



DCME Doc No. 9
21/09/01
English and French only

DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT CONVENTION AND AN AIRCRAFT PROTOCOL

(Cape Town, 29 October to 16 November 2001)

COMMENTS ON DRAFT CONVENTION

(Presented by the International Bar Association Sub-Committee E8 on International
Financial Law Reform)

Reference is made to your joint letter dated 24 May 2001 addressed to Marcello Gioscia and inviting the International Bar Association to designate one or more representatives as observers to the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol and to formulate comments on the current drafts of such documents. In response to such letter, Sub-Committee E8 of the International Bar Association is pleased to submit the following comments on the text of the draft UNIDROIT Convention on International Interests in Mobile Equipment dated 6 April 2001 (DCME Doc No. 3).

As a preliminary and general comment, the Sub-Committee would like to indicate its support for and approval of the multi-equipment approach of the draft Convention. We believe that this approach has allowed for the development of a suitably coherent body of rules applying to the three very important types of equipment dealt with under the Convention, all of which have become the focus of particular forms of financing techniques which depend crucially on the validity and enforceability of rights of security. Moreover, the view of our members participating from various jurisdictions is that the multi-equipment approach will assist the Convention in overcoming resistance which may be present in various national legal systems if there is a perception that a certain category of economic operators is being singled out for preferential treatment based merely on the type of business in which they engage. The multi-equipment approach, by contrast, underlines the need for a particular set of internationally recognised rules to apply to a broader category of equipment which, due to its highly mobile nature, cannot be adequately dealt with under any system of purely domestic law.

The Sub-Committee has seen that the Convention/Protocol structure has been extremely helpful in allowing specialist practitioners to participate in the highly technical discussions necessary to tailor the application of the international interest to the specific needs of single types of mobile equipment. Moreover, the Sub-Committee has found the Convention/Protocol structure to be impressively workable and, most importantly, extremely precise in the interpretation of the rules being introduced.

As comments relating to the Aircraft Protocol have already been made during the relevant working sessions through members of the IBA's Aviation Law Committee, Sub-Committee E8 has limited its drafting comments as set forth below to the provisions of the Convention itself.

1. *Preamble to the draft Convention*

The second declaration of the preamble to the draft Convention highlights the importance of asset-based financing and leasing and the need to facilitate these types of transaction. The provisions of Article 5 of the draft Convention reinforce the importance of the preamble in the interpretation of the Convention.

The Sub-Committee is aware that the most recent trend in the satellites market has been to recognise the importance of project financing, employing specifically financing techniques which are based more on projected revenues than on the value of space property as a class of fungible asset. At least once such property has been launched into outer space. The financing techniques involved for such property do not therefore rely as heavily on traditional asset-based financing as would be the case for aircraft and the Sub-Committee would support the inclusion of reference to project financing in the second declaration under the preamble to the draft Convention.

2. *Article 11*

The Sub-Committee would suggest the inclusion of the words “whether before or after default” following the words “including any remedies agreed upon by the parties,”.

3. *Article 12*

The Sub-Committee would suggest the inclusion of the words “within the meaning of Article 14” following the words “evidence of default” as they appear in the first line of paragraph 1, in order to mirror the provisions of Article 7 and ensure that the creditor’s rights apply also in the case of occurrence of events which otherwise give rise to the rights and remedies specified in Articles 7 to 9 and 12.

4. *Article 14*

The Sub-Committee would suggest inclusion of the words “whether before or after default” following the words “the parties may,” as they appear in the first line of this Article.

5. *Article 31*

The Sub-Committee has taken due note of the debate surrounding adoption of the provision currently set forth in the draft Convention in connection with the effect of an assignment of an international interest. While the Sub-Committee is sensitive to the argument that it is widely recognised in most legal systems that security follows a claim, whereas Article 31(1)(b) could be read as implying that the secured obligation is accessory to the international interest, we support the current drafting of Article 31. We believe that the current approach not only avoids conflict with the draft UNCITRAL Convention on Assignment in Receivables Financing, but is also the most effective means for ensuring the necessary degree of legal certainty which an assignment of an international interest requires.

6. *Article 32*

The Sub-Committee would support adoption of the second phrase in square brackets in the current draft of Article 32 of the Convention since the first alternative would not appear to provide a sufficient level of protection to a debtor in cases where consent was provided pursuant to a generic provision set forth in a financing agreement in advance of the assignment without identifying the assignee, and the debtor subsequently receives notice in writing of more than one assignment. Moreover, when acting for a potential assignee, the second alternative would allow practitioners a more practical means of ensuring the enforceability of the assignment by seeking from the debtor an acknowledgment that it

has not received notice of any prior assignment, and the obligation of the debtor to provide such acknowledgement upon the creditor's reasonable request may easily be inserted in the financing agreement.

7. Article 35

The Sub-Committee understands that the intention of this Article is to restrict an assignee's priority to purchase-money advances related to the charged equipment. The Sub-Committee is uncertain as to why this restriction is felt necessary and notes that modern international financing practice relies heavily on cross-collateralisation among a number of assets belonging to a debtor, which would remain completely without protection under the Convention if Article 35 is adopted as currently drafted. The Sub-Committee does not feel that this is an issue which can be adequately dealt with under the proposed UNCITRAL Convention on Assignment in Receivables Financing and would encourage the Diplomatic Conference to remove this limitation on the priority of an assignment under the Convention.

– END –