



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

(Cape Town, 29 October to 16 November 2001)

### COMMENTS ON ARTICLES 39 AND 55 OF THE DRAFT CONVENTION

(Presented by the United States)

The United States submits the following proposals for additional technical revisions of the Convention and the Aircraft Protocol. In formulating these additional proposals and in revising some of our earlier proposals, we have benefitted greatly from comments from other delegations and the Aviation Working Group.

#### 1. ARTICLE 39 – NON-CONSENSUAL RIGHTS AND INTERESTS

We propose revision of Article 39 of the Convention as follows:

##### Article 39

##### *Priority of non-registrable non-consensual rights or interests*

1.– A Contracting State may at any time in a declaration deposited with the depositary of the Protocol declare, generally or specifically, those categories of non-consensual right or interest (other than a right or interest to which Article 38 applies) which under that State's law would have priority over an interest in the object equivalent to that of the holder of the international interest and shall have priority over a registered international interest, whether in or outside the insolvency of the debtor. Such a declaration may be modified from time to time.

2. – A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3. – An international interest has priority over a non-consensual right or interest of a category not covered by a declaration deposited ~~prior to~~ under paragraph 1 by a Contracting State before the later of:

(a) the Contracting State's deposit of its instrument of ratification, acceptance, approval or accession with respect to this Convention; and

(b) the registration of the international interest.<sup>1</sup>

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<sup>1</sup> The time the Convention enters into force needs to feature in this temporal rule because paragraph 3(b) assumes that at the time of registration the Convention has already come into force.

## 2. TRANSITION

We propose revision of Article 55 of the Convention as follows:

### **Article 55** *Transitional provisions*

#### *Alternative A*

~~{This Convention does not apply to a pre-existing right or interest, which shall retain the priority it enjoyed before this Convention entered into force.}~~

1.- Subject to paragraph 5, this Convention does not apply to a right, duty, interest or transaction relating to a debtor which existed before the effective date of this Convention .

2. - Subject to paragraph 5, a right or interest relating to a debtor which existed before the effective date of this Convention retains the priority that it enjoyed under the applicable law before the effective date of this Convention.

3. - Subject to paragraph 5, a transaction validly entered into by a debtor before the effective date of this Convention and the rights, duties and interests flowing from it remains valid after the effective date of this Convention and may be terminated, completed, consummated or enforced as required or permitted by the applicable law as though this Convention had not entered into force.

4. - For the purposes of this article:

(a) “effective date of this Convention” means in relation to a debtor the later of the time:

(i) the Convention enters into force; and

(ii) the State in which the debtor is located becomes a Contracting State; and

(b) the debtor is located in the Contracting State where it has its centre of administration or, if it has no centre of administration, its habitual residence.

5. – After the effective date of this Convention, Articles 7 to 14 of this Convention apply to a transaction entered into before the effective date of the Convention to the extent that the debtor and the creditor at any time so agree.<sup>2</sup>

#### *Alternative B<sup>3</sup>*

~~1. — Except as provided by paragraph 2, this Convention does not apply to a pre-existing right or interest.~~

~~2. — Any pre-existing right or interest of a kind referred to in Article 2(2) shall retain the~~

2 The Protocol should contain a similar provision permitting the parties to apply the “opt-in” provisions to the extent that the Contracting State in which the debtor is located has made the relevant declaration(s).

~~3— The ICAO Legal Committee, while maintaining both alternatives A and B, expressed the view that in case alternative B was selected, the fees charged with respect to these transactions should be nominal.~~

~~priority it enjoyed before this Convention entered into force if it is registered in the International Registry before the expiry of a transitional period of [10 years] after the entering into force of this Convention in the Contracting State under the law of which it was created or arose. Where such a pre-existing right or interest is not so registered, its priority shall be determined in accordance with Article 28.~~

~~3. — The preceding paragraph does not apply to any right or interest in an object created or arising under the law of a State which has not become a Contracting State.]~~

### 3. DUTY TO HONOUR DE-REGISTRATION REQUEST

The United States proposes an addition of a new Article IX(4) to the Protocol to read as follows:

4. (a) The registry authority in a Contracting State shall, subject to the applicable aviation safety laws and regulations, honour a request for de-registration and export of an object if:

(i) the request is properly submitted by a creditor that holds a registered international interest in the object; and

(ii) all holders of registered interests ranking in priority to that of the creditor requesting de-registration and export have been satisfied or consented in writing to the de-registration and export and the creditor has given notice pursuant to paragraph 4.

(b) In its determination of whether the conditions precedent to a de-registration and export under paragraph (a) have been satisfied, the registry authority shall be governed by the applicable law of the Contracting State including the rules and regulations applicable to the registry authority.

### 4. NOTICE OF EXERCISE OF DE-REGISTRATION REMEDY

We propose revision of Article IX of the Protocol to add a new paragraph 4, which would require notice of the exercise of the remedy of de-registration and export. This change will make the article consistent with Article 7(3) of the Convention with respect to notice.

4. — A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed de-registration and 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 de-registration and export.

We also propose the renumbering and revision of Article IX(4) of the Protocol as follows:

4. 5. — A chargee giving ten or more calendar days' prior written notice of a proposed sale or lease or a proposed de-registration and export to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 7(3) of the Convention or paragraph 4. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

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