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**EXPLANATORY REPORT TO THE DRAFT PROTOCOL TO THE CONVENTION ON  
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO  
MINING, AGRICULTURAL AND CONSTRUCTION EQUIPMENT**

(Prepared by the UNIDROIT Secretariat)

**Introduction**

1. The purpose of this document is to provide explanatory comments on the provisions of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment ("[the draft MAC Protocol](#)")<sup>1</sup>, as approved by the Committee of Governmental Experts at its second session (CGE1, Rome, 2 – 6 October 2017) and the UNIDROIT Governing Council at its 97<sup>th</sup> session (Rome, 2-4 May 2018).
2. The analysis is derived from three sources. Firstly, where provisions are based upon articles in the previous Protocols to the Cape Town Convention, material from the Official Commentaries of the previous Protocols has been adapted to explain the purpose and function of the relevant provisions. In particular, the analysis is based upon the recently released fourth edition of the Aircraft Protocol Official Commentary (April 2019). Secondly, where new provisions have been drafted, the Secretariat has prepared analysis based upon the work of the Study Group (2014 – 2016) and the Committee of Governmental Experts (2017). Finally, the analysis has been updated to reflect the outcomes of consultations with Governments, experts and private sector stakeholders as well as research undertaken by the Secretariat over the last 18 months.
3. The document is to be considered in conjunction with the Legal Analysis, which provides a detailed examination of the legal and policy considerations underpinning the draft MAC Protocol (UNIDROIT 2019 – DCME-MAC – Doc. 5).
4. A glossary of abbreviations and acronyms for instruments and international organisations used in UNIDROIT documents is available at Appendix I of this Explanatory Report.

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<sup>1</sup> [UNIDROIT 2019 – DCME-MAC – Doc. 3.](#)

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

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## **DRAFT PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO MINING, AGRICULTURAL AND CONSTRUCTION EQUIPMENT**

### **Preamble**

*THE STATES PARTIES TO THIS PROTOCOL*

*CONSIDERING the significant benefits of the Convention on International Interests in Mobile Equipment (hereinafter referred to as the Convention), as facilitating the financing and leasing of uniquely identifiable high-value mobile equipment, in the light of the purposes set out in the preamble to the Convention,*

*AWARE of the benefits of extending the Convention to mining equipment, agricultural equipment and construction equipment,*

*NOTING that the World Customs Organisation's Harmonized Commodity Description and Coding System governed by the International Convention on the Harmonized Commodity Description and Coding System allows the determination of the categories of such equipment to which the extension of the Convention is warranted,*

*RECOGNISING the important role that mining equipment, agricultural equipment and construction equipment play in the global economy,*

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

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

### **Comment**

1. The preamble reflects the primary purpose of a Protocol to the Cape Town Convention, which is to adapt the Convention to the particular requirements of the industry sector affected while otherwise leaving it unchanged. The draft MAC Protocol, like the Convention, is based on the policy of allowing a high degree of party autonomy and recognition of the need to provide the creditor with adequate safeguards in the event of default, which are reinforced as regards mining, agricultural and construction equipment by the insertion of additional remedies and the modification of provisions of the Convention that restrict the exercise of remedies. However, it also incorporates provisions enabling a Contracting State to balance its legal philosophy on key issues against the economic advantages of particular provisions and to make a declaration in relation to such provisions.<sup>2</sup>

2. The text for the preamble is based on the almost uniform text used in the Aircraft Protocol and the Luxembourg Rail Protocol.<sup>3</sup> During CGE1, the Committee decided to add an explicit reference to the Cape Town Convention Article 51(1) criteria of unique identifiability, high-value and mobility

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<sup>2</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), para 5.11.

<sup>3</sup> The Space Protocol contains a longer preamble than the Aircraft and Luxembourg Rail Protocols. This was in part due to the involvement of United Nations bodies in its negotiation, whom tend to favour longer preambles.

to Paragraph 2. The Committee also decided to add Paragraph 4, which references the integral role played by the Harmonized System Commodity and Coding System (“HS”) in restricting the scope of the Protocol in its application to MAC equipment.

3. The Study Group had previously added an additional paragraph intended to reflect that developing countries often have a larger proportion of their economies reliant on primary industries such as agriculture and mining, and as such would particularly benefit from better access to financing for modern high value MAC equipment (“RECOGNISING the important role that mining, agricultural and construction equipment play in the global economy and in particular for developing countries”). However, at CGE2 the Committee decided to remove the additional paragraph, on the basis that the Protocol would be globally beneficial.<sup>4</sup>

4. In the second Paragraph, the Luxembourg Rail 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 Luxembourg Rail Protocol diverged in this respect. Paragraph 2 of the preamble of the draft MAC Protocol adopts the language of the Aircraft and Space Protocols.

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<sup>4</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraph 43.

## 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 an object that falls under a Harmonized System code listed in Annex 2 to the Protocol, including all installed, incorporated or attached accessories, components and parts which do not fall within a separate Harmonized System code listed in that Annex, and all data, manuals and records relating thereto;*
  - (b) *“construction equipment” means an object that falls under a Harmonized System code listed in Annex 3 to the Protocol, including all installed, incorporated or attached accessories, components and parts which do not fall within a separate Harmonized System code listed in that Annex, and all data, manuals and records relating thereto;*
  - (c) *“dealer” means a person (including a manufacturer) that sells or leases equipment in the ordinary course of its business*
  - (d) *“equipment” means mining equipment, agricultural equipment or construction equipment;*
  - (e) *“guarantee contract” means a contract entered into by a person as guarantor;*
  - (f) *“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;*
  - (g) *“Harmonized System” means the Harmonized Commodity Description and Coding System governed by The International Convention on the Harmonized Commodity Description and Coding System;*
  - (h) *“immovable-associated equipment” means equipment that is so associated with immovable property that an interest in the immovable property extends to the equipment under the law of the State in which the immovable property is situated;*
  - (i) *“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;*
  - (j) *“inventory” means equipment held by a dealer for sale or lease in the ordinary course of its business;*
  - (k) *“mining equipment” means an object that falls under a Harmonized System code listed in Annex 1 to the Protocol, including all installed, incorporated or attached accessories, components and parts which do not fall*

*within a separate Harmonized System code listed in that Annex, and all data, manuals and records relating thereto; and*

*(l) “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.*

## Comment

5. Article I(1) provides that, except where the context otherwise requires, terms used in the Protocol have the same meanings as those used in the Convention (Article 1(1)). As such, the 40 definitions in the Convention have to be borne in mind when reading the Protocol.

6. Paragraph 2, subparagraphs (e) “guarantee contract”, (f) “guarantor”, (i) “insolvency-related event” and (l) “primary insolvency jurisdiction” are identical to the definitions in Article I of the previous three Protocols to the Cape Town Convention. Paragraph 2, subparagraphs (a) “agricultural equipment”, (b) “construction equipment”, (c) “dealer”, (d) “equipment”, (g) “Harmonized System”, (h) “immovable-related equipment”, (j) “inventory” and (k) “mining equipment” are new definitions inserted into the draft MAC Protocol.

7. Rather than attempting to offer general definitions of “agricultural equipment”, “construction equipment” and “mining equipment” which might have encompassed equipment not meeting the requirements of Article 51(1) of the Convention, paragraph (2)(a),(b) and (k), in combination with Article 2(1) define the application of the draft Protocol to those types of equipment covered by the HS codes listed in the Annexes to the Protocol (Annex 1 for mining equipment, Annex 2 for agricultural equipment and Annex 3 for construction equipment). Throughout the history of the MAC Protocol project, concerns had been raised regarding its scope.<sup>5</sup> Specifically, the concern most often voiced was that the scope of a Protocol covering all mining, agricultural and construction equipment was too broad. The use of a descriptive definitional approach as utilised in the Aircraft Protocol (Article I(2)(a),(b),(c)), Luxembourg Rail Protocol (Article I(2)(e) and Space Protocol (Article I(2)(k)) was not appropriate in the MAC Protocol context. The draft MAC Protocol uses the Harmonized Commodity Description and Coding System (“HS”) to identify the types of mining, agricultural and construction equipment to be covered by the Protocol (see the definition of “Harmonized System”). The draft MAC Protocol Annexes list the HS codes that cover the types of mining, agricultural and construction equipment which fall within the scope of the Protocol. Use of the HS assists in limiting the scope of the draft MAC Protocol to high value equipment used primarily in the mining, agriculture and construction industries. There are 42 HS codes listed in the Annexes to the draft MAC Protocol (21 in Annex 1, 26 in Annex 2 and 32 in Annex 3).<sup>6</sup> The HS codes were suggested by the private sector through the MAC Working Group<sup>7</sup> and were scrutinised by the Study Group and Committee of

<sup>5</sup> See [UNIDROIT 2006 – C.D. \(85\) 19](#), page 10; [UNIDROIT 2009 – C.D. \(88\) 17](#), paragraphs 143 – 147; [UNIDROIT 2010 – C.D. \(89\) 17](#); paragraphs 33 – 37; [UNIDROIT 2011 – C.D. \(90\) 18](#), paragraphs 68 – 70; [UNIDROIT 2012 – C.D. \(91\) 15](#), paragraphs 46 – 47; [UNIDROIT 2013 – C.D. \(92\) 17](#), paragraphs 44 – 48; [UNIDROIT 2014 – C.D. \(93\) 14](#), paragraphs 34 – 38.

<sup>6</sup> It should be noted that the same HS code may be listed in more than one Annex, because equipment covered by that HS code is used in more than one of the three relevant industries (for example, an HS code might cover excavators that are used in both construction and mining and thus would be listed in both Annexes 3 and 1 respectively).

<sup>7</sup> The MAC Working Group is responsible for encouraging private sector participation in developing the Protocol, as well as communicating and representing private sector interests during the drafting process. It is an independent body outside the purview of UNIDROIT. The Working Group is made up of many of the largest MAC equipment manufacturers and financiers globally. Membership also includes several trade associations, including the Association of Equipment Manufacturers (AEM), which has 917 members in the agriculture and construction industries, the Equipment Leasing and Finance Association (ELFA), which represents over 575 financial service



Governmental Experts. In 2018, further HS codes were proposed by States for addition to the draft MAC Protocol Annexes.<sup>8</sup>

8. During CGE1, the Committee decided to amend the definitions of mining, agricultural and construction equipment to cover “all installed, incorporated or attached accessories, components and parts which do not fall within a separate HS code listed in that Annex, and all data, manuals and records relating thereto”. This approach is broadly consistent with the object definitions in Article I(2)(e) of the Aircraft Protocol, Article I(2)(e) in the Luxembourg Rail Protocol and Article I(2)(k) in the Space Protocol.

9. The term “agricultural” should be interpreted consistently with the United Nations Food and Agriculture Organization (FAO) definition of the qualifier “agricultural”, which includes forestry and fisheries (to the extent that fisheries cover aquaculture equipment).<sup>9</sup> The Study Group considered that there was no need to include such a definition in the text of the Protocol, and that this could be sufficiently dealt with in the Official Commentary.

10. The term “dealer” is a broad term used to identify entities (including manufacturers) that sell or lease MAC equipment. It was inserted in the draft MAC Protocol during CGE2 on proposal of the MAC Working Group as a necessary part of the rules governing the treatment of inventory (Article XII).<sup>10</sup>

11. The term “equipment” encompasses the phrase “mining, agricultural or construction equipment”. It was added to Article I by the Committee during CGE2 to simplify and streamline the text of the Protocol.<sup>11</sup>

12. The terms “guarantee contract” and “guarantor” cover not only suretyship guarantees and credit insurance, which are accessory to the principal contract, are dependent upon its validity and are triggered by the default of the principal debtor, but also guarantees which are issued as independent payment undertakings and are payable on written demand and presentation of any other specified documents irrespective of performance or default in performance of the underlying transaction, for example, documentary credits, demand guarantees and standby credits. A guarantor is an “interested person” within the definition of Article 1(m)(ii) of the Convention and as such is entitled to be given notice of an intended sale or lease by the creditor (Article 8(4)) and to discharge an international interest after default by the debtor (Article 9(4)) and be considered for protection by the court in proceedings for advance relief (Article 13(2)(3)). The parties to a related guarantee contract may choose the law to govern their relations inter se (Article VI(2)).<sup>12</sup>

13. “Harmonized System” refers to the Harmonized Commodity and Coding system nomenclature that is used in the MAC Protocol Annexes to determine the scope of the Protocol in relation to the MAC equipment. The Harmonized System is a global nomenclature system providing uniform classification of commodities or merchandise in international trade. States also use it to monitor controlled goods and quotas, calculate and collect internal excise and sales taxes and compile

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companies, banks and manufacturers, and the Verband Deutscher Maschinen und Anlagenbau (VDMA), which is one of the largest industrial associations in Europe representing 3,100 member companies in the engineering industry. The Working Group is led by Mr Phillip Durham who is a partner in the Structured Finance Group of the law firm Holland and Knight in New York. For further information: <https://www.macwg.org/>.

<sup>8</sup> Further information on the HS codes recommendation for inclusion in the draft MAC Protocol Annexes is available in UNIDROIT 2019 – DCME-MAC – Doc. 6.

<sup>9</sup> The use of the FAO definition of “agricultural” is only relevant to the MAC Protocol to the extent that it should be used for considering future proposals of HS codes covering “agricultural equipment” for inclusion in the MAC Protocol Annexes. There have been no proposals from Governments or the private sector to list HS codes covering aquaculture equipment in the draft MAC Protocol Annexes.

<sup>10</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 175 – 204.

<sup>11</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 46 – 48.

<sup>12</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.12.

transport statistics. Further information on the HS is available in Part 2D of the Legal Analysis (DCME-MAC – Doc. 5). The definition of Harmonized System is intended to incorporate the nomenclature as governed by the international treaty establishing the system, *the International Convention on the Harmonized Commodity Description and Coding System*, as well as its interpretative rules. As the definition refers to the Harmonized System generally rather than a specific edition (currently the 2017 edition of the Harmonized System is in force, and will be replaced by a new edition in 2022), the definition of Harmonized System is intended to refer to the Harmonized System currently in force at any given time.

14. “Immovable-associated equipment” is defined by a specific test that takes into account the relationship between a MAC object and immovable property under the domestic law of the State in which the equipment is located in order to determine whether an interest related to the immovable property extends to the MAC object. This approach to the definition of “immovable-associated equipment” was adopted to obviate the need to provide a uniform definition of “fixture”, which would have been extremely challenging and may have made the Protocol less desirable to States considering ratification/accession. This definition was added during CGE1.

15. An “insolvency-related event” is an event which triggers the remedies of the creditor specified in the alternative versions of Article X, which itself is dependent on the making of a declaration by the Contracting State concerned and can be excluded by agreement of the parties (Article III). There are two alternative limbs to the definition. The first is the traditional commencement of insolvency proceedings. For its meaning, see Article 1(d) of the Convention. The second, a declared intention to suspend payments, or actual suspension of payments, where a creditor may not commence proceedings or exercise Convention remedies by law or State action, also constitutes an insolvency-related event. This is required because, in certain systems, debtors in relation to mining, agricultural and construction equipment may not be eligible for insolvency proceedings. More generally, the basic intent of the second limb of the provision is to trigger the starting of the time period in Article X of the Protocol (any of the Alternatives) where there are financial problems and State action or law (whether made or taken before or after a declared intention to suspend payment) prevents application of the remedies under the Convention. Where the law preventing or suspending the right to institute insolvency proceedings is not in force and State action has not been taken at the time of the declaration of intention, the declaration becomes an insolvency related event when such law comes into force or the requisite State action has been taken, whichever is the earlier.<sup>13</sup>

16. Article I(2)(j) provides a definition of “inventory” which allows Contracting States to opt out of Protocol’s application to inventory financing under Article XII. It is linked with the definition of “dealer” in Article I(2)(c). Any equipment that falls within the scope of the MAC Protocol becomes inventory, if it is held by a dealer for sale or lease in the ordinary course of business. This definition was added during CGE2 to implement the MAC Working Group’s proposal regarding inventory.<sup>14</sup>

17. The “primary insolvency jurisdiction” is the Contracting State in which the centre of the debtor’s main interests is situated. There is a rebuttable presumption that this is the place of the debtor’s statutory seat or, if none, the place where it is incorporated or formed. This last part is a slightly different formulation from that used in Article 4(1)(a) of the Convention, which refers to the Contracting State “under the law of which” the debtor is incorporated or formed. In practice, this will almost invariably be the law of the place of incorporation or formation. The presumption does not cover all possibilities. In particular it does not apply to a natural person, and in the case the “centre of main interests” is presumably the debtor’s place of business or, if more than one, its principal place of business.<sup>15</sup>

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<sup>13</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), para 5.14.

<sup>14</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 175 – 198.

<sup>15</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.15.

## **Article II – Application of the Convention as regards mining equipment, agricultural equipment and construction equipment**

1. *The Convention shall apply in relation to mining equipment, agricultural equipment and construction equipment as provided by the terms of this Protocol and Annexes 1, 2 and 3 irrespective of any intended or actual use of the equipment.*
2. *The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to mining equipment, agricultural equipment and construction equipment.*
3. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will limit the application of the Protocol to the entirety of the equipment comprised in one or two of the Annexes.*
4. *This Protocol does not apply to objects falling within the definition of "aircraft objects" under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, "railway rolling stock" under the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock or "space assets" under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets.*

### **Comment**

18. Paragraph 1 emphasises the controlling power of the Protocol over the Convention as provided by Articles 6 (Relationship between the Convention and the Protocol) and 49 (Entry into Force) of the Convention.<sup>16</sup> It is generally consistent with Article II(1) in the three previous Protocols, although the draft MAC Protocol additionally provides for the Convention to apply to the Annexes to the Protocol, "irrespective of any intended or actual use of the equipment". This additional text was included in the draft Protocol at CGE2 to achieve the policy goal of ensuring that the actual or intended use of MAC equipment would not affect the ability of a party to create an international interest in MAC equipment or affect an existing international interest in the equipment.<sup>17</sup>

19. Paragraph 2 provides the name under which the Convention and Protocol should be known together, and is identical to the corresponding provisions in Article II(2) of the three previous Protocols.

20. Paragraph 3 provides States with the ability to opt-out of the application of the Protocol to the categories of equipment listed in each individual Annex to the Protocol. The effect of a Contracting State opting out of an Annex is that the Protocol will not apply to the category of equipment (mining, agricultural or construction) covered by the Annex that has been the subject of the opt out. When ratifying/acceding to the Protocol, a State will automatically apply it to all three categories of equipment, unless a specific declaration is made in relation to this article. Certain HS codes are listed in more than one Annex, because the MAC equipment which they cover are used in two or more of the mining, agricultural and construction fields. If a Contracting State opts out of one Annex which covers a certain HS code, if that HS code is listed in a separate Annex which the Contracting State has not opted out of, then the Protocol will apply to MAC equipment under that HS code in the Contracting State. This rule applies regardless of the end use of the equipment (see the comment

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<sup>16</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.19.

<sup>17</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 61 – 68.

on Article II paragraph 1 above). During CGE1, the Committee made a small amendment to Paragraph 3 to clarify that a declaration by a Contracting State limiting the application of the Protocol to a certain Annex would have to apply to the entirety of the equipment covered by that Annex, and Contracting States could not limit the application of the Protocol in relation to particular HS codes contained in a particular Annex.

21. Paragraph 4 is designed to ensure that objects falling within the scope of the Aircraft Protocol, the Luxembourg Rail Protocol and the Space Protocol do not fall within the scope of the draft MAC Protocol. It does this by carving out of the draft MAC Protocol any object which would fall under any of the previous Protocols, even if that object falls within the definition of “mining equipment”, “agricultural equipment” or “construction equipment” (by virtue of being listed in one of the relevant HS codes in the Annexes to the Protocol). This Paragraph has been inserted primarily to address the situation where some types of “railway rolling stock” could be considered MAC equipment. In contrast, it is extremely unlikely that some equipment subject to the Aircraft and Space Protocols would also be covered by the draft MAC Protocol, as the HS codes listed in the draft MAC Protocol Annexes do not cover such equipment.

### Article III – Derogation

*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 (2) – (4).*

#### Comment

22. Article III is consistent with Article IV(3) of the Aircraft Protocol.

23. Article III enables the parties, by agreement in writing, to exclude the application of Article X altogether or, in their relations with each other, to derogate from or vary the effect of any of the provisions of the Protocol except Article VIII(2)–(4). “Writing” includes authenticated teletransmissions (Convention, Article 1(nn)). The exclusion of Article X by agreement of the parties is not, of course, necessary unless the Contracting State that is the primary insolvency jurisdiction has elected to make a declaration under Article XXVII(3) opting into one of the insolvency alternatives in Article X. Where this is the case, then despite the absence of the word “other” before “provisions” it seems clear from the use of the word “exclude” in relation to Article X, in contrast to “derogate from or vary”, that the power of derogation or variation is not exercisable in relation to Article X and that the parties must either exclude the application of Article X in its entirety or adhere in full to the Alternative selected by the State that is the primary insolvency jurisdiction. This is logical because the question which, if any, of the three alternatives is to be selected is a matter for the Contracting State that is the primary insolvency jurisdiction, not the parties, and the Contracting State cannot select part of Alternative A, Alternative B or Alternative C but must select one of those alternatives in its entirety or make no declaration at all. Any exclusion agreement can be invoked by the insolvency administrator as well as the debtor. The parties cannot derogate from the provisions of Article VIII(2)–(4), laying down certain conditions for the exercise of remedies and can derogate or vary other provisions of the Protocol only in the relations between themselves and not so far as affecting third parties.<sup>18</sup>

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<sup>18</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.27.

## Article IV – Representative capacities

*A person may, in relation to 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.*

### Comment

24. Article IV is substantively identical to Article IV of the Luxembourg Rail Protocol, and is consistent with Article VI of the Aircraft Protocol and the Space Protocol. The Aircraft Protocol has slightly different wording, and both the Aircraft and Space Protocols additionally apply to sales.

25. Article IV should be interpreted broadly. The intent is to permit a person to take any action under the Convention, such as entering into agreements, enforcing them or registering them with the International Registry; in a representative capacity, whether as agent, trustee or in some other representative capacity. A narrow reading of this Article would lead to illogical results, for example, the ability to enter into an agreement and register an international interest as agent, but not to enter into or register an assignment in the same capacity. The same problems would arise where the interest was to be subordinated, again in that capacity. Accordingly, acts by the representative other than those specified in Article IV should be considered covered by it by analogy. This conclusion is reinforced by the extended definition of registration in Article 16(3) of the Convention. It is also consistent with the principle objective of this provision, namely, to simplify matters in the context of multi-party financing. This Article applies both to disclosed and to undisclosed representation (a party need not disclose or identify its representative capacity in the International Registry). Where a trustee or agent effects a registration on behalf of beneficiaries or principals it is not open to the beneficiaries or principals to make a separate registration of the same interest. The capacity and authority of the representative are in principle determined by the instrument under which the representative was appointed and the law governing that instrument. Where, in the case of a trust, the trust instrument specifies its governing law, that will be the applicable law for determining the validity of the trust. All Contracting States must recognise a validly created foreign trust, even if their national law does not recognise the institution of trust and even if the law governing the trust is not the law of a Contracting State.<sup>19</sup>

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<sup>19</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraphs 5.33 – 5.34.

## Article V – Identification of equipment

1. *For the purposes of Article 7(c) of the Convention and Article XX of this Protocol, a description of equipment is sufficient to identify the equipment if it contains:*

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

2. *For the purposes of Article 7 of the Convention, an interest in future 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 equipment, without the need for any new act of transfer.*

### Comment

26. The description-based approach in Article V is adapted from Article V of the Luxembourg Rail Protocol which provides that unique identification of an object, though essential to an asset-based registration system, is unnecessary for the constitution of an international interest which is based on the agreement of the parties and is not dependent on registration. In consequence the draft MAC Protocol distinguishes the identification requirements for the formation of an agreement, to which the present Article is directed, from the more stringent requirements for registration imposed by Article XVII. Article V(1) allows any method of description which enables the mining, agricultural or construction equipment to be identified in 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 mining, agricultural or construction equipment or such equipment except for specified items or types. As such, an international interest can be taken over an entire line of mining, agricultural or construction equipment, and over future mining, agricultural or construction equipment without the need for a new agreement every time an additional object is acquired. Article V(2) dispenses with the necessity for a new, post-acquisition act of transfer by the debtor. While Article V is based on Article V of the Luxembourg Rail Protocol, that Article derives its inspiration from Articles 5 and 7 of the 1988 UNIDROIT Convention on International Factoring. By necessary implication it also over-rides that part of Article 2(2) from the Convention requiring that the object be uniquely identifiable.<sup>20</sup>

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<sup>20</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.11.

## Article VI – Choice of law

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

2. *The parties to an agreement or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.*

3. *Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.*

### Comment

27. The drafting of this article is consistent with the Choice of Law Provisions in Articles VIII in the Aircraft Protocol and Article VI in the Luxembourg Rail Protocol. Article VIII of the Space Protocol instead reverses the onus of the provision, making it opt out rather than opt in (i.e. under the Space Protocol, the article applies unless expressly excluded in a declaration made by a Contracting State).

28. The Convention makes no express provision for choice of law by the parties. That is left to the rules of private international law of the forum State. The Protocol refers a number of matters to the applicable law. The laws of some jurisdictions impose certain restrictions on party choice, as by excluding selection of the law of a State which has no connection with the parties or the transaction or where all the elements of the transaction are situated in a single State, so that the transaction is a domestic transaction. Seeking commercial predictability, the present Article, which applies only where a Contracting State has made a declaration to that effect under Article XXVII, allows the parties to an agreement or a related guarantee contract or subordination agreement to choose a law governing their relations inter se without restrictions of this kind. States that are not prepared to permit an unqualified selection by the parties will not opt into this provision. The only Contracting State whose declaration is relevant in any given case is the State of the forum. The choice of law under Article VI is effective to displace rules of the *lex fori* which are mandatory only in the sense that they cannot be excluded by agreement where the *lex fori* applies - for example, rules requiring a connection between the parties or the transaction and the chosen law - but can be excluded by choice of a foreign law. However, such choice does not affect overriding mandatory rules of the *lex fori*, that is, rules which are considered of such importance by the *lex fori* that they apply regardless of the applicable law. Such rules do not displace the applicable law except so far as inconsistent with it, they merely sit on top of the applicable law. Member States of the European Union are precluded from making a declaration under Article VI, being bound by Rome I. If proceedings are brought in a Contracting State that has made no declaration under this Article, the validity of the choice of law will be determined by its own conflict of laws rules, including, in an EU Member State, Rome I but excluding Article VI.<sup>21</sup>

29. The law selected is deemed to be the domestic law of the designated State, excluding its conflict of laws rules. This is in line with the usual conflict of laws approach in international conventions in relation to commercial transactions and avoids problems of *renvoi*. The reference to "law" requires that any choice by the parties be a national legal system, as opposed to the broader

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<sup>21</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.38.



“rules of law”, which could encompass rules common to a number of States or accepted internationally or even the *lex mercatoria*.<sup>22</sup>

30. Article VI(3) deals with cases where the parties select the law of a territorial unit of a multi-unit State. Although, in contrast to Article 52(1) of the Convention, Article VI(3) is not expressed to be limited to territorial units which have their own system of law, this is inherent in the Article for otherwise there would be no distinct legal system to consider and the party choice would have to be interpreted as a reference to the law of the State itself. Article VI(3) is not confined to federal States but applies wherever a State has territorial units with different systems of law.<sup>23</sup>

31. In the relations between themselves the parties may apply the selected law to only part of their contract and, in consequence, may apply different laws to different parts or issues (*dépeçage*).<sup>24</sup>

32. Party choice is limited to contractual rights and obligations. Proprietary rights prospectively affect third parties and rights of creditors on the debtor’s insolvency, and are outside the scope of this Article. There is no requirement that the agreement on a choice of law be in writing, though in practice it almost invariably will be.<sup>25</sup>

33. The ability to select the governing law on contractual matters applies to agreements constituting international interests, guarantees and subordinations, as well as to other contracts incorporated by reference into any of the foregoing so as to become terms of them.<sup>26</sup>

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<sup>22</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.39.

<sup>23</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.40.

<sup>24</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.41.

<sup>25</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.42.

<sup>26</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.43.

## **Article VII – Association with immovable property**

1. *Where immovable-associated equipment is situated in a non-Contracting State, this Protocol does not affect the application of any law of that State that determines whether an international interest in the immovable-associated equipment ceases to exist, is subordinated to any other rights or interests in the immovable-associated equipment, or is otherwise affected by the association of the equipment with immovable property.*

2. *A Contracting State, shall, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that the entirety of Alternative A, B, or C of this Article shall apply in relation to an international interest in immovable-associated equipment which is situated in the Contracting State.*

### *Alternative A*

3. *If immovable-associated equipment is removable [.....], the association of the equipment with the immovable property does not affect its status as equipment under this Protocol.*

### *Alternative B*

3. *This Protocol does not affect the application of any law of the State where the immovable property is situated that determines whether an international interest in immovable-associated equipment ceases to exist, is subordinated to any other rights or interests in the immovable-associated equipment, or is otherwise affected by the association of the equipment with immovable property to the extent that the equipment loses its individual legal identity in accordance with the law of that State.*

4. *Where equipment subject to an international interest is immovable-associated equipment and to the extent that it has not lost its individual legal identity in accordance with the law of the State where the immovable property is situated, an interest in the immovable property that extends to that equipment has priority over the registered international interest in the equipment only if the following conditions are fulfilled:*

- (a) the interest in the immovable property has been registered in accordance with the requirements of domestic law prior to the time of registration of the international interest in the equipment under this Protocol and registration of the interest in the immovable property continues to be effective; and*
- (b) the equipment became associated with the immovable property prior to the time of registration of the international interest in the equipment under this Protocol.*

### *Alternative C*

3. *This Protocol does not affect the application of any law of the State where the immovable property is situated that determines whether an international interest in immovable-associated equipment ceases to exist, is subordinated to any other rights or interests in the immovable-associated equipment, or is otherwise affected by the association of the equipment with immovable property.*

**Comment**

34. This is a new provision not contained in any of the previous Protocols. No guidance can be drawn from the three previous Protocols, as aircraft objects, railway rolling stock and space assets are not affixable to immovable property. This article is necessary because parties must know with certainty how an international interest in MAC equipment will be affected if the equipment becomes associated with immovable property.

35. Article VII has been developed on the basis of extensive analysis and consultations over a number of years. Further explanation of Article VII is available in Part 3I of the Legal Analysis (DCME-MAC – Doc. 5).

36. Paragraph 1 provides that Article VII does not regulate the association between MAC equipment and immovable property in non-Contracting States. In the absence of an express provision stating otherwise, Article 29 of the Cape Town Convention could be applied in a court of a Contracting State to equipment located in a non-Contracting State, with the effect that an international interest would take priority over any domestic interest arising out of the equipment's association with immovable property. As Article 29 was not drafted to contemplate an international interest conflicting with an interest arising out of association with immovable property, the Study Group concluded that it would be prudent to include a draft provision providing that international interests in MAC equipment do not interfere with immovable property-related interests in non-Contracting States. This position was confirmed by the Committee of Governmental Experts.

37. Paragraph 2 provides that Article VII is a mandatory declaration that must be made by all Contracting States. Failure of a Contracting State to make a mandatory declaration would result in the Depositary declining the instrument of ratification/accession as incomplete and thus not capable of being accepted. The mandatory nature of Article VII underscores the importance of the relationship between international interests in MAC equipment and domestic immovable property interests: the Protocol aspires to give Contracting States some flexibility in determining the applicable rule in their jurisdiction, but also requires them to make an active decision. The language of Paragraph 2 is based upon Article 54(2) of the Cape Town Convention, which requires Contracting States to make a mandatory declaration in relation to whether a court's leave is required to exercise certain remedies under the Convention.

38. The timing of the association between the object and the immovable property is irrelevant in determining how potential conflicts between international interests in the object and interests in the immovable property extending to the same object are resolved.

*Alternative A*

39. Alternative A allows States to declare that association with immovable property does not affect an object's status as equipment under the Protocol, thereby allowing for an international interest in the object to continue to exist and enjoy priority over domestic interests resulting from its association with immovable property, even where the domestic law would grant a priority interest in the equipment to the owner of the immovable property or a person that has taken a mortgage or similar encumbrance that extends to the equipment. Alternative A does not distinguish between different types of interests arising out of association with immovable property under some domestic laws (i.e. "fixtures" and "accessories"). Under Alternative A, Contracting States could not impede enforcement of an international interest under the Cape Town Convention by applying provisions of their domestic immovable property law.

40. At CGE2, the Committee expressed concern that the protection provided under Alternative A was too broad. The Committee decided that the priority of the international interest under Alternative A should be limited where the physical removal of the equipment would cause "significant

damage” and requested the Secretariat to further consider exactly how the qualifier limiting the application of Alternative A should be formulated.<sup>27</sup> Part 3I of the Legal Analysis (DCME-MAC – Doc. 5) provides an explanation of the Secretariat’s proposal for the reformulation of Alternative A, which is as follows:

3. *Subject to paragraph 4, the association of immovable-associated equipment with immovable property does not affect its status as equipment under this Protocol.*

4. *Paragraph 3 does not apply to equipment which becomes so physically connected to immovable property that the disconnection of the equipment from the immovable property would result in significant damage to the immovable property and equipment. Whether the physical disconnection of the equipment from the immovable would result in significant damage shall take into account the anticipated value of the equipment following its disconnection and the cost of repairs to the equipment and immovable property.*

#### *Alternative B*

41. Alternative B distinguishes between different types of immovable-associated equipment, and in doing so it restricts the circumstances under which an international interest in an accessory will lose its priority as against another interest arising from its association with immovable property. The article distinguishes between the different types of interests by use of the additional criterion of “loss of individual legal identity”. The article reverts to the national law of the location of the immovable property to determine the circumstances under which the loss of individual legal identity occurs.

#### *Alternative C*

42. Alternative C subordinates an international interest in immovable-associated equipment to domestic law interests arising out of its association with immovable property, to the extent that the domestic law of the Contracting State in which the equipment is situated so provides. By potentially subordinating the international interest to a domestic law interest, Alternative C substantially effects the utility of international interests under the draft MAC Protocol, and widespread ratification/accession of Alternative C could diminish the effectiveness of the draft MAC Protocol.

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[UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 76 – 87.

## CHAPTER II

### DEFAULT REMEDIES AND PRIORITIES

#### Article VIII – 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 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 equipment. Any remedy given by the Convention in relation to 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 fourteen or more calendar days' prior written notice of a proposed sale or 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 [including but not limited to tax and customs authorities and transport infrastructure 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 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.*

#### Comment

43. Article VIII is consistent with Article VII of the Luxembourg Rail Protocol.

44. Articles VIII to X need to be read together. They contain two distinct sets of provisions. The first set relates to the additional remedies of export and physical transfer. This comprises Articles VIII(1), (2), (5) and (6) and IX(6). The second set embodies modifications of the provisions

governing the Convention remedies and comprises Article VIII(3) and (4) and Article IX (other than Paragraph (6)).<sup>28</sup>

45. Article VIII(1) adds two remedies to those given in the Convention, namely export and physical transfer of MAC equipment. It is important to note that these remedies are not an authority to transfer to any specified territory (e.g. in contravention of applicable export control rules) but rather are only authority to transfer MAC equipment from its existing territory. These additional remedies are available to all creditors, that is, chargees, conditional sellers, and lessors, and are included in the remedies available pending final determination under Article 13 of the Convention. They enable the creditor to move the MAC equipment to another State, whether or not a Contracting State, though subject in either case to the laws of that State.<sup>29</sup>

46. The Protocol itself provides a mechanism for procuring the remedy of export and physical transfer. This is available only where the Contracting State in which the MAC equipment is located has made a declaration under Article XXVII applying Article IX. However, Article VIII(1), which prescribes the remedy, is not itself dependent on a declaration, so that whether or not a Contracting State has made the requisite declaration, it is open to the creditor to fulfil the conditions of Article VIII(1) and (2) which are prerequisites to the substantive remedies and procure these in conformity with the procedural requirements of the *lex rei sitae* (see Article 14 of the Convention). But if a declaration has been made under Article XXVII applying Article IX, it is likely that the creditor will prefer to use the Protocol mechanism, which obliges the administrative authorities to provide the remedy if the conditions prescribed by the Protocol are met and precludes it from imposing separate procedural requirements of its own.<sup>30</sup>

47. To obtain the Protocol remedy it is necessary that, in addition to the Contracting State's declaration applying Article IX, four further conditions are satisfied:

- (i) The debtor must have agreed to the remedy (Article VIII(1)).
- (ii) The debtor must be in default (Article VIII(1)) within the meaning of Article 11 (Article VIII(1)).
- (iii) The creditor must also obtain the prior written consent of the holder of any registered interest ranking in priority to that of the creditor (Article VIII(2)). This last condition is mandatory and cannot be excluded by agreement (Article III). It is not necessary to obtain the prior consent of the holder of an unregistered non-consensual right or interest covered by Article 39 of the Convention.
- (iv) The creditor must either give notice to interested persons as provided by Article VIII(6) or obtain an order for advance relief under Article 13 and notify the administrative authorities in accordance with Article IX(6), or equivalent relief from a foreign court whose jurisdiction is recognised by the home court, and notify the administrative authorities of the grant of the order. The remedies must then be made available within seven calendar days and the applicable authorities must expeditiously co-operate with and assist the creditor in the exercise of those remedies in accordance with any applicable safety laws and regulations.<sup>31</sup>

48. Article 8(3) of the Convention requires that the extra-judicial remedies given by Article 8(1) be exercised in a commercially reasonable manner. Parties cannot derogate from this provision (Article 15). Paragraph 3 of the present Article disapplies Article 8(3) in relation to mining, agricultural and construction equipment and instead extends the requirement of commercial

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<sup>28</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.20.

<sup>29</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.21.

<sup>30</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.22.

<sup>31</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.23.

reasonableness to embrace all remedies given by the Convention. This provision is also mandatory and cannot be excluded by agreement (Article III).<sup>32</sup>

49. As under Article 8(3), a remedy is deemed to be exercised in a commercially reasonable manner where exercised in conformity with a provision of the agreement except where such a provision is “manifestly unreasonable”. This wording embodies a strong presumption in favour of the reasonableness of a contractual provision as to the mode of exercise of a remedy and is designed to encourage reliance on contract wording, particularly where the wording is customary in international MAC equipment financing and leasing contracts.<sup>33</sup>

50. Article VIII(4) crystallises the meaning of “reasonable prior notice” in Article 8(4) of the Convention. There is a safe-haven of 14 calendar days, rather than working days as provided in the Aircraft Protocol, so as to allow 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. While parties may select and rely on that time-period, it is open to the parties to agree to a longer period but not a shorter one, since Article III precludes derogation from Article VIII(4).<sup>34</sup>

51. Article VIII(5), as consistent with Article VII(5) of the Luxembourg Rail Protocol, imposes a general obligation on Contracting States to ensure that the relevant administrative authorities expeditiously assist a creditor in exercising remedies under the Protocol. Consensus was not reached at CGE2 on whether to retain the provisions referring to administrative authorities in Articles VIII(5), IX(6), Article X Alternative A (8), and Article X Alternative C (9).<sup>35</sup> To find a compromise solution, several States proposed alternative drafting, aimed at providing a more precise but not exclusive definition of administrative authorities and giving States the option to opt-out of the provision. Neither compromise solution received enough support to be adopted. As no consensus was reached, the relevant provisions were placed in square brackets, with the additional sub-bracketed phrase “including but not limited to tax and custom authorities and transport infrastructure authorities”.

52. The Secretariat has undertaken further consultations and research on the role of administrative authorities, which is available in Part 6R of the Legal Analysis (DCME-MAC – Doc. 5). On the basis of these consultations and research, the Secretariat suggests that the references to administrative authorities be retained as consistent with the Luxembourg Rail Protocol, without any further attempt to identify the relevant authorities and instead allow the Official Commentary to provide further information on this issue. As explained in Part 6R of the Legal Analysis, this suggestion is based on (i) the difficulties of trying to identify all possible relevant administrative authorities in the instrument itself, (ii) because the corresponding provision in the Aircraft Protocol has not created problems in the 76 States that have ratified that instrument and (iii) the existing drafting will retain consistency between the Luxembourg Rail Protocol and MAC Protocol on this issue.

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<sup>32</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.24.

<sup>33</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.25.

<sup>34</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.26.

<sup>35</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 92 – 107.

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

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

### **Comment**

53. Article IX applies in a Contracting State only if and to the extent that the Contracting State has made an affirmative declaration to that effect under Article XXVII(2). For the purposes 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 (Article IX(2)). A Contracting State which makes a declaration under Article IX is required by Article XXVII(2) to specify a binding time-period for the purpose of Paragraph 2 of the present Article within which the speedy relief sought is to be given. On the principle that a party cannot complain of matters caused by its own acts or omissions, a creditor will not have grounds for complaint if a court fails to give relief within the specified time because, for example, the creditor has not filed the correct documents or followed the proper procedures. Paragraph 3 adds sale and application of the proceeds of sale to speedy relief that can



be sought under Article 13(1) of the Convention, subject however, to the requirement that the debtor and the creditor “specifically agree”, that is, agree expressly (though not necessarily in writing) to the court’s ordering a sale and application of the proceeds of sale on the creditor’s application. This agreement may be made at any time. As a corollary, Paragraph 4 of the Article adds provisions matching those of Article 9(5) of the Convention.<sup>36</sup>

54. Although the term “speedy” in Paragraph 2 is not defined and is in regards to a specified date in a declaration made by the Contracting State, specifying the time period for “speedy” relief is not a mandatory declaration.

55. Article 13(2) of the Convention provides protection for the debtor but imposes transaction costs. In relation to MAC equipment, Article IX(5) enables that concern to be addressed by permitting the relevant parties to exclude Article 13(2) by an agreement in writing. This would not otherwise be allowed, since under Article 15 of the Convention, Article 13(2) is a mandatory provision. Such agreement does not, however, exclude the debtor’s rights under the applicable law to pursue a claim against the creditor for failure to perform any of its obligations to the debtor under the Convention, nor does it preclude the debtor from exercising any right to damages or other relief given by *lex fori* applicable (a) to the relief under Article 13 or (b) on final determination of the creditor’s claim, if the claim is dismissed and the debtor has suffered loss through the prior granting of relief under Article 13. For the meaning of “writing”, see Article 1 (nn) of the Convention.<sup>37</sup>

56. Under Article VIII(6)(a) of the Luxembourg Rail Protocol (which corresponds with Article IX(6)(a)), the provision erroneously references Article VII(1) (modification of default remedy provisions). Paragraph 5.23(4) of the Official Commentary to the Luxembourg Rail Protocol provides that this article should reference Article 13 of the Cape Town Convention. The draft MAC Protocol remedies this drafting error by referring to Article 13.

57. Article IX(6) has already been discussed to some extent in the comment on Article VIII above. The remaining provisions of Article IX need to be read in conjunction with Article VIII(3) and (4).<sup>38</sup> Subparagraph 6(a) provides that relief must be granted by administrative authorities seven calendar days after notification, which is consistent with the Luxembourg Rail Protocol approach, rather than the less exact five working days specified in the Aircraft Protocol. Paragraph 6 is in square brackets, as explained in the comment on Article VIII above.

58. Article IX is almost identical (less the drafting error mentioned earlier in this comment) to Article VIII of the Luxembourg Rail Protocol and broadly consistent with Article X in the Aircraft Protocol.

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<sup>36</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.28.

<sup>37</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.29.

<sup>38</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.27.

## Article X – Remedies on Insolvency

1. *This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVII(3).*

2. *References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.*

### Alternative A

3. *Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the 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 equipment if this Article did not apply.*

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

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

(a) *the insolvency administrator or the debtor, as applicable, shall preserve the equipment and maintain it and its value in accordance with the agreement; and*

(b) *the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.*

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

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

[8. *With regard to the remedies in Article VIII(1):*

(a) *they shall be made available by the administrative authorities in a Contracting State no later than seven calendar days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and*

(b) *the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable safety laws and regulations.]*

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

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

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

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

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

#### *Alternative B*

3. *Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVII(3) 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 equipment, in accordance with the applicable law.*

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

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

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

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

#### *Alternative C*

3. *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 equipment in accordance with the applicable law.*

4. *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.*

5. *If an application is made to the court under the preceding paragraph, the creditor shall not take possession of the equipment 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.*

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 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 equipment under arrangements designed to preserve and maintain it and its value.*

8. *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 equipment 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.*

[9. *With regard to the remedies in Article VIII(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. *Subject to paragraphs 4, 5 and 8, no exercise of remedies permitted by the Convention may be prevented or delayed after the cure period.*

11. *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.*

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 VIII of this Protocol shall apply to the exercise of any remedies under this Article.*

15. *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.*

## **Comment**

59. Article X is almost identical to the text of Article IX of the Luxembourg Rail Protocol (less the public service reference), and Alternatives A and B are consistent with Article X of the Aircraft Protocol and Article XXI of the Space Protocol.

60. In order to give Contracting States the widest variety of options in selecting insolvency remedies, the Study Group decided to include all three insolvency alternatives in the draft MAC Protocol as provided for in previous Protocols to the Cape Town Convention.

61. This provision is perhaps the single most significant provision economically. If the sound legal rights and protections embodied in the Convention and draft MAC Protocol are not available in the insolvency context, they are not available when they are most needed.<sup>39</sup>

62. This Article, which modifies Article 30(3) of the Convention, is designed to provide in relation to mining, agricultural or construction equipment a special insolvency regime to govern the creditor's rights where the debtor becomes subject to insolvency proceedings or an insolvency-related event (as defined in Article I(2)(i) of the draft MAC Protocol) has otherwise occurred. The underlying purpose is to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the creditor either (a) secures recovery of the object or (b) obtains from the debtor or the insolvency administrator, as the case may be, the curing of all past defaults and a commitment to perform the debtor's future obligations. Article X applies only where a Contracting State that is the primary insolvency jurisdiction (as defined by Article I(2)(l)) has made a declaration under Article XXVII(3), and it may be excluded by the parties (Article III), though only in its entirety.<sup>40</sup>

63. There are three alternative texts of this Article, Alternative A, the "hard", or rule-based version, and Alternatives B and C, the "soft", or discretion-based, versions. A Contracting State considering making a declaration under Article X has a number of options. It may decide to make no declaration at all, in which case Article X will not apply and the Contracting State's national insolvency law, in its current form, will continue to be applicable in this context. A Contracting State may opt to apply Article X to all types of insolvency proceedings or only to some, and it may apply Alternative A to some types of insolvency proceedings and Alternatives B or C to others, or apply one of these alternatives to all or only some types of insolvency proceedings and make no declaration as to others.

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<sup>39</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.30.

<sup>40</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.31.

But to whatever type of insolvency proceeding Alternative A, Alternative B or Alternative C is applied, it must be applied in its entirety. This is because each of the alternatives embodies a set of integrated provisions which make it impracticable to select one or more without the others. All the Alternatives impose obligations on “the insolvency administrator or the debtor, as applicable”. The debtor itself will be the relevant party where (a) the insolvency-related event is a cessation of payments and insolvency proceedings cannot be opened or have not yet been opened or (b) insolvency proceedings have commenced but the insolvency administrator has not yet been appointed, or (c) the estate is being administered by a debtor in possession. Article X does not provide for the case where there are two or more holders of registered international interests relating to the same object. Where this occurs, the duties of the insolvency administrator are owed to the secured creditors successively in order of their priority, and only when the obligations owed to the first such creditor have been discharged does the next in line become entitled to invoke Article X. The insolvency administrator need not be a court-appointed official; any method of appointment authorised by law suffices.<sup>41</sup>

64. The provision in Paragraph 2 of Article X is a boiler-plate provision found in the ‘Remedies on Insolvency’ articles in the previous Protocols (Article XI, Alternative A Paragraph 4 in the Aircraft Protocol, Article IX Paragraph 2 of the Luxembourg Rail Protocol and Article XXI, Alternative A Paragraph 5 of the Space Protocol). In the Aircraft and Space Protocols, this provision is located in Alternative A, whereas in the Luxembourg Rail Protocol, it is part of the overarching article and not attached to any specific Alternative. On the basis that it is appropriate for this provision to apply to the meaning of insolvency administrator in all articles, the draft MAC Protocol follows the Luxembourg Rail Protocol and includes the provision in the overarching provision.

#### *Alternative A*

65. Alternative A requires the insolvency administrator, by the end of the “waiting period” specified in the declaration of the relevant Contracting State or any earlier date on which the creditor would otherwise be entitled to possession under the applicable law, either (a) to give possession of the mining, agricultural or construction equipment to the creditor, or (b) to cure all defaults (other than a default constituted by the opening of insolvency proceedings, which of course, is not capable of being cured) and to agree to perform all future obligations under the agreement and related transaction documents, including obligations under other transaction documents (e.g. a loan agreement) which the debtor has, by virtue of their incorporation by reference, agreed to perform under such agreement. “Related transaction documents” is not defined but includes promissory notes given as payment under the agreement or as security for payment, and documents which embody collateral contracts and undertakings forming part of the overall transaction between the parties. It does not, however, include undertakings which are given orally and not embodied in the agreement or some other document. The duties must be performed before the end of the waiting period if the creditor has previously become entitled to possession. The underlying premise is that the commencement of the insolvency proceedings produces a stay on the creditor’s right to possession. Where this is not the case or where any stay has been lifted, the creditor becomes entitled to possession even if the waiting period has not expired.<sup>42</sup>

66. Unless and until the creditor is given the opportunity to take possession or control, the administrator or the debtor, as applicable, must preserve the mining, agricultural or construction equipment and maintain its value in accordance with the agreement and, subject to this, may allow its use, while the creditor is entitled to apply for any other forms of interim relief available under the applicable law. The applicable law is determined by the *lex fori*. The forum is not necessarily the insolvency forum, since courts chosen by the parties have jurisdiction (Convention, Articles 42, 43(2)), as do courts of a Contracting State on the territory of which the debtor is situated where the interim relief is, by the terms of the order granting it, enforceable only in the territory of that

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<sup>41</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.32.

<sup>42</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.33.

Contracting State (Article 43(2)). Paragraph 8 requires the registry authority and administrative authorities in a Contracting State, as applicable, to make available to the creditor the remedy of export and physical transfer no later than seven calendar days after the creditor has notified such authorities that it is entitled to pursue those remedies in accordance with the Convention, in addition to which they must expeditiously co-operate and assist the creditor, though only in conformity with the applicable safety laws and regulations. It is implicit in this provision that the creditor is in fact entitled to exercise the remedies in question. So if the insolvency administrator's duty to give up possession under Paragraph 3 has not yet arisen under that Paragraph or the insolvency administrator has acquired the right to retain possession under Paragraph 7, the requisite authorities will not be obliged to provide any assistance to the creditor.<sup>43</sup>

67. The duty of the insolvency administrator or the debtor under the Convention to preserve the mining, agricultural or construction equipment and its value comes to an end once the administrator or the debtor, as the case may be, has given the creditor the opportunity to take possession, whether or not the creditor avails itself of that opportunity. Thereafter, the duty to take care of the mining, agricultural or construction equipment is governed by the applicable law.<sup>44</sup>

68. Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor's consent (Paragraphs 9 and 10). Moreover, no second waiting period may be imposed in respect of a breach of a commitment to perform future obligations. Accordingly, under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to suspend the enforcement of an international interest over mining, agricultural or construction equipment, or vary the terms of the agreement, without the consent of the creditor, nor would provisions of national insolvency law providing for an automatic stay pending reorganisation be operative beyond the declared waiting period. The effect is to displace Article 30(3)(b) of the Convention. Finally Paragraph 12 provides that no rights or interests other than non-consensual rights or interests of a category covered by a declaration under Article 39(1) are to have priority in insolvency proceedings over registered interests. The underlying rationale of Alternative A is to give mining, agricultural or construction equipment financiers and lessors the assurance of a clear and unqualified rule.<sup>45</sup>

69. Alternative A presupposes that the creditor holds an international interest which is effective in the insolvency proceedings, either because it was registered in the International Registry prior to the commencement of those proceedings or because it is otherwise effective under the applicable law (see Article 30(1) and (2) of the Convention).<sup>46</sup>

70. Paragraph 8 is in square brackets, based on the discussions at CGE2 in relation to the scope of administrative authorities. As explained in the comment on Article VIII, the Secretariat suggests that the existing drafting be retained, without specifying the exact administrative authorities in the Article itself. Such an approach would maintain consistency with the drafting of Alternative A with the existing three Protocols.

#### *Alternative B*

71. Alternative B requires the insolvency administrator or the debtor, as the case may be, upon the request of the creditor, to notify the creditor within the time specified in a declaration by the Contracting State whether it will (a) cure all defaults and perform all future obligations under the agreement and related transaction documents or (b) give the creditor the opportunity to take

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<sup>43</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.33.

<sup>44</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.34.

<sup>45</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.35.

<sup>46</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.36.

possession of the mining, agricultural or construction equipment, in the latter case subject to any additional step or the provision of any additional guarantee that the court may require as permitted by the applicable law. The right to take possession may be given either by the agreement, in which case it is the law governing the agreement that will be the applicable law, or by the procedural rules of the forum, in which case the applicable law will be *lex fori*. If the insolvency administrator or debtor does not either give the notice as to performance or give the creditor possession, the court may (but is not obliged to) permit the creditor to take possession on such terms as the court may order. In contrast to the position under Alternative A, the insolvency administrator or the debtor is not required to take any action unless and until required to do so by the creditor; accordingly, any time-period specified in a declaration by a Contracting State as regards Alternative B should be expressed to commence not earlier than the time the insolvency administrator or the debtor receives the creditor's request. Paragraph 6 of Alternative B does not specifically deal with the case where the insolvency administrator or the debtor agrees to cure all defaults and to perform all future obligations but fails to do so. In that situation there seems no reason why the court should not be able to exercise its powers under Paragraph 6.<sup>47</sup>

72. Paragraph 5 of Alternative B of Article X requires the creditor to provide evidence of its claims and proof that its international interest has been registered. There is no similar provision in Alternative A. This is because Alternative B, unlike Alternative A, involves an application to the court, and the evidence and proof are to be provided to the court. Again in contrast to Alternative A, the requirement to furnish proof that the international interest has been registered signifies that the creditor cannot invoke the provisions of Alternative B without first registering its international interest. This is despite the fact that such registration is only one of the methods of preserving the effectiveness of the international interest on the debtor's insolvency, the other being its effectiveness under the applicable law (Article 30(2)). The latter is not sufficient to enable the creditor to invoke the provisions of Alternative B. Paragraph 6 of Alternative B provides that if the insolvency administrator does not give notice in conformity with Paragraph 3 or fails to give the creditor the opportunity to take possession when the insolvency administrator has declared that it will do so, the court may permit the creditor to take possession upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee. So in the absence of a court order or consent of the debtor the creditor may not take possession. Paragraph 7 states that the mining, agricultural or construction equipment may not be sold pending the court's decision. It would seem that the creditor's ability to exercise other remedies is governed by the applicable insolvency law.<sup>48</sup>

73. Alternative B is included in all three of the previous Protocols.

#### *Alternative C*

74. Alternative C is only featured in the Luxembourg Rail Protocol, and was designed to be a compromise between Alternatives A and B, and also better reflect the approach to insolvency in many Continental European countries. Alternative C follows Alternative A in requiring the insolvency administrator, within the specified period, to cure all defaults or give the creditor an opportunity to take possession. The only difference is that the period in question is labelled the "cure period" rather than the "waiting period", but they appear to mean the same thing except that the commencement date of the cure period is specified (see Alternative C, Paragraph 15). Payments under the agreement are not suspended during the cure period but continue to accrue.<sup>49</sup>

75. Alternative C differs from Alternative B in that it enables the insolvency administrator to apply to the court for an order suspending its obligation to give the creditor an opportunity to take

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<sup>47</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.37.

<sup>48</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.38.

<sup>49</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.39.



possession of the mining, agricultural or construction equipment for a period (“the suspended period”) commencing with the end of the cure period and ending no later than the expiration of the agreement or any renewal of it, and on such terms as the court considers just (Alternative C, Paragraph 3). So instead of having to leave the initiative to the creditor to apply for leave to repossess, the insolvency administrator can itself apply for a suspension order.<sup>50</sup>

76. If a suspension order is sought it must be applied for during the cure period but it can be made either during the cure period or later. Any suspension must commence from the end of the cure period and end no later than the expiration of the agreement or any renewal thereof (Paragraph 4). Any such order must require that all sums accruing to the creditor during the suspension period be paid from the insolvency estate as they become due and that the insolvency administrator perform all other obligations arising during the suspension period (Paragraph 4). So the creditor is entitled to receive payment of sums accruing during the suspension period ahead of other creditors in the insolvency – assuming, of course, that there are funds to do so – and to have other obligations arising during that period carried out.<sup>51</sup>

77. While the court is not obliged to make an order for payment of sums accruing due prior to the commencement of the suspension period it has power to make an order for such payment, wholly or in part, as a term of suspending the insolvency administrator’s duty to give the creditor an opportunity to take possession, and the sum ordered to be paid could be an amount payable under an acceleration clause. Indeed, there appears to be nothing to preclude the court from requiring all defaults (other than a default constituted by the opening of insolvency proceedings) to be cured as a condition of suspending the creditor’s right to possession.<sup>52</sup>

78. Paragraph 9 is in square brackets, based on the discussions at CGE2 in relation to the scope of administrative authorities. As explained in the comment on Article VIII, the Secretariat suggests that the existing drafting be retained, without specifying the exact administrative authorities in the article itself. Such an approach would maintain consistency with the drafting of Alternative C in the Luxembourg Rail Protocol.

79. Paragraph 14, unlike the Luxembourg Rail Protocol, does not contain a reference to a ‘public service’ article (Article XXV of the Luxembourg Rail Protocol), as the draft MAC Protocol does not contain a corresponding provision.

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<sup>50</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.40.

<sup>51</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.41.

<sup>52</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.42.

### **Article XI – Insolvency assistance**

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

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

#### **Comment**

80. Article XI is derived directly from Article X of the Luxembourg Rail Protocol and Article XII of the Aircraft Protocol. Paragraph 2 of Article XXII of the Space Protocol necessarily differs in its approach, as space assets are located in space and not situated in the territory of a State.

81. Article XI is an opt-in provision requiring a declaration under Article XXVII(1). It seems clear that the only relevant declaration in any particular case is a declaration by the Contracting State falling within Paragraph 2, the assistance of whose courts is invoked. Where such a declaration is made, foreign courts and foreign insolvency administrators applying Article X are entitled to call for maximum co-operation on the part of the courts of the declaring State. This, of course, is in addition to any entitlement to co-operation they may have under other laws, for example from States that have adopted the UNCITRAL Model Law on Cross-border Insolvency.<sup>53</sup>

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Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.71.

## Article XII – Provisions relating to inventory

1. *Notwithstanding Article 29(3)(a) of the Convention, the buyer of inventory from a dealer acquires its interest in it free from any registered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.*
2. *Notwithstanding Article 29(4)(a) of the Convention, the conditional buyer or lessee of inventory of a dealer acquires its interest in or rights over that inventory free from any registered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.*
3. *Paragraphs 4 to 7 apply only where a Contracting State has made a declaration pursuant to Article XXVII(4).*
4. *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 dealer is situated in a Contracting State referred to in paragraph 3 at the time the interest is created or arises.*
5. *For the purposes of this Article a dealer is situated in a State where it has its place of business or, if it has more than one place of business in different States, its principal place of business.*
6. *Notwithstanding Article 29(3)(b) of the Convention, if a State has made a declaration under paragraph 3, a buyer of inventory from a dealer acquires its interest in it free from any unregistered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.*
7. *Notwithstanding Article 29(4)(b) of the Convention, if a State has made a declaration under paragraph 3, a conditional buyer or lessee of inventory of a dealer acquires its interest in or rights over that inventory free from any unregistered interest as to which the dealer is the debtor, unless the applicable law otherwise provides.*

### Comment

82. Article XII provides a new set of rules regulating interests in inventory. It was introduced at CGE2 in October 2017 on the basis of a proposal from the MAC Working Group that Contracting States should be given a choice as to whether the Protocol applies to inventory financing.<sup>54</sup> There is no corresponding provision in the three existing Protocols, as aircraft, railway rolling stock and space assets are not commonly held as inventory.

83. Article XII has two main purposes: (i) to allow Contracting States to opt-out of the application of the Convention to inventory financing and (ii) alter the Convention's priority rules in relation to buyers of MAC equipment that is held as inventory by a dealer.

84. Following CGE2, a number of deficiencies were identified in the drafting of Article XII. On consultation with international experts, the Secretariat has developed the following alternative drafting for Article XII:

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<sup>54</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 175 – 198.

*Article XII*

1. *A buyer, conditional buyer or lessee of inventory from a dealer acquires its interest in it free from any registered interest as to which the dealer is the debtor if, under the non-Convention law, the buyer, conditional buyer or lessee would acquire its interest free of an interest equivalent to that registered interest and is effective against third parties.*

2. *Paragraphs 3 and 4 apply only where a Contracting State has made a declaration pursuant to Article XXVII(4).*

3. *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 referred to in paragraph 2 at the time the interest is created or arises.*

4. *Article 29(3)(b) and (4)(b) of the Convention do 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 a buyer, conditional buyer or lessee acquires its interest in or rights over the inventory.*

85. A detailed analysis of the treatment of inventory under the Protocol and the proposed alternative drafting is available in Part 2H of the Legal Analysis (DCME-MAC – Doc. 5). The proposed alternative drafting retains the two policy rationales of the current Article XII, but simplifies and clarifies the drafting. The below comments relate to the proposed alternative drafting, rather than the existing Article XII.

86. Paragraph 1 overrides Articles 29(3)(a) and (4)(a) by providing protections that exist under domestic law for buyers, conditional buyers and lessees of inventory from dealers. Paragraph 1 would replace Paragraphs 1 and 2 of the current Article XII because it refers compendiously to the rights of a “buyer, conditional buyer and lessee”. The purpose of paragraph 1 is to take the standards of a take-free rule under domestic law (to the extent that they exist) that applies to a buyer, conditional buyer or lessee, and apply those standards to a buyer, conditional buyer or lessee who acquires equipment held as inventory from a dealer, in relation to a registered interest. This approach effectively applies the take-free rule in the non-Convention law to the registered interest (as if the registered international interest was a registered interest in a domestic registry).

87. The language “equivalent to that registered interest” clarifies that the buyer take-free standards adopted from the non-Convention law should be equivalent to the type of registered interest affected by the take-free rule. The concept of an “equivalent” interest is derived from Article 39(1)(a) of the Convention, which provides the right for Contracting States to make a declaration in relation to the protection of non-consensual interests which have priority over national law interests “equivalent” to a registered international interest. “Registered interest” is intended to apply to any registered interest as defined in the Convention, including registered non-consensual rights or interests under Article 40 and registered national interests under Article 50. The test is limited to where the non-Convention law would allow the buyer to take-free from an interest that is “effective against third parties”. This limitation is designed to prevent a buyer from utilising a potentially more lenient take-free rule under the non-Convention law that might allow a buyer to take free of an interest for which the holder had not taken appropriate steps to make its interest effective against third parties (such as registration on a domestic law registry, where this is contemplated by the non-Convention law).

88. Paragraph 2 provides that Contracting States can opt-out of the Protocol's application to inventory financing ("inventory financing opt-out") by declaring that it will apply paragraphs 3 and 4.

89. Paragraph 3 provides that an interest in inventory under which the dealer is the debtor is not an international interest. This rule, combined with Paragraph 4 in disapplying Article 29(3)(b) and 29(4)(b) of the Convention, are the core components of inventory financing opt-out. Paragraph 3 additionally provides that the connecting factor in determining whether the inventory financing opt-out applies is the location of the inventory in the declaring State at the time the interest is created or arises. This is a proposed change to Paragraphs 4 and 5 of the current Article XII, which provide that the connecting factor is the location of the debtor. The basis of this proposed change is that using the location of the inventory as the connecting factor better reflects the underlying policy for the inventory financing opt-out. The opt-out permits States whose laws adequately facilitate inventory financing to retain those laws rather than subject inventory financing to the Protocol's asset-by-asset, object-specific registration requirements. The governing law in such situations is usually the law of the State in which the inventory collateral is located. It follows that a State that makes an opt-out declaration would most likely be seeking to maintain the currently applicable law for inventory situated in that State.

90. Article 29(3)(b) and (4)(b) of the Convention provide that a buyer, conditional buyer or lessee acquires an interest in equipment free from an unregistered interest even if it has actual knowledge of such an interest. The proposed new Paragraph 4 of Article XII disappplies this rule in relation to buyers, conditional buyers or lessees of inventory from a dealer where the inventory is situated in a Contracting State that has exercised the inventory financing opt-out. In combination with Paragraph 3, this has the effect that the declaring State's domestic law will continue to determine whether and in what circumstances a buyer, conditional buyer or lessee can take free from interests in equipment held in inventory to which the dealer is the debtor.<sup>55</sup>

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<sup>55</sup> The phrase "even if it has actual knowledge," in Articles 29(3)(b) and (4)(b) of the Convention are not included in paragraph 4. It is understood that this reflects an intention to defer to the non-Convention law in determining whether knowledge has an effect on a buyer, conditional buyer or lessee's take free right of an unregistered interest.

### Article XIII – 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 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 equipment.*

#### Comment

91. The text of this article is identical to Article XI of the Luxembourg Rail Protocol, which is consistent with Article XXV of the Space Protocol, and Article XVI of the Aircraft Protocol (the Aircraft and Space Protocols contain additional language regarding buyers, as those Protocols apply to sales).

92. Article XIII establishes a quiet possession regime which is based on transparency through use of the International Registry and is directly linked to the priority rule in Article 29(4); indeed, it can properly be regarded as itself a supplementary priority rule that can be varied by a subordination agreement between debtor and chargee registrable under Article 16(1)(e). It applies only where a debtor is not in default within the meaning of Article 11 of the Convention. Assuming no such default, a debtor is entitled to quiet possession, on the terms of the agreement, as against (a) its creditor, (b) the holder of any interest from which the debtor takes free under Article 29(4) of the Convention, and (c) any interest to which it would otherwise be subordinated where the holder of that interest agrees to the debtor's quiet possession. Conversely, a debtor is not entitled to quiet possession as against the holder of any interest to which the debtor takes subject. Yet reflecting the principle of party autonomy, the foregoing rules may be varied by the agreement of the relevant parties. Where registrations are made reflecting these subordinations, third parties are bound thereby.<sup>56</sup>

93. Article XIII does not state which acts constitute a breach of the debtor's right to quiet possession once it is in possession. In the relations between the debtor and the creditor this is left to the agreement between them. Questions not dealt with by the agreement or arising in the relationship between the debtor and third parties are left to the applicable law. Seizure or attempted seizure of the mining, agricultural or construction equipment by the creditor (in the absence of default) or by a lessor's chargee under a charge registered after registration of the lessor's interest would clearly be an infringement of the right to quiet possession. So too would seizure, absent a default, by a third party at the request or by the authority of the creditor or chargee, or arrest of the object by the third party for sums due to it from the creditor, or a taking of the object in execution of a judgment obtained by the third party against the creditor or chargee. Quite independently of Article XIII, the debtor may have remedies against the creditor for any interference with the debtor's possession which is a breach of the agreement under the applicable law.<sup>57</sup>

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<sup>56</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraphs 5.45 – 5.46.

<sup>57</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraphs 5.47 – 5.48.

## CHAPTER III

### REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN MINING EQUIPMENT, AGRICULTURAL EQUIPMENT AND CONSTRUCTION EQUIPMENT

#### Article XIV – 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 Mining, Agricultural and Construction Equipment, provided that such Supervisory Authority is able and willing to act in such capacity.*
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.*
4. *The first Registrar of the International Registry shall be appointed 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.*

#### Comment

94. The Cape Town Diplomatic Conference for the adoption of the Aircraft Protocol and the Berlin Diplomatic Conference for the adoption of the Space Protocol both identified existing international bodies which were invited to become Supervisory Authorities for the International Registries for those respective Protocols. The Luxembourg Diplomatic Conference for the adoption of the Luxembourg Rail Protocol instead resolved to establish a new international body to act as Supervisory Authority for the International Registry under the Luxembourg Rail Protocol.

95. Resolution No. 2 of the Cape Town Diplomatic Conference invited the International Civil Aviation Organisation (ICAO) to accept the functions of Supervisory Authority for aircraft objects. Resolution No. 2 of the Berlin Diplomatic Conference invited the governing bodies of the International Telecommunications Union (ITU) to consider the matter of becoming Supervisory Authority upon or after entry into force of the Protocol.

96. Article XIV is adapted from Article XXVIII of the Space Protocol, which allows a degree of flexibility in designating a Supervisory Authority. Paragraphs 2 and 3 are identical in language and approach to Article XVII Paragraphs 3 and 4 of the Aircraft Protocol. The draft MAC Protocol does not adopt the approach of the Luxembourg Rail Protocol in establishing a new international body.

97. Further information on the process of identifying an entity to perform the role of Supervisory Authority under the MAC Protocol is contained in Part 6Y of the Legal Analysis (DCME-MAC – Doc. 5).

### **Article XV – 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.*

#### **Comment**

98. The regulations referred to in this article are those to govern the operation of the International Registry. Article XV is consistent with the text of Article XVIII of the Aircraft Protocol and Article XXIX of the Space Protocol.



### [Article XVI – Designated entry points

1. *A Contracting State may at any time designate an entity or entities as the entry point or entry points through which there shall or 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.]*

#### Comment

99. Article XVI implements for mining, agricultural and construction equipment Article 18(5) of the Convention. It is for each Contracting State to decide whether to designate an entity as the entry point for the transmission of registration information to the International Registry.

100. The effect of not requiring use of a designated entry point, or merely permitting its use, is that registrations can be made directly with the International Registry. It is open to a State to require use of a designated entry point for some classes of transactions only while leaving the registration of other classes within the Convention to be effected directly. It is not, of course, open to a State to prohibit direct registration of classes of transactions without allowing access to the designated entry point for those registrations.<sup>58</sup>

101. A Contracting State which designates an entity pursuant to this Article will be free to add such additional requirements (including the payment of fees) as it considers necessary for transmission of data to the International Registry, though in doing so it will need to have regard to Article 26 of the Convention. Contracting States designating national entry points are responsible for ensuring that these operate at least during working hours in their respective territories. Searches will be able to be made on-line from any point connected to the International Registry and are not made through a national entry point.<sup>59</sup> The cost of establishing and operating a national entry point must be borne by the Contracting State that designates the entry point.<sup>60</sup>

102. Use of the 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 (Article XIX).<sup>61</sup> Further, an entry point may not be designated for registration of a notice of a national interest, or of a non-consensual right or interest, arising under the laws of another State. Subject to this, an entry point may be designated for any kind of registration, whether of an international or prospective international interest, a notice of a national interest, or a registrable non-consensual right or interest, arising under the law of the State designating the entry point, an assignment or prospective assignment, a subordination, or an amendment or discharge of a registration.<sup>62</sup>

<sup>58</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.56.

<sup>59</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.57.

<sup>60</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.100.

<sup>61</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.58.

<sup>62</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.55.

103. The registration will take effect as provided by Article 19 of the Convention; receipt of information at the national entry point is not sufficient. Similarly, the fact that a registration made via an entry point does not qualify for national registration under national law is irrelevant under the Convention. An international interest is valid if it complies with the Convention's substantive requirements. Its priority is established when it is registered with the International Registry.<sup>63</sup>

104. It was decided at the first Study Group meeting that the draft MAC Protocol should allow the designation of entry points, as this would make it easier for countries with national personal property registries to ratify/accede to the MAC Protocol.

105. Article XVI is largely based on Article XIII of the Luxembourg Rail Protocol. However, the Luxembourg Rail Protocol includes additional language clarifying that the designation of an entry point by a Contracting State is done by declaration, whereas the Aircraft and Space Protocols do not contain such a clarification. The Study Group decided not to include the clarification, in conformity with the Aircraft and Space Protocols. However, the Aircraft Protocol Official Commentary<sup>64</sup> notes that a declaration is still required ("it is for each Contracting State to decide whether to make a declaration designating an entity as the entry point..."). As a result, Article XXVIII (reservations and declarations) of the Luxembourg Rail Protocol lists Article XII (designated entry points) as an article under which declarations can be made, whereas Article XXXII of the Aircraft Protocol does not list Article XIX (designated entry points) nor does Article XLIII (reservations and declarations) of the Space Protocol list Article XXXI (designated entry points). The Diplomatic Conference may wish to discuss this matter further.

106. The Luxembourg 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, which the Aircraft Protocol deals with in Article XX(4). The draft MAC Protocol follows the approach of the Luxembourg Rail Protocol, with the relevant sentence located in Article XVI, Paragraph 1.

107. At CGE2, the Committee debated whether Article XVI should be retained.<sup>65</sup> Ultimately, CGE2 decided to retain Article XVI in square brackets, for further consideration at the Diplomatic Conference. On the basis that Article XVI is a non-mandatory provision (it only applies to Contracting States that make a declaration nominating a domestic entry point), assists in linking the International Registry to domestic registries and is desired by several negotiating States, it may be prudent to retain the Article. Further analysis on this issue is available in Part 5Q of the Legal Analysis.

108. Should Article XVI be retained, either the Protocol or Regulations need to identify the connecting factor that determine whether a party is obliged to use a designated entry point in registering an interest in the International Registry. As consistent with the Aircraft Protocol and Luxembourg Rail Protocol, it is suggested that the connecting factor in relation to domestic entry points be established by the regulations. During CGE2, several delegations suggested that the connecting factor should be the debtor's location. Complications may arise where a debtor is situated in multiple locations in different Contracting States that have all designated a mandatory entry point. In such a situation, it would be expected that the entry point most closely associated with the transaction (often this would be the State in which the equipment is located at the time the registration is made) would be used. However, nothing would prevent the creditor utilising another entry point, should the debtor also be "situated" in that State under Article 4 of the Convention. Another option would be for the regulations to establish that the connecting factor is the location of the equipment at the time of creation or registration of the international interest, which would prevent the possibility of multiple entry points. However, such an approach would also cause

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<sup>63</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraphs 5.59 – 5.60.

<sup>64</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.89.

<sup>65</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraphs 124 – 134.

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problems where the equipment was located in a non-Contracting State before its export or transfer for use in a Contracting State. The Diplomatic Conference may wish to further discuss which connecting factor might be most appropriate to be set out in the future regulations for the MAC Protocol International Registry.

## **Article XVII – Identification of equipment for registration purposes**

*A description of equipment that contains its manufacturer's serial number and such additional information as required to ensure uniqueness is necessary and sufficient to identify the object for the purposes of Article 18(1)(a) of the Convention. The Regulations shall specify the format of the manufacturer's serial number and provide what additional information is required to ensure uniqueness.*

### **Comment**

109. Articles XVII and XVIII(1) establish the criteria for the registration and searching for equipment in the future International Registry. These provisions were adopted at CGE2, on recommendation from the Intersessional Working Group on Registration Criteria (IWGRC) established by the Committee. Further analysis on the registration criteria is available in Part 5P of the Legal Analysis (DCME-MAC – Doc. 5).

110. Article XVII provides that the process of registration requires two types of information: first, the registering person must identify the MAC equipment by indicating its manufacturer's serial number that is typically to be found on a serial number plaque permanently affixed to the equipment. The manufacturer's serial number is chosen as the key identifier because of its permanence and its ability to uniquely identify a mining, agricultural or construction object. Additionally, the registering party must also indicate other additional information concerning the equipment as required to ensure uniqueness in accordance with the Regulations. No registration can be affected without this information being indicated by the registering person. The selection of appropriate categories of mandatory additional information in the future Regulations should ensure that the registration process is kept simple and that the additional information can both guarantee the uniqueness of the identification of the MAC equipment and serve the transparency objectives and the informative value of a registration in the International Registry.

### **Article XVIII – Additional modifications to Registry provisions**

1. *For the purposes of Article 19(6) of the Convention, the search criterion for equipment shall be its manufacturer's serial number.*
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. *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 [and the reasonable costs of the Depositary associated with the performance of the functions, exercise of the powers, and discharge of the duties contemplated by Article 62 of the Convention].*
4. *The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.*
5. *The Registrar shall be liable under Article 28(1) of the Convention for loss caused up to an amount not exceeding the value of the equipment to which the loss relates. Notwithstanding the preceding sentence, the liability of the Registrar shall not exceed 5 million Special Drawing Rights in any calendar year, or such greater amount, computed in such manner, as the Supervisory Authority may from time to time determine by regulations.*
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.*

#### **Comment**

111. Paragraph 1 of this Article states, for the purposes of Article 19(6) of the Convention, the basic search criteria for a mining, agricultural or construction equipment object. Article 19(6) determines when an interest is "searchable", which, under Article 19(2) and (3), determines when it is valid. That, in turn, establishes priority for the purposes of Article 29 of the Convention. On the basis of the IWGRC's recommendation which was adopted at CGE2, the single search criterion is the manufacturer's serial number.<sup>66</sup> Article XV(1) of the Luxembourg Rail Protocol provides that the criteria for searching the International Registry will be established by the regulations. Section 8.1 of the baseline regulations for the Rail Protocol International Registry then state that searches shall be

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<sup>66</sup> [UNIDROIT 2017 – Study 72K – CGE2 – Report](#), paragraph 136.

made using only the manufacturer's serial number. As such, in effect, Article XVII(1) of the draft MAC Protocol is substantively consistent with Article XV(1) of the Luxembourg Rail Protocol, however the Luxembourg Rail Protocol defers the substantive rule to the Regulations to provide additional flexibility.

112. Paragraph 2 gives greater precision to the phrase "without undue delay" in Article 25(2) of the Convention, specifying a period no later than ten calendar days after the receipt of the demand for the discharge. But the obligation to procure the discharge within this time is not a strict one; all that is required is that the holder of the prospective international interest or the person in whose favour a prospective assignment is registered takes such steps as are within its power.<sup>67</sup> This 10 calendar day approach follows the approach of the Rail and Space Protocols, as opposed to 5 working days as provided in the Aircraft Protocol.

113. Paragraph 3 is based upon the Aircraft and Space Protocols provision for the recovery of costs for the International Registry and the Supervisory Authority. Alternatively, the Luxembourg Rail Protocol deals with this in a separate article. The Supervisory Authority is required to set and may from time to time amend fees. The basis of the fees is cost recovery. The International Registry is a not for-profit operation. In setting the fees the Supervisory Authority is entitled to charge for reasonable setting-up costs – which will thus be recouped over a period rather than falling on the State's Parties to the Convention and the MAC Protocol – and the reasonable costs of establishing, operating and regulating the International Registry and of supervising the Registrar and performing other functions of the Supervisory Authority. Such costs may obviously include provision for servicing of equipment, repair and replacement and maintenance of the system as a state-of-the-art registration system. But the Supervisory Authority is not entitled to fix fees on the basis of a profit to either the Registrar or itself.<sup>68</sup>

114. During CGE1, the Committee decided to insert an additional sentence in square brackets at the end of Paragraph 3 that contemplates cost recovery for the Depositary from the fees collected from operating the International Registry.<sup>69</sup> The additional wording would allow the Depositary to recover costs related to the Depositary discharging its duties under Article 62 of the Convention. It was suggested by the Secretariat that such a provision should be considered on the basis that due to its unique and somewhat complicated system of mandatory and optional declarations, the Depositary role under the Cape Town Convention and its Protocols is significantly more burdensome than is usually the case for international treaty depositaries. Allowing the Depositary to recover fees in a manner consistent with the fee recovery mechanism of the Supervisory Authority is a matter that the Diplomatic Conference might wish to discuss further.

115. Paragraph 4 provides that the International Registry is required to provide its registration and search facilities on a 24-hour basis, and the intention of the provision is that the facility should be available seven days a week throughout the year, though it may be necessary from time to time to close the Registry for limited periods for maintenance, repair, upgrading of systems, technical security and the like, though obviously the Registry will seek to keep disruption to the service to a minimum. Paragraph 4 diverges from the Aircraft Protocol approach, and instead adopts the Luxembourg Rail Protocol approach by moving the second sentence ("various entry points shall be operated at least during working hours in their respective territories") to Paragraph 1 of Article XVI (Designated entry points).<sup>70</sup>

116. Paragraph 5 sets two limits on the Registrar's liability. First, the liability for loss caused cannot exceed the value of mining, agricultural or construction equipment to which the loss relates.

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<sup>67</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.64.

<sup>68</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.100.

<sup>69</sup> [UNIDROIT 2017 – Study 72K – CGE1 – Report](#), paragraph 150 – 152.

<sup>70</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.65.

Second, the Registrar's total liability cannot exceed five million Special Drawing Rights (SDRs) in any one calendar year or such greater amount, computed in such a manner, as the Supervisory Authority may from time to time determine by regulations. SDRs are units of account established by the International Monetary Fund and calculated in terms of a basket of major currencies. The limit in relation to SDRs is an overall annual limit, not a limit per event, and raises the question whether, in the case of two or more claims in the same calendar year, they are to be dealt with on a first in time basis, which would mean that no one claim in a calendar year could be paid until all other claims in the same calendar year had been established and quantified. It is open to the Supervisory Authority to fix a higher overall limit and prescribe the manner in which that is to be calculated.<sup>71</sup> It is important to note that the limit of 5 million is significantly lower than the liability of the Aircraft Protocol, which sets the liability of the International Registry at the maximum value of an aircraft object.

117. Paragraph 6 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.

118. Paragraphs 7 and 8 of this Article deal with insurance of the Registrar against liability. Paragraph 7 is based on the Luxembourg Rail Protocol approach, which provides that the insurance or guarantee shall be determined by the Supervisory Authority, having regard to the prospective liability of the Registrar. The Space Protocol provides that the insurance or guarantee shall cover the Registrar's liability as provided for in the Regulations. The Aircraft Protocol does not have a corresponding provision addressing this issue. Paragraph 7 provides that the amount of the insurance or financial guarantee to be procured by the Registrar is to be not less than the amount determined by the Supervisory Authority to be appropriate, having regard to the Registrar's prospective liability. The Registrar is entitled to obtain cover for a greater amount that may also, under Paragraph 8, cover events for which it is not liable under Article 28 of the Convention.<sup>72</sup>

119. Paragraph 8 is identical to Paragraph 6 of the Aircraft Protocol, Paragraph 8 of the Luxembourg Rail Protocol and Paragraph 7 of the Space Protocol corresponding articles.

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<sup>71</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.66.

<sup>72</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.67.

### Article XIX – Notices of Sale

*The regulations shall authorise the registration in the International Registry of notices of sale of equipment. 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.*

#### Comment

120. Article XIX adopts the approach of Article XVII of the Luxembourg Rail Protocol which, though allowing registration of notices of sale, provides that any such registration and any search made or certificate issued is to be for information purposes only and is not to have effect under the Convention or Protocol. By contrast, under the Aircraft Protocol and Space Protocol, parties to a sale of an aircraft or space object may register the sale and secure the benefit of the priority provision of the Convention. Under the draft MAC Protocol, the sole purpose of the registration facility is to give notice of the sale transaction with a view to securing a priority under national law. It is, of course, for the applicable law to determine whether a voluntary registration in the International Registry has any significance in the application of its priority rules. Article XIX does not provide for the registration of notice of a prospective sale; such registration would be pointless because it is extremely unlikely that it would be capable of producing any effects under national law.<sup>73</sup>

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Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.70.



## CHAPTER IV

### JURISDICTION

#### Article XX – 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 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 equipment as specified in Article V(1) of this Protocol.*

#### Comment

121. Article XX is consistent with Article XXII of the Aircraft Protocol, Article XVIII of the Luxembourg Rail Protocol and Article XXXIII of the Space Protocol.

122. The reason for this Article is that mining, agricultural or construction equipment may be owned or controlled by States or State entities, and while under the law of many States it is considered an aspect of State sovereignty that a State can waive its immunity, this is not universally true. This Article makes it clear that a waiver of immunity is binding, though only where it is in writing that describes the mining, agricultural or construction equipment object. The waiver may relate to immunity from jurisdiction, enforcement or both. The instrument of waiver should make clear its extent. The general rule of international law, which is not affected by this Article, is that waiver of immunity from suit does not by itself constitute waiver of immunity from enforcement. Though Article XX(2) says that the waiver must contain a description of the mining, agricultural or construction equipment, what is meant is not necessarily the waiver clause itself but the instrument of waiver, which will usually be the agreement containing the waiver clause.<sup>74</sup>

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<sup>74</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.105.

## CHAPTER V

### RELATIONSHIP WITH OTHER CONVENTIONS

#### **Article XXI – Relationship with the UNIDROIT Convention on International Financial Leasing**

*The Convention on International Interests in Mobile Equipment as applied to agricultural, construction and mining 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.*

#### **Comment**

123. Article XXI is consistent with the drafting in Article XXV of the Aircraft Protocol, Article XIX of the Luxembourg Rail Protocol and Article XXXIV of the Space Protocol.

124. The 1988 UNIDROIT Leasing Convention provides for the rights of parties involved in an international leasing transaction, including the lessor, the lessee and the supplier. The lessee is given various direct rights against the supplier, in place of remedies against the lessor, in whose favour basic default remedies are specified. The lessor's real rights are also protected in the event of the lessee's bankruptcy. The effect of Article XXI is that as between two Contracting States which are Parties both to the Leasing Convention and the Cape Town Convention the latter supersedes the former in its entirety, not merely in cases of inconsistency.<sup>75</sup>

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<sup>75</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.114.

## CHAPTER VI

### FINAL PROVISIONS

#### **Article XXII – 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 Mining, Agricultural 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 XXIV.*
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.*

#### **Comment**

125. Article XXII is consistent with Article XXVI of the Aircraft Protocol, Article XXII of the Luxembourg Rail Protocol and Article XXXVI of the Space Protocol.

126. A State may not become a Party to the MAC Protocol without also becoming a Party to the Convention, which requires not only that the State is a Contracting State but that the Convention has entered into force for that State (*Vienna Convention on the Law of Treaties 1969, Article 2(1)(g)*).<sup>76</sup>

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<sup>76</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.115.

### Article XXIII – 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.*

#### Comment

127. Article XXIII is consistent with Article XXVII of the Aircraft Protocol, Article XXI of the Luxembourg Rail Protocol and Article XXXVII of the Space Protocol.

128. This Article enables a Regional Economic Integration Organisation established by sovereign States and having competence over matters within the scope of the Protocol to adhere to the Protocol as if it were a Contracting State. For the corresponding provision in the Convention, see Article 48.<sup>77</sup>

129. Paragraph 2 allows a Regional Economic Integration Organization to "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. A declaration to the Depositary under paragraph 2 is different from a formal declaration by a Contracting State under the Protocol. As such, Article XXIII is not listed as an article under which declarations can be made in Article XXIX (reservations and declarations). This is consistent with Article 56 of the Convention, Article XXXII of the Aircraft Protocol, Article XXVII of the Luxembourg Rail Protocol and Article XLIII of the Space Protocol.

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<sup>77</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.116.

## Article XXIV – Entry into force

1. *This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:*

*(a) the first day of the month following the expiration of three months after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, and*

*(b) the date of the deposit by the Supervisory Authority with the Depositary of a certificate confirming that the International Registry is fully operational.*

2. *For other States this Protocol enters into force on the first day of the month following the later of:*

*(a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and*

*(b) the date referred to in sub-paragraph (b) of the preceding paragraph.*

### Comment

130. Article XXIV is consistent with Article XXVIII of the Aircraft Protocol, Article XXIII of the Luxembourg Rail Protocol and Article XXXVIII of the Space Protocol.

131. Paragraph 1 deals with entry into force as regards the five States whose ratification/accession brings the MAC Protocol into force. Paragraph 2 deals with States adhering to the Protocol thereafter. Subparagraph (b) of Paragraph 1 is designed to ensure that the Protocol cannot come into force until the International Registry is operational, as consistent with the Rail and Space Protocols. The Convention does not come into force as regards mining, agricultural and construction equipment until the MAC Protocol has been brought into force.

132. During CGE1, the Committee decided to set the number of instruments of ratification required to bring the Protocol into force at five and place the number in square brackets, with the intention of further discussing the issue at the Diplomatic Conference. Article XXVIII of the Aircraft Protocol required the deposit of eight instruments for entry into force, Article XXIII of the Luxembourg Rail Protocol requires the deposit of four instruments for entry into force and Article XXXVIII of the Space Protocol requires the deposit of ten instruments for entry into force.

## Article XXV – Territorial units

1. *If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.*
2. *Any such declarations are to be notified to the Depository and shall state expressly the territorial units to which this Protocol applies.*
3. *If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.*
4. *Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.*
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.*

### Comment

133. The text of Paragraphs 1 – 4 is consistent with Article XXIX in the Aircraft Protocol, Article XXIV of the Luxembourg Rail Protocol and Article XXXIX of the Space Protocol, however, it omits paragraph 6 of the Space Protocol from this article, as consistent with the Aircraft and Luxembourg Rail Protocols. Sub-paragraph 5(c) is consistent with the Luxembourg Rail Protocol.

134. This Article applies to the draft MAC Protocol the same provisions as apply to the Convention under Article 52. The reference to “administrative authorities”, which was carried over in error to the Convention by Article 52(5)(c), denotes the authorities concerned with the enforcement of the remedy of export and physical transfer referred to in Articles VIII(1) and X, Alternative A, Paragraph 8. Article XXV(1) does not apply to the extent that the law in relation to the matters dealt with in the Protocol is the same in all territorial units, whether because they have adopted uniform laws or because the law is federal law.<sup>78</sup>

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Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.118.

## Article XXVI – Transitional Provisions

*In relation to agricultural equipment, construction equipment and mining equipment Article 60 of the Convention shall be modified as follows:*

- (a) *replace paragraph 2(a) with the following:*
- “(a) “effective date of this Convention” means in relation to a debtor the latest of the time when:*
- (i) this Convention enters into force;*
- (ii) the State in which the debtor is situated at the time the right or interest is created or arises becomes a Contracting State, and*
- (iii) the Protocol becomes applicable in that State to the equipment which is subject to the pre-existing right or interest.”*
- (b) *replace paragraph 3 with the following:*
- “3. A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years and not later than ten years after the date on which the declaration takes effect, when Articles 29, 35 and 36 of this Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”*
- (c) *insert the following paragraph:*
- “4. For the purposes of paragraph 3, a declaration takes effect with respect to a pre-existing right or interest in equipment to which the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment becomes applicable in that State in accordance with Article XXXIII(4) of that Protocol at the time the Protocol becomes applicable to that equipment.”*

### Comment

135. The drafting of this article is based upon Article XXVI of the Luxembourg Rail Protocol. Article XL of the Space Protocol adopts a different approach to amending Article 60, which takes into account issues unique to the Space Protocol (such as the enforcement of default remedies in a space asset which is physically linked to another space asset which is also subject to a separate international interest). The Aircraft Protocol has no transitional provisions, as it was drafted simultaneously with the Cape Town Convention itself and the drafting oversights were not identified at that time.

136. Paragraph 1 of Article 60 of the Convention sets out the general principle that unless otherwise declared by a Contracting State, the Convention does not apply to a pre-existing right or interest, which retains its priority under the applicable law. Any such declaration is controlled by the provisions of Article 60(3). Article XXVI amends Article 60 to make explicit various points that are implicit in that Article in its unamended form.<sup>79</sup>

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<sup>79</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraphs 5.82 – 5.83.

137. Subject to the effect of a declaration under Article 60, a pre-existing right or interest is outside the scope of the Convention and Protocol for all purposes. Where a pre-existing interest is assigned after the effective date of the Convention, the assignee stands in the position of the assignor, no new interest is created and the interest assigned remains a pre-existing interest and thus outside the scope of the Convention unless covered by a declaration under Article 60.<sup>80</sup>

138. During CGE1, the Committee amended Article XXVI Paragraph (a) to provide additional clarification as to the meaning of “effective date of this Convention”. The Committee also amended Article XXVI Paragraph (c) to clarify that a declaration made under Article 60(3) of the Cape Town Convention would also apply to a pre-existing right or interest in equipment that became subject to the MAC Protocol due to the addition of an HS code to the Annexes in accordance with the process set out in Article XXXII(4).<sup>81</sup> Paragraph (c) might require further consideration in light of the Diplomatic Conference’s consideration of the MAC Protocol’s amendment process.

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<sup>80</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.85.

<sup>81</sup> [UNIDROIT 2017 – Study 72K – CGE1 – Report](#), paragraph 108 – 110.



## **Article XXVII – Declarations relating to certain provisions**

1. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply either or both of Articles VI and XI of this Protocol.*
2. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article IX of this Protocol, wholly or in part. If it so declares, it shall specify the time-period required by Article IX(2).*
3. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, B or C of Article X and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A, B or C. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article X.*
4. *A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply paragraphs 4 to 7 of Article XII.*
5. *(a) Any declaration made pursuant to this Protocol shall apply to the entirety of the equipment to which this Protocol applies.*  
*(b) A Contracting State that makes a declaration in respect of any Alternative provided for in Articles VII or X shall choose the same Alternative regarding the entirety of the equipment to which this Protocol applies.*
6. *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.*

### **Comment**

139. Article XXVII provides a mechanism allowing Contracting States to make certain declarations under the Protocol. Article XXVII is consistent with Article XXVIII of the Aircraft Protocol, Article XXIII of the Luxembourg Rail Protocol and Article XXXVIII of the Space Protocol, although the declarations that are permitted under each Protocol necessarily vary.

140. The draft MAC Protocol allows declarations to be made in relation to 11 Articles (Articles II, VI, VII, IV, X, XII, XVI, XXV, XXVII, XXVIII and XXX). Most declarations are opt-in, except Article VII which is mandatory and Article XII which is opt-out. Articles II, VII, XXV, XXVIII and XXX allow for Contracting States to directly make declarations under those articles. Conversely, declarations in relation to Articles VI, IX, X, XI and XII are made under Article XXVII.

141. In relation to the insolvency remedies, Paragraph 3 requires a Contracting State to specify “the types of insolvency proceeding” to which it will apply Alternative A, Alternative B or Alternative C. However, the intention is to cover both forms of insolvency-related event referred to in Article I(2)(i) and the second of these deals with the case where the creditor cannot pursue insolvency proceedings. Accordingly, paragraph 3 should be interpreted as enabling a Contracting State to specify the types of insolvency proceeding or other insolvency-related event to which Alternative A, Alternative B or Alternative C is to apply.<sup>82</sup>

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<sup>82</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.122.

142. Paragraph 3 also requires that the declaration state the time-period required by Article X within which the debtor or the insolvency administrator has to give possession or cure all defaults and agree to perform all future obligations (Alternatives A and C) or to give notice whether it will do so (Alternative B). Whereas under Alternatives A and C of Article X the duty arises automatically upon the occurrence of an insolvency-related event under Alternative B it arises only on request by the creditor. Accordingly, any time-period specified by a declaration in relation to Alternative B should be expressed to commence no earlier than the date of receipt of the creditor's request by the insolvency administrator or the debtor.<sup>83</sup>

143. During CGE2, the Committee inserted Paragraph 4 to allow for Contracting States to opt-out of the MAC Protocol's application to inventory financing. This provision will need to be amended should the Diplomatic Conference decide to adopt the Secretariat's revised text for Article XII.

144. During CGE1, the Committee inserted Paragraph 5 to clarify that declarations made in relation to immovable property (Article VII) or insolvency remedies (Article X) cannot be made on an Annex-by-Annex basis by Contracting States.<sup>84</sup> For example, under the current drafting a Contracting State cannot make a declaration that Article VII Alternative A would apply to Agricultural Equipment under Annex 2, but Article VII Alternative B would apply to Construction Equipment under Annex 3 and Mining Equipment under Annex 1.

145. Paragraph 6 requires Contracting States to apply Article X in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction, defined in Article I(2)(1). So if there are secondary insolvency proceedings in another Contracting State relating to mining, agricultural or construction equipment situated in that State, the courts of that State must apply the version of Article X selected by a declaration of the Contracting State of primary jurisdiction.<sup>85</sup>

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<sup>83</sup> Luxembourg Rail Protocol Official Commentary (Second edition, January 2014), paragraph 5.90.

<sup>84</sup> [UNIDROIT 2017 – Study 72K – CGE1 – Report](#), paragraph 113.

<sup>85</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.123.

## Article XXVIII – Declarations under the Convention

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

### Comment

146. Article XXVIII is consistent with Article XXXI of the Aircraft Protocol, Article XXIX of the Luxembourg Rail Protocol and Article XLII of the Space Protocol (noting that Article XLII of the Space Protocol does not reference Article 60, as Article XL of the Space Protocol disapplies Article 60).

147. This Article is not strictly necessary but has the merit of making it clear that declarations under the Convention relating to specified provisions apply to any modification of those provisions by the MAC Protocol.<sup>86</sup>

148. Article XXIX in the Luxembourg Rail Protocol appears after the article governing “Reservations and Declarations”, whereas in the Aircraft and Space Protocols it appears directly before it. The draft MAC Protocol adopts the approach of the Aircraft and Space Protocols.

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<sup>86</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.124.

### Article XXIX— Reservations and declarations

1. *No reservations may be made to this Protocol but declarations authorised by Articles II, VII, XXV, XXVII, XXVIII and XXX 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.*

#### Comment

149. A reservation differs from a declaration in that it is a unilateral act by a Contracting State purporting to exclude or modify a Treaty provision (Article 2(1)(d) of the Vienna Convention on the Law of Treaties), and, unless authorised by the Treaty, is not binding on other States unless they accept it (Article 20 of the Vienna Convention), whereas a declaration applying or excluding a provision of the Convention is authorised by the Convention itself and requires no acceptance.<sup>87</sup>

150. The draft MAC Protocol allows declarations to be made in relation to 11 Articles (Articles II, VI, VII, IV, X, XII, XVI, XXV, XXVII, XXVIII and XXX). Articles II, VII, XXV, XXVIII and XXX allow for Contracting States to directly make declarations under those articles, as permitted by paragraph 1 of Article XXIX. Conversely, declarations in relation to Articles VI, IX, X, XI and XII are made under Article XXVII.

151. As explained in the Article XVI comment, Article XXVIII (reservations and declarations) of the Luxembourg Rail Protocol lists Article XII (designated entry points) as an article under which a declaration can be made, whereas the Aircraft Protocol and Space Protocol do not. As the Official Commentaries to the Aircraft and Space Protocols clarify that designations of a domestic entry point to the International Registry are indeed made by declaration, the Diplomatic Conference may wish to discuss whether a reference to Article XVI should be added to paragraph 1 of Article XXIX.

152. No reservation is permitted under the draft MAC Protocol, although declarations are authorised by the Articles listed in Paragraph 1.

153. This Article does not state when a declaration takes effect. International treaty practice provides that a declaration notified to the Depositary prior to or upon entry into force of the Protocol for the declaring State takes effect simultaneously with such entry into force.

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<sup>87</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.349.

### **Article XXX – Subsequent declarations**

1. *A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXVIII 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.*
2. *Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.*
3. *Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.*

#### **Comment**

154. A State which has made a declaration may make a subsequent declaration supplementing, replacing or modifying the earlier declaration but not so as to affect rights and interests arising prior to the effective date of the subsequent declaration. This qualification is necessary to ensure the certainty of acquired legal rights.<sup>88</sup>

155. Paragraph 2 provides that subsequent declarations will become effective on the first day of the month six months after the declaration has been notified to the Depositary.

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<sup>88</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.355.

### Article XXXI – Withdrawal of declarations

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

#### Comment

156. Article XXXI provides the rules governing the withdrawal of declarations under the Protocol. A declaration may be withdrawn but not so as to affect rights or interests arising prior to the effective date of withdrawal.<sup>89</sup>

157. Article XXXI is substantively consistent with Article XXXIV of the Aircraft Protocol, Article XXXI of the Luxembourg Rail Protocol and Article XLV of the Space Protocol (noting that Article XLII of the Space Protocol does not reference Article 60, as Article XL of the Space Protocol disapplies Article 60).

158. Article XXXII (Reservations and Declarations) of the Aircraft Protocol allows for the making of a declaration under Article XXXIV (Withdrawal of declarations), whereas the Rail and Space Protocols do not allow for the making of declarations under their corresponding “withdrawal of declarations” articles. Article XXXI is consistent with the approach of Article XXXI of the Luxembourg Rail Protocol and Article XLV of the Space Protocol, as it is understood that the withdrawal of a declaration does not constitute the making of a new declaration.

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<sup>89</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.358.

### Article XXXII – 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 Annexes, shall be considered a denunciation of the Protocol in relation to that Annex.*

#### Comment

159. Article XXXII, Paragraphs 1 – 3 is consistent with Article XXXV of the Aircraft Protocol, Article XXXII of the Luxembourg Rail Protocol and Article XLV of the Space Protocol.

160. By denouncing the Convention a State Party to the Protocol communicates its withdrawal from the Protocol. This takes effect 12 months after receipt of the denunciation by the Depositary but does not affect rights and interests arising prior to that time.<sup>90</sup>

161. It is open to a Contracting State which is Party to the MAC Protocol and other Protocols to the Cape Town Convention to denounce the MAC Protocol while continuing to adhere to the others. A Contracting State which is party only to the present Protocol and denounces it without denouncing the Convention remains bound only by those final provisions of the Convention which are operative independently of the MAC Protocol.<sup>91</sup>

162. Paragraph 4 was inserted on recommendation by the Study Group. Paragraph 4 provides that a subsequent declaration from a State that disapplies the Protocol to a certain category of equipment under an Annex to the Protocol is, in effect, a denunciation of the Protocol in relation to those categories of equipment that the State subsequently opts out of.

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<sup>90</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.360.

<sup>91</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 5.129.

**Article XXXIII – 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 other than to the Annexes [pursuant to paragraphs 4 and 5] 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 five States Parties in accordance with the provisions of Article XXIV relating to its entry into force.*

[4. *After each revision of the Harmonized System, or such other times as the circumstances may require, the Depositary, after consultation with the Supervisory Authority, shall convene a meeting of Contracting States to consider any amendments to the Annexes that reflect changes to the Harmonized System that have affected the Harmonized System codes listed in the Annexes, or the inclusion of any additional codes covering uniquely identifiable high value mobile equipment of a type that is used in the mining, agricultural or construction sector that may warrant inclusion of such equipment in the Annexes. Each such amendment shall be approved by at least a two-thirds majority of States participating in the meeting. The Depositary shall communicate to all Contracting States the adoption of the amendment. Contracting States shall notify the Depositary within a period of twelve months from the date of the communication if they do not accept to be bound by the amendment. Any such amendment shall become effective in respect of the other States ninety days after the end of that period of 12 months unless [XX%] or more of the Contracting States have notified the Depositary that they do not accept to be bound. The Depositary shall immediately notify all Contracting States of the amendment and the date at which the amendment becomes effective.]*

[5. *After each revision of the Harmonized System, or such other times as the circumstances may require, the Depositary, after consultation with the Supervisory Authority, shall convene a meeting of Contracting States to consider any amendments to the Annexes that reflect changes to the Harmonized System that have affected the Harmonized System codes listed in the Annexes without changing the scope of the*



*Annexes. Each such amendment shall be approved by at least a two-thirds majority of States participating in the meeting. After approval of an amendment by Contracting States the amendment will become effective upon the expiration of [ninety] days after such approval. The Depositary shall immediately notify all Contracting States of the amendment and the date at which the amendment becomes effective.]*

6. *Any revision to the Annexes shall not affect rights and interests arising prior to the date the revision becomes effective or applicable.*

## Comment

163. Article XXXIII contains two different mechanisms for amending the instrument. Paragraphs 2 and 3 provide the rules governing the amendment process for the articles of the Protocols, whereas paragraphs 4 – 6 provide a separate process for amendments to the Annexes.

164. At CGE2, consensus could not be reached on the amendment mechanism for the MAC Protocol or its Annexes.<sup>92</sup> The Committee tasked the Secretariat to work with interested States to develop an alternative text that was likely to attract wide support from negotiating states.

165. On the basis of extensive research and consultations, the Secretariat has developed the following alternative amendment proposal, as provided in the text box below. A detailed explanation of the Secretariat's proposal is available in Part 6X of the Legal Analysis, and a review of amendment mechanisms in other international treaties is available in Appendix VIII of the Legal Analysis (DCME-MAC – Doc. 5).

### **Article XXXIII – 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;*
- (d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable; and*
- (e) whether to add Harmonized System codes to one or more Annexes, or to remove Harmonized System codes from one or more Annexes.*

<sup>92</sup>

[UNIDROIT 2017 – Study 72K - CGE2 - Report](#), paragraphs 157 - 163.

3. Any amendment to this Protocol other than technical adjustments to the Annexes pursuant to Article XXXIV 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 five States Parties in accordance with the provisions of Article XXV relating to its entry into force.

4. Any amendment to the Annexes shall not affect rights and interests arising prior to the date the amendment becomes effective or applicable.

#### **Article XXXIV – Technical adjustments to the Annexes**

1. Upon the adoption of a revision of the Harmonized System, the Depositary shall consult the World Customs Organization and Supervisory Authority in relation to any HS codes listed in the Annexes that might have been affected by the revision.

2. The Depositary shall inform all Contracting States notifying them of any HS codes in the Annexes affected by the revision and propose technical adjustments to the HS codes in the Annexes that ensure the Annexes remain aligned with the Harmonized System. Technical adjustments proposed by the Depositary shall attempt to minimise changes to the application of the Protocol to mining, agricultural and construction equipment resulting from the revision of the Harmonized System.

3. Technical adjustments to the Annexes proposed by the Depositary under paragraph 2 are deemed to have been adopted by Contracting States unless any Contracting State objects to a technical adjustment within twelve months of being notified.

4. Where one or more Contracting States object to a technical adjustment within twelve months of being notified, the Depositary shall convene a meeting of Contracting States to consider technical adjustments to the HS codes in the Annexes to which objection has been made. In considering such technical adjustments to the Annexes, participating Contracting States shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, decisions shall be adopted by a two-thirds majority vote of the Contracting States present and voting. Decisions by the meeting of Contracting States shall be binding on all Contracting States.

5. Where a proposed technical adjustment fails to be adopted by a meeting of Contracting States under paragraph 4, the HS code affected by the proposed technical adjustment shall be removed from the Annexes in order to retain consistency with the Harmonized System.

6. The Depositary shall inform Contracting States of all changes to the MAC Protocol Annexes under paragraphs 3, 4 and 5. Unless otherwise provided, such changes shall enter into force six months from the date of the circulation of the communication by the Depositary.

7. Any changes to the Annexes under paragraphs 3, 4 and 5 shall not affect rights and interests arising prior to the date the changes becomes effective or applicable.

### Article XXXIV – 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:*
    - (i) *each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;*
    - (ii) *the date of the deposit of the certificate referred to in Article XXIV(1)(b);*
    - (iii) *the date of entry into force of this Protocol;*
    - (iv) *each declaration made in accordance with this Protocol, together with the date thereof;*
    - (v) *the withdrawal or amendment of any declaration, together with the date thereof; and*
    - (vi) *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.*

#### Comment

166. Article XXXIV is consistent with Article XXXVII of the Aircraft Protocol, Article XXXIV of the Luxembourg Rail Protocol and Article XLVIII of the Space Protocol.

167. Paragraph 1 designates UNIDROIT as the Depositary for the MAC Protocol. Paragraph 2(a)-(c) lists the specific responsibilities of the Depositary, which are quite onerous in view of the number and diversity of declarations which can be made under the MAC Protocol. Before accepting the deposit of any instrument the Depositary has to be satisfied that it is accompanied by the mandatory declaration under Article VII.<sup>93</sup>

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<sup>93</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.380.

168. Paragraph 2(d) requires the Depository to perform “such other functions [as are] customary for depositories”. These include keeping custody of the original text of the MAC Protocol, receiving signatures to the Protocol, examining each signature and instrument to ensure it is in proper form and in accordance with the Protocol, and registering the Protocol with the Secretariat of the United Nations upon its coming into force (Article 77(1) Vienna Convention on the Law of Treaties).<sup>94</sup>

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<sup>94</sup> Aircraft Protocol Official Commentary (Fourth edition, April 2019), paragraph 4.383.

### **Comment on the Annexes to the draft Protocol**

169. The Annexes to the draft MAC Protocol list the HS codes that cover the types of mining, agricultural and construction equipment which fall within the scope of the Protocol.

170. The listing of the HS codes covering equipment from the different sectors (mining, agriculture and construction) in different Annexes allows Contracting States to apply the Protocol to equipment used in only one or two of the mining, agriculture and construction industries, if they so wish (see Article II(3)). Certain HS codes are listed in more than one Annex, because equipment covered by that HS code is used in more than one of the three relevant industries (for example, an HS code might cover excavators that are used in both mining and construction and thus would be listed in both Annexes 1 and 3 respectively).

171. There are 42 HS codes listed in the Annexes to the draft MAC Protocol (21 in Annex 1, 26 in Annex 2 and 32 in Annex 3). The HS codes currently listed the Annexes are consistent with the list approved by the Committee of Governmental Experts at its second session (Rome, October 2017). The listed HS codes are consistent with the sixth edition of the HS which entered into force in 2017.

172. An explanation of the HS is available in Part 2D of the Legal Analysis (DCME-MAC – Doc. 5). A summary of the process undertaken to select the HS codes listed the Annexes and a description of the types of MAC equipment each HS code applies to is available in DCME-MAC – Doc. 6.

173. In 2018, the UNIDROIT Secretariat established a process under which States could propose additional HS codes for inclusion in the MAC Protocol Annexes. On the basis of the proposals received, the UNIDROIT Secretariat is recommending that an additional 14 HS codes be added to the Annexes, and one HS code that is currently listed be removed. If these recommendations are adopted by the Diplomatic Conference, there will be a total of 55 different HS codes listed in the MAC Protocol Annexes. Further information on this process is also in DCME-MAC – Doc. 6.

## **ANNEXES TO THE PROTOCOL**

### **ANNEX 1 – MINING EQUIPMENT**

1. As consistent with Article II, the Convention shall apply in relation to mining equipment that falls under the following Harmonized System codes in this Annex.

820713: Interchangeable tools for hand tools, whether or not power-operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools - Rock drilling or earth boring tools -- With working part of cermets

842911 - Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Track laying

842919: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Other

842952: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Other

843010 : Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Pile-drivers and pile-extractors

843031: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Coal or rock cutters and tunnelling machinery -- Self-propelled

843039: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Coal or rock cutters and tunnelling machinery -- Other

843041: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other boring or sinking machinery -- Self-propelled

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other boring or sinking machinery -- Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other machinery, self-propelled

843061: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers – Other machinery, not self-propelled -- Tamping or compacting machinery

847431: Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand - Mixing or kneading machines -- Concrete or mortar mixers

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

870191: Tractors – Other, of an engine power - Not exceeding 18 kW

870192: Tractors – Other, of an engine power - Exceeding 18 kW but not exceeding 37 kW

870193: Tractors – Other, of an engine power - Exceeding 37 kW but not exceeding 75 kW

870194: Tractors – Other, of an engine power - Exceeding 75 kW but not exceeding 130 kW

870195: Tractors – Other, of an engine power - Exceeding 130 kW

870410: Motor vehicles for the transport of goods - Dumpers designed for off-highway use

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof - Self-loading or self-unloading trailers and semi-trailers for agricultural purposes

## ANNEX 2 – AGRICULTURAL EQUIPMENT

1. As consistent with Article II, the Convention shall apply in relation to agricultural equipment that falls under the following Harmonized System codes in this Annex.

842482: Mechanical appliances (whether or not hand-operated) for projecting, dispersing, or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines – Other appliances -- Agricultural or Horticultural

842911: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Track laying

842919: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Other

842920: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Graders and levelers

842930: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers – Scrapers

842951: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Front-end shovel loaders

842952: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Other

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other boring or sinking machinery -- Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers – Other machinery, self-propelled

843210: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers – Ploughs

843221: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers - Harrows, scarifiers, cultivators, weeders and hoes -- Disc harrows

843231: Seeders, planters and transplanters; no-till direct seeders, planters and transplanters



843239: Seeders, planters and transplanters; other than no-till direct seeders, planters and transplanters

843241: Spreaders and distributors; for manure and fertilizers, for agricultural, horticultural or forestry use; manure spreaders

843242: Spreaders and distributors; for manure and fertilizers, for agricultural, horticultural or forestry use; fertiliser distributors

843340: Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437- Straw or fodder balers, including pick-up balers

843351: Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437 - Other harvesting machinery; threshing machinery -- Combine harvester-threshers

843680: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment, poultry incubators and brooders - Other machinery

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

870191: Tractors – Other, of an engine power -- Not exceeding 18 kW

870192: Tractors – Other, of an engine power -- Exceeding 18 kW but not exceeding 37 kW

870193: Tractors – Other, of an engine power -- Exceeding 37 kW but not exceeding 75 kW

870194: Tractors – Other, of an engine power -- Exceeding 75 kW but not exceeding 130 kW

870195: Tractors – Other, of an engine power -- Exceeding 130 kW

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof - Self-loading or self-unloading trailers and semi-trailers for agricultural purposes

### ANNEX 3 – CONSTRUCTION EQUIPMENT

1. As consistent with Article II, the Convention shall apply in relation to construction equipment that falls under the following Harmonized System codes in this Annex.

820713: Interchangeable tools for hand tools, whether or not power-operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools - Rock drilling or earth boring tools -- With working part of cermets

842641: Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane - Other machinery, self-propelled -- On tyres

842649: Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane - Other machinery, self-propelled -- Other

842911: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Track laying

842919: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Bulldozers and angledozers -- Other

842920: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Graders and levelers

842930: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Scrapers

842951: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers -- Mechanical shovels, excavators and shovel loaders -- Front-end shovel loaders

842952: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Machinery with a 360° revolving superstructure

842959: Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers - Mechanical shovels, excavators and shovel loaders -- Other

843010: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow ploughs and snow-blowers - Pile-drivers and pile-extractors

843031: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Coal or rock cutters and tunneling machinery -- Self-propelled

843039: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Coal or rock cutters and tunnelling machinery -- Other

843041: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other boring or sinking machinery -- Self-propelled

843049: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other boring or sinking machinery -- Other

843050: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other machinery, self-propelled

843061: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other machinery, not self-propelled -- Tamping or compacting machinery

843069: Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers - Other machinery, not self-propelled -- Other

847431: Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand - Mixing or kneading machines -- Concrete or mortar mixers

847432: Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand - Mixing or kneading machines -- Machines for mixing mineral substances with bitumen

847910: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter - Machinery for public works, building or the like

847982: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter - Other machines and mechanical appliances -- Mixing, kneading, crushing, grinding, screening, sifting, homogenising, emulsifying or stirring machines.

870130: Tractors (other than tractors of heading 8709) – Track-laying tractors

870191: Tractors – Other, of an engine power -- Not exceeding 18 kW

870192: Tractors – Other, of an engine power -- Exceeding 18 kW but not exceeding 37 kW

870193: Tractors – Other, of an engine power -- Exceeding 37 kW but not exceeding 75 kW

870194: Tractors – Other, of an engine power -- Exceeding 75 kW but not exceeding 130 kW

870195: Tractors – Other, of an engine power -- Exceeding 130 kW

870410: Motor vehicles for the transport of goods - Dumpers designed for off-highway use

870510: Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units)  
– Crane lorries

870540: Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units)  
– Concrete-mixer lorries

871620: Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof -  
Self-loading or self-unloading trailers and semi-trailers for agricultural purposes

**APPENDIX I****GLOSSARY****UNIDROIT INSTRUMENTS**

Aircraft Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (2001)
Cape Town Convention <i>or</i> CTC	Convention on International Interests in Mobile Equipment (2001)
Luxembourg Rail Protocol	Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (2007)
MAC Protocol	Future Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (incomplete)
Space Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (2009)
UNIDROIT Leasing Convention	UNIDROIT Convention on International Financial Leasing (1988)
UNIDROIT Principles or UPICC	UNIDROIT Principles of International Commercial Contracts (editions issued 1994, 2004, 2010, 2016)

**OTHER INTERNATIONAL INSTRUMENTS**

HS	Harmonized Commodity Description and Coding System
Montreal Convention	Convention for the Unification of Certain Rules for International Carriage by Air (1999)
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

**INTERNATIONAL ORGANISATIONS AND OTHER GROUPS**

CGE1	The first session of the MAC Protocol Committee of Governmental Experts (Rome, 20-24 March 2017)
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CGE2	The second session of the MAC Protocol Committee of Governmental Experts (Rome, 2-6 October 2017)
ICAO	International Civil Aviation Organization
IWGRC	Intersessional Working Group on Registration Criteria (established by CGE1)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WCO	World Customs Organization