INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

EN

MAC Protocol
Diplomatic Conference

UNIDROIT 2019
DCME-MAC – Doc. 14
Original: English
October 2019

COMMENTS ON THE DRAFT MAC PROTOCOL

(Submitted by the United Kingdom)

The United Kingdom is appreciative of the constructive efforts made to improve the text of the draft MAC Protocol (DCME-MAC – Doc. 3) and particularly welcomes the excellent Legal Analysis prepared by the UNIDROIT Secretariat (DCME-MAC – Doc 5 corr.). We also support the general thrust of the paper presented by the United States of America, including the proposals on Article XII, subject only to ensuring that disapplication of the Convention by the opt-out declaration does not affect the provisions relating to default remedies, including remedies on insolvency and, more generally, provisions of the Convention and Protocol regulating relations between the parties to an agreement *inter se*.

We have drafted certain provisions solely for the purpose of crystallising our proposals. Final drafting can be left to the drafting committee at the Diplomatic Conference.

Preamble

1. Rephrase the 3rd recital to read as follows:

   "NOTING THAT the World Customs Organization's Harmonized System allows the determination … warranted."

Explanatory note

The spelling of "Organization" has been corrected and the detail of the HS left to the amended definition in Article I(2)(g) as expanded below.

Article I(2)

2. In paragraph 2(g) after "Coding System" add:

   ", as amended by the Protocol of Amendment to the International Convention on the Harmonized Commodity and Coding System of 24 June 1986".

Explanatory note

We consider that the full title of the Convention should be given in paragraph 2(g), as above.

Article VII, Alternative A

3. Replace the existing text with the following:

> "3. If immovable-associated equipment is severable from the immovable property, its association with the immovable property does not affect the creation, continued existence or priority of any international interest in that equipment. If immovable-associated equipment was, but no longer remains, severable from that property, this Protocol ceases to apply.
> 4. Immovable-associated equipment is severable from the immovable property if it would be economic to sever it, having regard the estimated cost of severance and removal and of any repair to or restoration of the immovable property or the equipment."

Explanatory note

This seeks to reflect the view expressed by several participants that the test of severability of equipment from immovable property should be a factual damage-based test instead of a legal test.

Article VIII(1)

4. It has been suggested that the provision be limited to export and physical delivery across State borders. On the other hand, we understand the concerns of the Working Group and some experts, that departing from the language of previous protocols as to export and physical transfer, which has not led to any problems under the equivalent provisions in the Aircraft Protocol. might lead to negative inferences. We therefore propose that the existing language be retained. However, if the Conference agrees to record that this is to be interpreted as "physical transfer across State borders" the Official Commentary can refer to this agreed interpretation as part of the *travaux préparatoires* and note that this makes explicit what is implicit in the earlier Protocols.

Explanatory note

It would be difficult either to define or to list the relevant administrative authorities and we suggest that this question be left to the Official Commentary.

Article XII

5. Replace the text with the following:

> "1. A Contracting State that has not made a declaration under paragraph 2 of this Article may make a declaration that the rules of its domestic law and not those of Article 29(3)(a) and (4)(a) of the Convention shall determine whether and in what conditions a buyer, conditional buyer or lessee of inventory from a dealer acquires its interest in it free from an interest which is the equivalent of

that of the holder of an international interest and as to which the dealer is the debtor.

2. A Contracting State may make a declaration that an interest in inventory created or provided for by an agreement under which the dealer is the debtor is not an international interest if the inventory is situated in a Contracting State at the time the interest is created or arises.

3. Notwithstanding any declaration under the preceding paragraph, the provisions of Chapters II and III of the Convention and Articles V, VI and VIII to XI of this Protocol, other than paragraph 12 of Alternative A, paragraph 5 of Alternative B and paragraph 13 of Alternative C of Article X, shall continue to apply.

4. Where a Contracting State has made a declaration pursuant to paragraph 2 of this Article then Article 29(3)(b) and (4)(b) of the Convention shall not apply to a buyer, conditional buyer or lessee of inventory from a dealer if the inventory is situated in a Contracting State referred to in paragraph 2 at the time that the buyer, conditional buyer or lessee acquires its interest in or right over the inventory."

Explanatory note

Paragraph 1 will not apply to a Contracting State that has made the more wide-ranging declaration under paragraph 2. Since the relevant law is the domestic law of the declaring State this makes it unnecessary to refer to non-Convention law. Departing slightly from wording of the kind to be found in Article 39(1) we have omitted the word "registered" before "interest" in line 4 because 'registered interest' is defined in Article 1(cc) of the Convention and will not feature in domestic law.

We have reformulated paragraph 2 so that the substance of the declaration is set out in this Article, in the same way as in Articles 39, 40 and 50 of the Convention. The justification for the special treatment of inventory is, of course, that an asset-based registration system is not best suited to inventory, which is constantly being turned with consequent numerous registrations followed quickly by discharged, in a Contracting State which has a well-developed debtor-based registration system. Our preference would have been for a rather differently structured Article in which the opt-out declaration was limited to provisions relating to registration and priorities. However, we are content to adopt the approach advocated by the MAC Working Group as set out in paragraph 2 of the text above but we regard it as essential to preserve the important default remedies in the Convention and Protocol, including those operative on the debtor's insolvency under Alternative A of Article X. But paragraph 12 of Alternative A and paragraph 13 of Alternative C of Article X are excluded because these prescribe priority rules which should be left to the domestic law of a Contracting State making a declaration under paragraph 2, while Alternative B, paragraph 5 is excluded because a declaration under paragraph 2 would preclude the creditor from having a registered international interest.

Moreover, party autonomy is a cardinal principle of the Convention and Protocol, so that provisions governing the constitution of an international interest and relations between the parties *inter se* also need to be preserved. It is particularly important to preserve the flexible means of identification provided by Article V of the Protocol, because the laws of many States require specificity in describing collateral and either do not permit the grant of security over types of equipment or over after-acquired property or impose qualifications not prescribed by Article 5. Paragraph 3 is designed to preserve the above provisions of the Convention and Protocol. The opt-out of the Convention as

a whole followed by a preservation of stated provisions does have the merit of following the approach adopted in Article 50 of the Convention relating to internal transactions.

A buyer taking free of a registered international interest under the domestic law of the Contracting State making a declaration under paragraph 1 will need to ensure that it has a *locus standi* to apply for discharge of the international interest. Though under Article 25 of the Convention only the debtor can apply for a discharge, Irish courts have followed the Official Commentary on the Convention and Aircraft Protocol to make an order for discharge under its general jurisdiction and then enforce it by an order under Article 44(1) if the first order is not complied with. It may, however, be necessary to include a special provision on discharge if the jurisdiction rules of the place of the International Registry do not allow an equivalent procedure.

Article XXXIII

5. We believe there is general agreement with the revised text prepared by the UNIDROIT Secretariat, as set out on page 42 of the Legal Analysis, on the need to split the original provisions so as to distinguish procedures for proposals by States Parties to add codes to or remove codes from one or more Annexes, dealt with in Article XXXIII, from technical adjustments to the Annexes resulting from revisions of the Harmonized System itself, dealt with in Article XXXIV. Under the latter Article it might be thought necessary to make a further distinction between adjustments necessitated solely by a reordering of HS Codes within an Annex, such as by renumbering, splitting or amalgamating codes or altering a heading or subheading without changing the range of equipment covered by the Annex, from other adjustments arising from revisions to the Harmonised System. However, if the procedure set out below is adopted we do not consider that there is any need to make this distinction. We accept that as a matter of treaty practice revisions can be effected only by agreement of Contracting States. But we agree that the necessary agreement can be obtained by the tacit approval procedure in paragraph 3, together with the possibility of a meeting being triggered by an objection to an amendment. We nevertheless consider that given the delay and expense involved in organising and attending a meeting paragraph 4 should be triggered only by an objection by one-third of all Contracting States. We also agree that the decision of any meeting called should not bind a State who opt out of that decision. We have not at this stage sought to make any drafting proposals.

Annexes 1 and 3

6. Delete the last code (871620), which is limited to trailers and semi-trailers "for agricultural purposes" and should therefore feature only in Annex 2.

All Annexes

7. Delete "1." as there is only one paragraph.

Interpretation

8. It is understood that the interpretation of the Convention is intended to be governed by those WCO rules of interpretation having legal force, namely the General Rules for the Interpretation of the Harmonized System, applied in hierarchical order, together with the Section, Chapter and Subheading Notes and numbers and texts of the headings and subheadings but not titles of chapters and subchapters or classification Opinions of the Harmonized System Committee. We consider that this should be expressly stated in the Protocol.