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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

DRAFT FINAL PROVISIONS

capable of embodiment in the draft Unidroit Convention
on the International Return of Stolen or Illegally Exported Cultural Objects

with

EXPLANATORY NOTES

(drawn up by the Unidroit Secretariat)

Rome, January 1995

INTRODUCTION

1. In accordance with traditional practice, the draft final provisions capable of embodiment in a Unidroit Convention are drawn up by the Secretariat of the Institute in advance of the Diplomatic Conference of adoption.

2. In this instance, the draft final provisions of the future Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects as set out below are based essentially on those of the 1988 Unidroit Conventions on International Financial Leasing and on International Factoring.

DRAFT FINAL PROVISIONS CAPABLE OF EMBODIMENT IN THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

Article A

1. This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until [30 June 1996].

2. This Convention is subject to ratification, acceptance or approval by States which have signed it.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

Commentary

The four paragraphs of this article reflect provisions traditionally to be found in Unidroit Conventions (cf. Article 15 of the Financial Leasing Convention). While practice varies as to the length of time for which international private law conventions remain open for signature after their adoption, the average is approximately twelve months and for this reason the date of 30 June 1996 has been included in paragraph 1 in square brackets, although it will of course be for the Diplomatic Conference itself to decide this question.

Article B

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [third] instrument of ratification, acceptance, approval or accession.

2. For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Commentary

This article corresponds to Article 16 of the Financial Leasing Convention. Here again however, practice is not uniform in regard to the number of instruments of ratification, acceptance, approval, or accession that must be deposited in order for a private law convention to enter into force. The authors of the 1988 Unidroit Conventions on International Financial Leasing and on International Factoring opted for the number of three, thus following the pattern of the conventions adopted within the framework of the Hague Conference on Private International Law, the most recent example being the 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (hereafter referred to as the 1993 Hague Adoption Convention).

Article C

Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of a stolen or illegally exported cultural object than provided for by this Convention.

Commentary

This provision appears as Article 10 of the draft Convention (see CONF. 8/3, paragraphs 122 to 127), although it was the intention of the committee of governmental experts that it should be included in the final provisions. As formulated, Article C would allow a Contracting State to the future Unidroit Convention to apply any rules to which it is bound by an international instrument or by its national law (including its conflicts of law rules) that are more favourable to the restitution of a stolen or illegally exported cultural object than as is provided for by the Convention.

As stated in paragraph 127 of document CONF. 8/3, there is a certain ambiguity in the wording of Article 10 since it is unclear whether it is intended to create an obligation for Contracting States to apply more favourable rules of national law as may exist at present or in the future or rather to leave States an option in that regard. This matter was not determined by the committee of experts and if the latter course were to be approved it might, in the interests of legal certainty, be preferable to introduce a provision whereby Contracting States would make a declaration, at the time of signature or at any other time as might be specified in the Convention, listing those situations in respect of which they would apply more favourable treatment to claims for restitution or return than is provided for by the Convention. Provision has been made for such a declaration in Article F(a).

Some States might however not wish to see an automatic application of Article 10 and, subject to the decision to be taken by the Conference in this regard, the Secretariat has proposed a form of wording in Article F(b) which seeks to meet their concerns.

Article D

1. This Convention does not affect any international instrument to which Contracting States are [, or may become,] Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of this Convention.

Commentary

It is customary for international private law conventions to contain a provision safeguarding existing agreements, often of a regional character, dealing with the same or a similar subject-matter. It should, however be recalled that at the fourth session of the committee of governmental experts one representative expressed concern at an earlier proposal on the ground that it referred to "agreements already concluded" which did not cover European Community instruments such as Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Moreover, the language in question did not extend to future instruments whereas it was not inconceivable that the Directive would be revised in the future or a new instrument adopted. In these circumstances it was agreed that the member States of the European Union would table a new text for consideration by the Diplomatic Conference.

Pending the submission of such a text the Secretariat has provisionally included as Article D(1) a slightly amended version of Article 39(1) of the 1993 Hague Adoption Convention, which employs the word "instrument" but which, unlike the Hague text, contains the words "or may become" in square brackets.

Paragraph 2 of Article D is based on Article 39(2) of that same Convention and could be of especial interest if the future Unidroit Convention were not to establish a system of central authorities intended to facilitate the application of the future Convention (see CONF. 8/3, paragraph 76).

Article E

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. *These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.*

3. *If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:*

- (a) the territory of a Contracting State in Article 1(a) shall be construed as referring to the territory of a territorial unit of that State;*
- (b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;*
- (c) the Contracting State where the cultural object is located in Article 9(1) shall be construed as referring to the territorial unit of that State where the object is located;*
- (d) the law of the Contracting State where the object is located in Article 9(3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and*
- (e) a Contracting State in Article 10 shall be construed as referring to a territorial unit of that State.*

4. *If a Contracting State makes no declaration under paragraph 1, this Convention is to extend to all territorial units of that State.*

Commentary

In recent years a variety of formulae have been employed in international private law conventions to meet the difficulties sometimes experienced by States with a federal system of government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

In particular, such clauses permit States to accept the Convention in the first instance for certain territorial units only and then to extend its application to other territorial units and it is with a view to achieving that result that Article E is submitted as a basis for discussion at the Diplomatic Conference.

While paragraphs 1, 2 and 4 are standard provisions to be found in a number of conventions, paragraph 3 is based on Article 36 of the 1993 Hague Adoption Convention and has been adapted so as to attempt to address the difficulties which might be faced by some federal States in connection with the international restitution and return of stolen and illegally exported cultural objects. In particular, it seeks to ensure that:

- (a) the stolen object has been removed from the territory of a territorial unit to which the Convention has been extended;
- (b) claims for the restitution or return of stolen or illegally exported cultural objects may only be initiated before a court or other competent authority of a territorial unit to which the Convention has been extended;
- (c) claims for restitution or return under the Convention based on the location of an object may only be made in and before the courts or other competent authorities of a territorial unit to which the Convention has been extended;
- (d) resort to provisional measures can be had under the law of a territorial unit to which the Convention has been extended and in which the object is located;
- (e) a territorial unit to which the Convention has been extended can apply rules more favourable to the restitution of objects than is provided for by the Convention.

Article F

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that:

- (a) it will avail itself of the option provided under Article C to apply rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by the Convention in the situations to be specified in its declaration;*
- (b) it will not avail itself of the option provided under Article C to apply rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by the Convention.*

Commentary

The need to retain either sub-paragraph (a) or sub-paragraph (b) will depend upon the decision to be taken by the diplomatic Conference concerning the automatic application of Article C.

The question also remains open as to whether the Conference may wish to add any further sub-paragraphs to Article F, in particular in relation to the question of the possible retroactive application of the future Convention, since some delegations in the committee of governmental experts stated that it would be impossible for their Governments to accept the Convention if it were to impose an obligation on them to return cultural objects that had been stolen or illegally exported before the entry into force of the Convention for them.

Article G

1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to 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 the receipt of the notification by the depositary.

Commentary

Precedents for the provisions of Article G are to be found in many international conventions and in particular in Article 21 of the Financial Leasing Convention.

Article H

No reservations are permitted except those expressly authorised in this Convention.

Commentary

The wording of article H follows literally that of Article 22 of the Financial Leasing Convention.

Article I

1. This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.

2. Denunciation is effected by the deposit of an instrument to that effect with the depositary.

3. A denunciation takes effect on the first day of the month following the expiration of six months after the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it takes effect upon the expiration of such longer period after its deposit with the depositary.

Commentary

The language of the provisions of Article I is identical to that of Article 24 of the Financial Leasing Convention.

Article J

1. *This Convention shall be deposited with the Government of the Italian Republic.*

2. *The Government of the Italian Republic shall:*

- a) *inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:*
 - (i) *each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;*
 - (ii) *each declaration made under Articles E and F;*
 - (iii) *the withdrawal of any declaration made under Article G (4);*
 - (iv) *the date of entry into force of this Convention;*
 - (v) *the agreements referred to in Article D;*
 - (vi) *the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;*
- (b) *transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).*

Commentary

The functions of depositary of Unidroit Conventions are traditionally exercised by the Government of the State on whose territory the Diplomatic Conference for the adoption of the Convention in

question is held. With slight adaptations, Article J corresponds to Article 25 of the Financial Leasing Convention.

Authentic text and witness clause

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Rome, this day of June, one thousand nine hundred and ninety-five, in a single original, of which the English and French texts are equally authentic.

Commentary

The general language of the provision follows many precedents. The reference to English and French as the authentic texts of the future Convention reflects the fact that these are the two working languages of Unidroit and that the authentic texts of Unidroit Conventions have accordingly hitherto been traditionally drawn up in these two languages.