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

(Cape Town, 29 October to 16 November 2001)

### **PRELIMINARY COMMENTS ON DRAFT CONVENTION AND DRAFT PROTOCOL**

(presented by the Government of Canada)

Note: Unless otherwise specified references hereunder are to the Consolidated Text known as the *Draft Convention on International Interests in Aircraft Equipment*.

#### **I - PRELIMINARY GENERAL COMMENTS**

Canada has been and remains a strong proponent of this project.

The Canadian authorities would like to extend their congratulations to ICAO and UNIDROIT for their time and effort in preparing materials of high quality.

#### **II - PRELIMINARY SPECIFIC COMMENTS IN RELATION TO FEDERAL STATE CLAUSES**

##### **A - Applicable Law for States with a non-unified Legal System**

##### **Article 5 of the Consolidated Text (Article 5 of the Draft Mobile Equipment Convention)**

Article 5 defines the applicable law for States with a non-unified legal system. Unfortunately that provision does not make reference to a federal State interpretation clause settling, in the absence of a law of that State, which territorial unit's rules shall govern. The relevant provisions of the Convention now read as follows:

[...]

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.

4. – Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

It is for consideration whether those provisions defining the applicable law for States with a non-unified legal system (federal State extension clause) should make reference to a federal State interpretation clause which could be included to Chapter XIII. A formulation based on the more recent precedents adopted by the international community is suggested for inclusion in Article 5 or perhaps in Chapter XIII. It reads:

For the purpose of identifying the applicable law under the Convention, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;
- b) in the absence of such rules, the law of the relevant territorial unit as defined in Article Z (j) and (k) [federal State interpretation clause suggested below] applies.

#### **B - Federal State Interpretation Clause**

It is for consideration whether to include a federal State interpretation clause. Such clauses are interpretative or definitional in nature and essential to a clear understanding of the manner in which the instrument will apply in a federal State. These clauses interpret or define terms or further refine certain provisions. They are useful in respect of both federal States and those unitary States having more than one legal system. An interpretative clause is particularly relevant in the context of private international law conventions since connecting factors in private international law are usually more relevant to the territorial units of the State than to the national State.

The scope of a number of terms and provisions would have to be better circumscribed to ensure a proper application of the instruments in States that have a non-unified legal system. Some of those terms and provisions are listed below together with an indication of where they are used:

- **“court”**

The term “court” is found in Articles 1, 12(2), 13(2) and (3), 19(1), 55 and 66 of the Consolidated Text (Articles 1, 7(5), 8(2) and (3), 12(2), 43 and 51 of the Draft Mobile Equipment Convention).

- **“court of a Contracting State”**

The term “court of a Contracting State” is found in Articles 53, 54 and 56 of the Consolidated Text (Articles 41, 42 and 44 of the Draft Mobile Equipment Convention).

- **“the debtor is situated in a Contracting State”**

The expression “the debtor is situated in a Contracting State” is found in Article 3 of the Consolidated Text (Article 3 of the Draft Mobile Equipment Convention).

- **“the debtor is situated in any Contracting State:**

- (a) **under the law of which it is incorporated or formed;**
- (b) **where it has its registered office or statutory seat;**
- (c) **where it has its centre of administration; or**
- (d) **where it has its place of business.”**

This provision is found in Article 4 of the Consolidated Text (Article 4 of the Draft Mobile Equipment Convention).

- **“habitual residence” of the debtor**

The term “habitual residence” of the debtor is found in Article 4 of the Consolidated Text (Article 4 of the Draft Mobile Equipment Convention).

- **“procedure prescribed by the law of the place where the remedy is to be exercised”**

This expression is found in Article 20 of the Consolidated Text (Article 13 of the Draft Mobile Equipment Convention).

- **“that State’s law”**

The term “that State’s law” is found in Article 52(1) of the Consolidated Text (Article 39(1) of the Draft Mobile Equipment Convention)

- **the place where the object is situated**

The concept of the place where the object is situated is found in Article 54(1) of the Consolidated Text (Article 42(1) of the Draft Mobile Equipment Convention).

- **the place where the debtor is situated**

The concept of the place where the object is situated is found in Article 54(2) of the Consolidated Text (Article 42(2) of the Draft Mobile Equipment Convention).

- **“administrative authorities” in a Contracting State**

The concept of “administrative authorities” in a Contracting State is found in Article 19(8) of the Consolidated Text (Article X(6)(a) of the Draft Protocol).

- **“the courts of a Contracting State in which an aircraft is situated”**

The term “the courts of a Contracting State in which an aircraft is situated” is found in Article 23 of the Consolidated Text (Article XII of the Draft Protocol).

- **“the domestic rules of law of the designated State”**

The expression “the domestic rules of law of the designated State” is found in Article 9 of the Consolidated Text (Article VIII of the Draft Protocol). It is for consideration whether the expression should read “the law of the designated State” instead of “the domestic rules of law of the designated State”.

A federal State interpretation clause interpreting or defining such terms and provisions reading as follows could be inserted in the Consolidated Text:

Article Z

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

- (a) any reference to the court or courts of that Contracting State shall be construed as referring to the court or courts having jurisdiction in a territorial unit;
- (b) any reference to Contracting State in Articles 3 and 19(8) shall be construed as referring to a territorial unit;
- (c) any reference to the law of incorporation or formation in that Contracting State shall be construed as referring to the law of incorporation or formation in force in a territorial unit where the debtor was incorporated or formed;
- (d) any reference to a registered office or statutory seat in that Contracting State shall be construed as referring to the registered office or statutory seat in a territorial unit;
- (e) any reference to the centre of administration in that Contracting State shall be construed as referring to the centre of administration in a territorial unit;
- (f) any reference to the place of business in that Contracting State shall be construed as referring to the place of business in a territorial unit;
- (g) any reference to habitual residence in that Contracting State shall be construed as referring to habitual residence in a territorial unit;
- (h) any reference to the location of the object in that Contracting State shall be construed as referring to the location of the object in a territorial unit;

- (i) any reference to the situation of the debtor in that Contracting State shall be construed as referring to the situation of the debtor in a territorial unit;
- (j) any reference to the law chosen by the parties of the designated State shall be construed as referring to the law in force in the designated territorial unit;
- (k) any reference to the law or procedure of the Contracting State in which a remedy is to be exercised shall be construed as referring to the law or procedure in force in such territorial unit in which such remedy is to be exercised;
- (l) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities in a territorial unit;
- (m) [...].

### **III - PRELIMINARY SPECIFIC COMMENTS ON FINAL PROVISIONS**

#### **Article 63 of the Consolidated Text**

Article 63 reads quite clearly as follows:

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

[...].

Article 47 of the Draft Mobile Equipment Convention should more logically read:

- 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/fifth] instrument of ratification, acceptance or approval of or accession to a Protocol but only as regards a category of objects to which that Protocol applies:

[...].

Both provisions should use the same delay period.

#### **Bracketed Article 49 of the Draft Mobile Equipment Convention (no equivalent provision in the Consolidated Text)**

There is no need to maintain bracketed Article 49 of the Draft Mobile Equipment Convention. It appears to constitute an undue and premature constraint on the sovereignty of States.

**Article 50 of the Draft Mobile Equipment Convention (no equivalent provision in the Consolidated Text)**

In the light of the comment on bracketed Article 49 of the Draft Mobile Equipment Convention, Article 50 should at the very least be streamlined to read along the following lines:

UNIDROIT may create working groups in cooperation with other organisations to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, including a category referred to in Article 2(3)(b) and (c), each member of which is uniquely identifiable, and associated rights relating to such objects.

**Article 66 of the Consolidated Text**

Article 66 reads:

A Contracting State may declare at the time of ratification, acceptance, approval or accession the relevant “court” or “courts” for the purposes of Article 1 and Chapter XI of this Convention.

Article 51 of the Draft Mobile Equipment Convention should read:

A Contracting State may declare at the time of ratification, acceptance, approval of, or accession to a Protocol the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of this Convention in relation to that Protocol.

**Articles 67, 68, 69, 70 and 71 of the Consolidated Text (Articles 52, 53 and 54 of the Draft Mobile Equipment Convention and Articles XXVIII, XXIX and XXX of the Draft Protocol)**

It is for consideration whether all declarations could be linked to the federal extension clause in order to afford the State the possibility to make these declarations for territorial units to which the instrument will be extended.

**Article 65 of the Consolidated Text (Article XXVII of the Draft Protocol)**

It is for consideration whether a period of three months should be specified for the coming into force of substitute declarations made under this Article as it is done in the general entry into force rule found in Article 63 of the Consolidated Text (Article XXVI of the Draft Protocol).

**Articles 70 and 71 of the Consolidated Text (Articles XXIX and XXX of the Draft Protocol)**

It is for consideration whether the six month delay for the coming into force of declarations and withdrawals of declarations under Articles 70 and 71 respectively of the Consolidated Text (Articles XXIX and XXX of the Draft Protocol) should be in line with the delay of three months suggested above for the coming into force of the instrument for territorial units that are the object of a substitute declaration under Article 65 of the Consolidated Text (Article XXVII of the Draft Protocol).

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