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

(Cape Town, 29 October to 16 November 2001)

### **AFRICAN STATES' POSITION ON THE DRAFT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE DRAFT PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT**

**(Presented by the African States)**

#### **SUMMARY:**

**This paper provides this Diplomatic Conference with an African States' common position on the draft Convention on International Interests in Mobile Equipment and the draft Protocol to the Convention on Matters specific to aircraft equipment for consideration before their adoption.**

**References: DCME Doc No. 3  
DCME Doc No. 4**

## **1. INTRODUCTION**

1.1 Based mainly on the draft Convention on International interests in Mobile Equipment and the draft Protocol to the Convention on Matters specific to aircraft equipment made available well in advance by ICAO to all Contracting States, African States are of the view that their common position illustrated in this paper should be taken into consideration during the discussion which will lead to the adoption of these two legal Instruments.

## **2. NECESSITY OF THE TREATY IN CIVIL AVIATION**

### **Importance and Benefits of the Treaty**

2.1 All developing countries air carriers in general and African air carriers in particular are in need of obtaining financing to acquire modern aircraft. However, such financing is either not readily available or if available the cost of financing is too high in order to cover associated risks.

2.2 The high cost of aircraft acquisition needs financing in one form or another. Airlines in African countries have limited range of options to finance aircraft acquisitions and often resort to export credit facilities coupled with sovereign guarantees to reduce the cost of borrowing.

2.3 African countries legal frameworks are not uniform and are often inconsistent with the general principles underlying asset based financing often resulting in high cost of financing as financing is comparatively more costly where there is risk. Where the perceived risk is excessive, the financing can be non-available. It is therefore useful that the UNIDROIT Convention and Protocol establishes **a uniform, commercially oriented and comprehensive international legal framework** relating to the creation, priority and enforcement of security and leasing interests in aircraft equipment. The treaty further contains bankruptcy rules that protect rights in the context of insolvency.

2.4 By providing a commercially oriented uniform, transparent and predictable system for priority, creation and enforcement of rights, the Treaty relatively reduces the financial risks associated with the financing which can be directly passed on African carriers by way of availability and reduced cost of aircraft financing: lower interest rates, longer or shorter repayment terms, increased level of financing, lower premiums or other fees, modifications, reductions or elimination of credit enhancements such as personal, bank or sovereign guarantees, security deposits or letter of credits, etc.

2.5 The benefit ensuing from availability and reduced cost of financing to African carriers has synergistic effect; improved safety of African carriers which comes with acquisition of modern aircraft, enhanced contribution to the national economies as a result of improved air transport, reduced fare to customers as a result of operation of modern and operationally efficient aircraft, higher dividend to the shareholders including to the government which often is the shareholder, etc. The treaty will also play a role in reducing the pressure on African governments to provide financing support to their airlines allowing them to divert scarce public fund to other sectors.

2.6 Through a series of optional provisions, the treaty attempts to balance economic needs with other policy interest of the States.

2.7 The treaty also provides for electronic registry of interest in aircraft thereby introducing element of efficiency in the registration system.

2.8 By setting up this international focal framework, the treaty reduces overall risk to the creditor and broadens the spectrum of financing alternatives available to African carriers.

### **3. COMMENTS AND RECOMMENDATIONS ON THE DRAFT CONVENTION AND PROTOCOL**

#### **Preamble (4<sup>th</sup> paragraph of the draft Convention)**

3.1 While appreciating the importance that the Convention will enhance economic benefit to all interested parties, in order to emphasize that the benefit is mutual, the following is recommended:

*The phrase 'and mutual' be added after the phrase 'to provide broad.'*

#### **Default Remedies**

- **Default by the Creditor/Lessor**

3.2 It is worth while noting that the Convention does not address default by the creditor or the lessor. The prominent defaults which may be committed by a creditor can be, breach of quite

enjoyment clauses, non-return of maintenance reserve in the event of lease, breach of tax obligations, non delivery of aircraft, failure to take redelivery of aircraft, etc. Hence, it is recommended that:

*a statement the Annex be included to address the issue.*

- **Commercial reasonableness (Art.7 of the Convention and Art. IX (3) (b) (ii) of the Protocol)**

3.3 It is recommended to delete Article IX (3)(b)(ii) of the Protocol because courts should be able to intervene if the unreasonableness is manifest despite the stipulations of the security agreement. It is recommended to either:

*a. Endeavor to have the provision deleted; or*

*b. Make the provision an optional clause*

- **Substantial default (Art. 10 (2) of the Convention)**

3.4 It is important that the phrase “substantial default” be defined in the 2nd line of art. 10 (2) of the Convention. In this regard the following definition is recommended:

*“Substantial default means a default which deprives materially the non-defaulting party the expected economic benefits it would obtain had performance been carried out by the defaulting party”.*

- **Remedies on insolvency (Art. XI of the Protocol)**

3.5 Under Article XI of the Protocol, two alternatives are given by way of remedy for the creditor in the event of the debtor’s insolvency. Under Alternative A, the insolvency administrator is obliged to give the aircraft back at the end of the waiting period (such period to be declared by each contracting state). In addition under Alternative A, the insolvency administrator has duties of preserving the aircraft, the creditor may apply interim relief, the insolvency administrator may retain the use of the aircraft if the default is cured, etc.

3.6 Alternative B gives room to cure defaults and provides that the aircraft will not be sold pending decision by the court. Under Alternative B the insolvency administrator is required to give notice to the creditor that it will cure all defaults or give back the aircraft to the creditor. With the incorporation of paragraphs 5 and 6 of Alternative A in Alternative B, it is recommended,

*that Alternative B is adopted as it prevents the aircraft from being sold pending decision by Court, requires the creditor to produce proof of its claim and gives flexibility to the insolvency administrator to perform or not to perform during the waiting period by giving the notice to the creditor. It is also much more simplified. However, the time within which the insolvency administrator has to give notice to the creditor has to be stated in the Protocol (and not to be left to states declaration per Article XXVIII (3) of the Protocol) to bring about uniformity.*

### **Prior interest (Art. 55 of the Convention)**

3.7 It is recommended that Alternative “B” be adopted instead of Alternative “A” because it provides better overall advantage in bringing all interests on aircraft into one registry thereby making it easier for search purposes. This overall benefit outweighs very much the cost of re-registration in the International Register of existing interest which cost is believed to be nominal.

**The Supervisory Authority and the Registrar (Art.16 of the Convention and Art. XVI of the Protocol)**

- 3.8 It is preferable if ICAO becomes the Supervisory Authority. This is because:
- a. ICAO has a general objective of promoting development of international civil aviation;
  - b. ICAO has also the objective of encouraging the development of airlines globally;
  - c. The creation of the International Registry Authority may take time;
  - d. Both financiers and carriers may feel more comfortable if ICAO conducts the registration and regulation functions than the situation where regulation of important financial interest is entrusted to a newly created institution.

**Liability of the Registrar (Art.27 of the Convention)**

3.9 The Convention provides under Article 27 two alternatives regarding liability of the Registrar. Under alternative A, the Registrar is responsible for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar or from a malfunction of the international registration system. Under Alternative B, the Registrar is liable for loss suffered by a person directly arising from the failure of the Registrar to exercise reasonable care and skill in the performance of its duty. In both instances, the Registrar is expected to provide insurance or financial guarantee covering its liability. It is recommended:

*that Alternative A be adopted, as it requires the claimant not to prove negligence, which can be difficult. Further, Alternative A introduces elements of strict liability without prove of negligence. Further, for the purpose of clarity the phrase “malfunction of international registration system” should be defined by way of enumeration.*

**Ratification (Art. 47 of the Convention and Art. XXVI of the Protocol)**

3.10 African States support minimum number of ratification (3-5) for the coming into force of the Instruments.

**Technical Matter**

3.11 During the consideration of technical subjects related to “Electronic Registry”, African States recommend that Plenipotentiaries to this Diplomatic Conference should bear in mind the lack of proper facility in developing States to take advantage of this procedure. Therefore, the Conference should discuss thoroughly this issue before adopting any decision

**4 OPTIONAL CLAUSES**

4.1 While African States recognize the benefit of consolidating all optional clauses into one Annex, they however questioned the need (appropriateness) of such Annex being an Opt-in Annex only. It is therefore recommended that the Annex would include both Opt-in and Opt-out provisions which becomes effective by affirmative action of the States.

**5        STRUCTURE**

5.1            African States are of the opinion that the two Treaty approach has made the instrument difficult to understand and cumbersome to use. It is therefore recommended that consolidated text of the Convention/Protocol be officially sanctioned by the Diplomatic Conference.

**6        ACTION BY THE DIPLOMATIC CONFERENCE**

6.1            African States request all Plenipotentiaries to this Diplomatic Conference to consider comments and recommendations provided in paragraphs 3, 4 and 5 above before the adoption of the concerned legal instrument.

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