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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 Kuwait)

1. ARTICLE 1 – DEFINITIONS

(d) “commencement of the insolvency proceedings” means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;

It is suggested to add the term: “or bankruptcy”, the reason being that certain legal regimes differentiate between the two cases of insolvency and bankruptcy. Insolvency is a situation that is applicable to civil dealings, while bankruptcy is a failure to fulfill obligations (failure to pay) in commercial dealings. Both regimes are governed by different rules. Some states do not have an insolvency regime, including the Kuwaiti legislation that regulates cases of bankruptcy rather than insolvency. Accordingly, it is suggested that the definition be amended as follows:

[“commencement of the insolvency or bankruptcy proceedings” means the time at which the insolvency or bankruptcy proceedings are deemed to commence under the applicable insolvency or bankruptcy law”].

(h) “court” means a court of law or an administrative or arbitral tribunal established by a Contracting State;

[Note by C/AR: Kuwait here suggests to use the Arabic word "قاضي" to qualify the arbitral tribunal while maintaining the word "مكح" for administrative tribunal, as the word "مكح" is used in the text to qualify both the administrative and arbitral tribunals. The Arabic text will be amended accordingly].

(q) “leasing agreement” means an agreement by which a lessor grants a right to possession or control of an object (with or without an option to purchase) to a lessee in return of a rental

It is suggested to add the words: “for the purpose of using it” after the words “a right to possession”. This will give a clearer meaning of leasing.

2. ARTICLE 2:- THE INTERNATIONAL INTEREST

Paragraph (1): This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

The term “effects” here has no significance; the reason for its introduction here is unknown. It is suggested to delete this word from the text altogether. The text will be clearer without it.

3. ARTICLE 5: - INTERPRETATION AND APPLICABLE LAW

Paragraph (3): References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

We are of the opinion that the accurate legal term in Arabic for the shaded sentence should be “the rules of ascription of the forum State”. We therefore suggest that the text as amended should read:

“References to the applicable law are to the rules of ascription of the forum State.”

4. ARTICLE 6: - FORMAL REQUIREMENTS

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest...

We are of the opinion that the phrase “as an international interest” is an inappropriate formulation. We suggest that the sentence should start off with “the international interest” as this is defined in the definitions article. Accordingly it will read as follows:

“An international interest is constituted under this Convention...”

5. ARTICLE 7: - REMEDIES OF CHARGE

Paragraph (2): the phrase “in a commercially reasonable manner” is somewhat loose and needs to be further tightened.

The last sentence: “A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable,” is ambiguous; it may require redrafting to make it clearer.

6. ARTICLE 8: - VESTING OF OBJECT IN SATISFACTION; REDEMPTION

Paragraph (3): “The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.”

It is our understanding that the purpose of the text is that the court will not grant an application under paragraph (2) if the chargor has fulfilled most of his obligations, as it is unreasonable to expect a situation where the court would rule for the transfer of an object’s ownership when the chargor has fulfilled most of his obligations. Accordingly, we suggest that the text be amended to read as follows:

“The court shall not grant an application under the preceding paragraph if it is satisfied that the chargor or any other interested person has fulfilled a significant portion of his obligations, after taking into account any amount paid by the chargor to any of the interested persons”.

7. ARTICLE 15: - THE INTERNATIONAL REGISTRY

Paragraph (1) (c) “acquisitions of international interests by legal or contractual subrogation;”

We suggest that the word “contractual” be replaced with the word “consensual”.

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