

10. With regard to the remedies in Article VII(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.
11. Subject to paragraphs 4, 5 and 8, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.
12. Subject to paragraphs 4, 5 and 8, no obligations of the debtor under the agreement and related transactions may be modified in insolvency proceedings without the consent of the creditor.
13. 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.
14. 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.
15. The Convention as modified by Articles VII and XXV of this Protocol shall apply to the exercise of any remedies under this Article.
16. For the purposes of this Article, the “cure period” shall be the period, commencing with the date of the insolvency-related event, specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

It was agreed at the first Study Group meeting that the MAC Protocol should offer at least two of the insolvency remedies reflected in the other Protocols to the Cape Town Convention. It is clear that the MAC Protocol must offer Alternative A, given that under the Aircraft Protocol 40 Contracting States having made declarations applying this creditor friendly provision.

At the first Study Group meeting it was tentatively agreed that Alternatives A, B and C should be kept in the draft Protocol, pending further discussion. Given that Alternative B is included in all three previous Protocols, it would be reasonable for its inclusion in the MAC Protocol as well. The first Study Group meeting was supportive of also including Alternative C, on the basis that takes into account the Continental European approach to insolvency. As a matter of policy, there is also benefit to giving Contracting States the widest variety of options in selecting insolvency remedies, as long as they remain consistent with the approaches in the previous Protocols. As such, the current proposal is to recommend that the MAC Protocol include Alternatives A, B and C, as consistent with the approach in the Rail Protocol. This issue is considered in more detail in Part I(D) of the Legal Analysis (UNIDROIT 2015 - Study 72K – SG2 – Doc. 4).

Option 1 is the status quo in relation to how declarations are made under the Protocol. Option 2 has been altered to allow for Contracting States to make a declaration specifically under this Article, as part of a Protocol-wide option to simplify the making of declarations (see Article XXIV). Similarly, paragraph 3 has been transferred from the Article governing ‘Declarations relating to certain provisions’ (formerly Article XXV in the first draft Protocol), also as part of a Protocol-wide option to simplify the making of declarations. The Study Group is invited to consider how best to deal with declarations under the Protocol.

**Article X\***Insolvency assistance*Option 1*

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

*Option 2*

1. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply this Article.*

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 IX.<sup>3</sup>

Option 1 is the status quo in relation to how declarations are made under the Protocol. Option 2 has been altered to allow for Contracting States to make a declaration specifically under this Article, as part of a Protocol-wide option to simplify the making of declarations (see Article XXIV).

Paragraph 2 is identical to the corresponding paragraphs of the Aircraft and Railway Protocols. It does not seem necessary to modify the text.

**Article XI\***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 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 with the corresponding provisions in the Aircraft and Railway Protocols.

\* Previously Article XI in the first draft Protocol.

<sup>3</sup> Remedies on Insolvency.

\* Previously Article XII in the first draft Protocol.

**CHAPTER III**  
**REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AGRICULTURAL,  
 MINING AND CONSTRUCTION EQUIPMENT**

**Article XII\***

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 XIII\***

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.

\* Previously Article XIII in the first draft Protocol.

\* Previously Article XIV in the first draft Protocol.

### **Article XIV\***

#### 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.

This provision is identical to Article XIII of the Rail Protocol. The Rail Protocol approach slightly modified the approach in Article XIX of the Aircraft Protocol by including the final sentence of paragraph 1, dealing with operational hours of the national entry points. Article XXXI of the Space Protocol adopts paragraph 1 of the Aircraft Protocol approach (with no reference to hours of operation), but does not have paragraph 2 (which is found in both Aircraft and Rail Protocols).

As provided in the Official Commentary to the Rail Protocol, use of an entry point may be made optional or compulsory, except in the case of information required for registrations of notices of sale, for which use of the entry point cannot be made compulsory. This reflects the fact that such registrations cannot affect the rights of any person, or have any other effects, under the Convention or Protocol.

It was decided at the first Study Group meeting that the MAC Protocol should allow the designation of entry points, as this would make it easier countries with national personal property registries to ratify the Convention (e.g. Spain). It was further decided that the Rail Protocol approach should be adopted, given that the MAC Protocol will allow for the registration of notifications of sale on the same basis as the Rail Protocol.

This Article has also been moved before the Article on Identification of Agricultural, Mining and Construction Equipment for registration purposes, as consistent with Rail Protocol.

### **Article XV**

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

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;

It was decided at the first Study Group meeting that the approach in Article XIV of the Rail Protocol should be followed. However, the provisions in Article XIV of the Rail Protocol relating to the identification of equipment through an affixed national or regional identification number were removed (paragraphs 1(c), 2, 3 and 4), as it was considered unlikely that states would have specific national registries relating specifically to agricultural, construction and mining equipment. Removing these paragraphs confirms that only MAC equipment produced with unique serial identification numbers issued by a manufacturer are capable of being registered in the international registry.

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\* Previously Article XVI in the first draft Protocol.

**Article XVI\***Additional modifications to Registry provisions**OPTION 1**

1. For the purposes of Article 19(6) of the Convention, the search criteria for [agricultural, construction and mining equipment] 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.
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 ~~or the person in whose favour a prospective sale has been registered~~ shall take such steps as are within its power to procure the discharge of the registration no later than five working 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. The various entry points shall be operated at least during working hours in their respective territories.
5. The amount of the insurance or financial guarantee referred to in Article 28(4) of the Convention shall, in respect of each event, not be less than the maximum value of [the relevant type of agricultural, construction and mining equipment] ~~an aircraft object~~ as determined by the Supervisory Authority.
6. 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.

**OPTION 2**

1. For the purposes of Article 19(6) of the Convention, the search criteria at the International Registry shall be established by the regulations.
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 ten calendar days after the receipt of the demand described in such paragraph.
3. Where a subordination has been registered and the obligations of the debtor to the beneficiary of the subordination have been discharged, the beneficiary shall procure the discharge of the registration no later than ten calendar days after written demand by the subordinated party delivered to or received at the beneficiary's address stated in the registration.
4. The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.
5. 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.

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\* Previously Article XVII in the first draft Protocol.

*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.*

6. *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.*

7. *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.*

8. *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.*

### OPTION 3

~~1. Article 16 of the Convention applies with the following being added immediately after paragraph 1:~~

~~— "1 bis The International Registry shall also provide for:~~

~~— (a) the recording of rights assignments and rights reassignments;~~

~~— (b) the recording of acquisitions of debtor's rights by subrogation;~~

~~(c) the registration of public service notices under Article XXVII(1) of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets; and~~

~~(d) the registration of creditors' notices under Article XXVII(4) of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets."~~

2. *For the purposes of Article 19(6) of the Convention, the search criteria for space assets shall be the criteria specified in Article XXX of this Protocol.*

3. *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 or the person in whose favour a prospective sale has been registered shall take such steps as are within its power to procure the discharge of the registration no later than ten calendar days after the receipt of the demand described in such paragraph.*

4. *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.*

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

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

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.*

Consideration of this Article is difficult due to the significantly diverging practices over the three previous Protocols. This Article was poorly drafted in the first draft Protocol and has been redrafted to allow SG2 to better consider the three different approaches in the Aircraft, Rail and Space Protocols. Option 1 is modelled on Article XX of the Aircraft Protocol. Option 2 is modelled on Article XV of the Railway protocol. Option 3 is modelled on Article XXXII of the Space Protocol.

Paragraph 1 of Option 1 specifically details the search criteria that should be available in the International Registry. Alternatively, Paragraph 1 of Option 2 allows the Regulations to determine the search criteria. Paragraph 2 of Option 3 provides that the search criteria will be those set in the Regulations that are required to describe the object for registration purposes. In the MAC Protocol context, Paragraph 1 of Option 2 appears to be the most flexible and straightforward option.

Paragraphs 2 of Options 1 and 2 and Paragraph 3 of Option 3 are substantively similar, except for Option 1 providing for a period of five working days to discharge a registration, as opposed to 10 calendar days as consistent with Options 2 and 3. The 10 calendar day solution appears to be most appropriate for inclusion in the MAC Protocol.

Paragraph 3 of Option 1 and Paragraph 4 of Option 3 provide for the recovery of costs for the International Registry and the Supervisory Authority. Alternatively, The Rail Protocol (Option 2) deals with this in a separate paragraph (see optional additional Articles at the end of the Draft Protocol). The Study Group is invited to consider which approach should be adopted in the MAC Protocol.

Sentence 1 of Paragraph 4 of Option 1 (providing that the centralised functions of the International Registry will be operated on a twenty-four hour basis) is identical to Paragraph 4 of Option 2 and Paragraph 5 of Option 3. However, Sentence 2 of Paragraph 4 of Option 1 additionally provides that ‘various entry points shall be operated at least during working hours in their respective territories’. On the basis that the MAC Protocol will allow national entry points to the International Registry, the Study Group is invited to consider whether this additional sentence should be adopted.

Paragraph 5 of Option 1 sets the liability of the International Registry at the maximum value of an aircraft object. At the first Study Group meeting, it was noted that there was a disagreement on the implementation of the insurance provisions in the Aircraft Protocol and it took time to resolve the issue. Paragraph 5 of Option 2 provides that the liability of the Registrar is set at the amount not exceeding the value of the railway rolling stock to which the loss relates, but shall not exceed 5 million Special Drawing Rights in any calendar year, which is significantly lower than the liability in the Aircraft Protocol (Option 1). Paragraph 6 of Option 2 further provides that the liability cap will not apply for loss caused by gross negligence or intentional misconduct of the Registrar and its officers and employees. Alternatively, Option 3 does not explicitly provide for the liability cap for the Registrar, and instead deals with the issue in the Regulations. The Study Group is invited to consider which approach should be adopted in the MAC Protocol.

Paragraph 7 of Option 2 and Paragraph 6 of Option 3 regulate insurance or financial guarantee required to cover the liability of the Registrar. Option 2 provides that the insurance or guarantee shall be determined by the Supervisory Authority, having regard to the prospective liability of the Registrar. Option 3 provides that the insurance or guarantee shall cover the Registrar’s liability as provided for in the Regulations. Option 1 does not have a corresponding provision addressing this issue. The Study Group is invited to consider which approach should be adopted in the MAC Protocol.

Paragraph 6 of Option 1, Paragraph 8 of Option 2 and Paragraph 7 of Option 3 are identical and should be adopted in the MAC Protocol.

### ***Article XVII*** ***Notices of Sale***

*The regulations shall authorise the registration in the International Registry of notices of sale of railway rolling stock. The provisions of this Chapter and of Chapter V of the Convention, shall, in so far as relevant, apply to these registrations. However, any such registration and any search made or certificate issued in respect of a notice of sale shall be for the purposes of information only*

*and shall not affect the rights of any person, or have any other effect, under the Convention or this Protocol.*

At the first Study Group meeting it was decided to add an additional Article based on Article XVII of the Rail Protocol in relation to notices of sale. Article XVII of the Rail Protocol allows for the registration in the International Registry of notices of sale covering railway rolling stock. However, such registration of a notice of sale is for information purposes only and does not have any legal effect under the Convention or Protocol. The first Study Group meeting noted that the benefits of this approach were that it allowed for more accessible information on the sales of equipment to be provided, and it generated additional fees for the International Registry. This Article has been added to the Protocol in the same location, as it exists in the Rail Protocol (at the end of the Chapter dealing with the International Registry).

## **CHAPTER IV JURISDICTION**

### **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. At the first Study Group meeting the necessity of this provision was questioned, as it was more relevant in the Aircraft and Rail Protocols because many airlines and railways are state owned. At the first Study Group meeting it was decided to retain the provision, pending further consideration by the Committee of Governmental Experts.

## **CHAPTER V RELATIONSHIP WITH OTHER CONVENTIONS**

### **Article XIX\***

#### Relationship with the UNIDROIT Convention on International Financial Leasing

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.

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\* Previously Article XVIII in the first draft Protocol.

\* Previously Article XIX in the first draft Protocol.

**CHAPTER VI**  
**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.
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**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.
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\* Previously Article XX in the first draft Protocol.  
\* Previously Article XXI in the first draft Protocol.

**Article XXII\***Entry into force

1. *This Protocol enters into force separately for each specific list of equipment contained in [the Annexes to the Regulations of the International Registry] 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 of that specified list of equipment.*
  - (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 for each specific list of equipment contained in the [Annexes to the Regulations of the International Registry] 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 of that specified list of equipment; and*
  - (b) *the date referred to in sub-paragraph (b) of the preceding paragraph.*

At the first Study Group meeting it was concluded that the MAC Protocol should enter into force for each specific class of equipment contained in the Annexes to the Regulations of the International Registry (agricultural, construction and mining) once that class had received four ratifications, and the Registry was operational. The Study Group decided that drafting from Article XXIV of the Rail Protocol and Article XXXVIII of the Space Protocol should be adapted to achieve this.

The Study Group is invited to consider the above drafting, which attempts to achieve the agreed upon approach.

**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 Depositary 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.

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\* Previously Article XXII in the first draft Protocol.

\* Previously Article XXIII in the first draft Protocol.

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.*

The text of paragraphs 1 – 4 is identical to Article XXIX in the Aircraft Protocol, Article XXIV of the Rail Protocol and Article XXXIX of the Space Protocol. Paragraph 5 is taken from the Railway Protocol. At the first Study Group meeting it was agreed to adopt the above drafting, noting that paragraph 5(c) will need to be omitted, depending on whether relevant administrative authorities relating to MAC equipment exist.

**Article XXIV\***Declarations**Option 1**

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 VI<sup>4</sup> and X<sup>5</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 VIII<sup>6</sup> of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article VIII(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 IX<sup>7</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 IX.

4. The courts of Contracting States shall apply Article IX 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 list of equipment contained in the Annexes to the International Registry.

**Option 2**

~~1. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, make the following declarations:~~

~~— (a) declare that it will apply either or both of Articles VII<sup>8</sup> and XI<sup>9</sup> of this Protocol.~~

~~(b) A Contracting State may, under Article II<sup>10</sup> of this Protocol, 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 to the Regulations of the International Registry].~~

~~(c) declare that it will apply Article IX<sup>11</sup> of this Protocol, wholly or in part. If it so declares, it shall specify the time period required by Article IX(3).~~

~~(d) declare that it will apply the entirety of Alternative A, B or C of Article X<sup>12</sup> of this Protocol 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. 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.~~

~~2. 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.~~

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\* Previously Article XXIV in the first draft Protocol.

<sup>4</sup> „Choice of law“

<sup>5</sup> „Insolvency Assistance“

<sup>6</sup> „Modification of provisions regarding relief pending final determination“

<sup>7</sup> „Remedies on Insolvency“

<sup>8</sup> Choice of law

<sup>9</sup> Insolvency Assistance

<sup>10</sup> Application of the Convention

<sup>11</sup> Modification of provisions regarding relief pending final determination

<sup>12</sup> Remedies on Insolvency

3. *Declarations may only be made under articles of this Protocol, where expressly authorised.*<sup>13</sup>
4. *No reservations may be made to this Protocol.*
5. *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.*
6. *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.*
7. *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.*
8. *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.*
9. *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.*
10. *Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.*

Option 1 is the status quo in relation to how declarations are made under the Protocol, and is consistent with the ‘Declarations relating to certain Provisions’ Articles in Article XXX in the Air Protocol, Article XXVII in the Rail Protocol and Article XLI in the Space Protocol.

At the first Study Group meeting, it was recommended that the Articles governing declarations be simplified, as the approach to declarations uniformly adopted across the three previous Protocols’ is unnecessarily complicated. As such, Option 2 differs significantly from the previous Protocols. Paragraph 1 compresses the Articles governing ‘Declarations relating to certain provisions’ contained in Article XXX in the Air Protocol, Article XXVII in the Rail Protocol and Article XLI in the Space Protocol into one paragraph. It is suggested that this paragraph be eliminated, allowing States to make declarations directly under the relevant Articles themselves Article II (3) (Application of the Convention) , Article VI (1) (Choice of Law), Article VIII (1) (Modification of provisions regarding relief pending final determination), Article IX (1) (Remedies on Insolvency). The Study Group is invited to consider whether it is necessary to actually maintain this Article at all, as it simply reiterates the possible declarations available to States under previous Articles of the Protocol.

Paragraph 2 is consistent with the Articles governing ‘Declarations under the Convention’ under the previous three Protocols (Article XXXI in the Aircraft Protocol, Article XXIX in the Rail Protocol and Article XLII in the Space Protocol). However, the Official Commentaries to the previous commentaries states that this Article is ‘arguably unnecessary but has the merit of making it clear that declarations under the Convention relating to specified provisions apply to any modifications of those

<sup>13</sup> Article II (3) (Application of the Convention) , Article VI (1) (Choice of Law), Article VIII (1) (Modification of provisions regarding relief pending final determination), Article IX (1) (Remedies on Insolvency), Article XXII (Territorial Units).

Provisions by each Protocol’ (Aircraft Protocol Official Commentary 5.119, Rail Protocol 5.94, Space Protocol Official Commentary 5.141). As such, in the interests of simplifying the approach to declarations, it suggested that the Study Group consider deleting this unnecessary provision altogether, and clarifying in the Official Commentary that its deletion has no substantive effect. Alternatively, if the Study Group decides that it should remain in the Protocol, it is suggested that it be made a subparagraph of this Article, rather than its own standalone Article, for simplicity.

Paragraphs 3,4 and 10 are based on the Articles governing ‘Reservations and declarations’ under the previous three Protocols (Article XXXII in the Aircraft Protocol, Article XXVIII in the Rail Protocol and Article XLIII in the Space Protocol). In the previous Protocols, this Article was constructed with an additional specific reference to the Articles that specifically allowed declarations (e.g., Article XXXII of the Aircraft Protocol provides that ‘*no reservations may be made to this Protocol, but declarations authorised by Articles XXIV, XXIX, XXX, XXXI, XXXIII and XXXIV may be made in accordance with these provisions*’). This approach appears to be unnecessarily overcomplicated. Instead, paragraph 3 provides that declarations may only be made where expressly authorised, thus eliminating the need for paragraph 1.

Paragraphs 5 is consistent with the wording of Paragraph 1 of Article XXXIII of the Aircraft Protocol and Article XXX of the Railway Protocol (Subsequent Declarations). The drafting of paragraphs 6 and 7 is consistent with all the drafting of the ‘Subsequent Declarations’ Article in all previous Protocols. The first Study Group meeting decided to adopt the approach above, as modelled on the Aircraft and Rail Protocols. It is suggested that these provisions can be made subparagraphs of this Article, rather than its own standalone Article, for simplicity.

Paragraph 8 is consistent with the wording of Paragraph 1 in Article XXXIV of the Aircraft Protocol and Article XXXI of the Rail Protocol (Withdrawal of declarations). The drafting of paragraph 9 is consistent with the Railway and the Space Protocols. The first Study Group meeting decided to adopt the above drafting of this Provision. It is suggested that these provisions can be made subparagraphs of this Article, rather than its own standalone Article, for simplicity.

The Study Group is invited to consider how best to deal with declarations under the Protocol.

#### **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.~~

The Study Group should consider deleting or moving this Article, as discussed in the commentary to Option 2 under Article XXIV (declarations) above.

#### **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.~~

The Study Group should consider modifying and moving this Article, as discussed in the commentary to Option 2 under Article XXIV (declarations) above.

**Article XXVII**Subsequent declarations

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 Depository to that effect.~~
2. ~~Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depository. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depository.~~
3. ~~Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.~~

The Study Group should consider modifying and moving this Article, as discussed in the commentary to Option 2 under paragraphs 5, 6 and 7 to Article XXIV (declarations) above.

**Article XXVIII**Withdrawal of declarations

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 Depository. 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 Depository.~~
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 Study Group should consider moving this Article, as discussed in the commentary to Option 2 under paragraphs 8 and 9 to Article XXIV (declarations) above.

**Article XXV\***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.
4. *A subsequent declaration made by a State Party under Article II declaring that the Protocol does not apply to one or more categories of equipment, being agriculture, construction or mining equipment as listed in the Annexes to the Regulations of the International Registry, shall be considered a denunciation of the Protocol in relation to those categories of equipment.*

This drafting is consistent with all previous Protocols (Article XXXV of the Aircraft Protocol, Article XXXII of the Rail Protocol and Article XLV of the Space Protocol). It was decided at the first Study Group meeting that an additional paragraph should be added to this Article, clarifying that a subsequent declaration from a State that disapplies the Protocol to a certain category of equipment is, in effect, a denunciation of the Protocol in relation to those categories of equipment that the State subsequently opts out of. The Study Group is invited to consider whether paragraph 4 addresses this issue sufficiently.

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\* Previously Article XXIX in the first draft Protocol.

**Article XXVI\***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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\* Previously Article XXX in the first draft Protocol.

**Article XXVII\***  
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:
    - (h) 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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\* Previously Article XXXI in the first draft Protocol.

**Article ??**Affixable Equipment*Option 1*

*An international secured interest over a piece of agricultural, construction or mining equipment shall not be extinguished or otherwise affected in the event it becomes affixed in any way to immovable property.*

*Option 2*

*Where a piece of agricultural, construction or mining equipment which is subject to an international secured interest under this Protocol becomes affixed to immovable property, the applicable law governing immovable property shall apply.*

These additional Articles provide possible drafting options for addressing affixable equipment under the MAC Protocol. Option 1 upholds the priority of an international secured interest, even in the event it becomes affixed. Alternatively, Option 2 provides that affixation of a piece of MAC equipment will subject it to the applicable domestic law governing immovable property in the relevant jurisdiction. The desirability of these draft Articles will depend on the policy decided upon in dealing with fixtures.

An Article dealing with affixable equipment could be inserted after Article II, which deals with the Scope of the Convention. Alternatively, it could be drafted as an Article modifying Article 29 of the Convention, which regulates priority of competing interests.

**Article ??**Relationship with the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock

*Where an interest in a piece of equipment is capable of registration under both this Protocol and the the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment and the debtor is situated in a Contracting State that has ratified both Protocols, any interest in that piece of equipment shall be registered under this Protocol.*

At the first Study Group meeting, it was suggested that the potential conflict between the MAC Protocol and Rail Protocol could be resolved in either an additional Article in Chapter V dealing with conflict priority, or under Article II which deals with the scope of the Convention. The Study Group is invited to consider how best to deal with this issue at its second session.

**Article ??**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.*

The Rail Protocol contains an additional article (Article XVI) which regulates the fees collected by the International Registry. SG2 is invited to discuss whether a similar Article should be included in the MAC Protocol. If it is decided to include such an Article, it would follow the 'Additional modifications to Registry provisions', as consistent with the Rail Protocol.