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DRAFTING COMMITTEE

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PRELIMINARY DRAFT UNIDROIT CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

[PREAMBLE

THE ~~CONTRACTING STATES~~ PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use high-value mobile equipment and to facilitate the financing of the acquisition and use of such an equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

DESIRING to provide broad economic benefits for all interested parties,

[BELIEVING that such rules must (i) reflect the principles underlying asset-based financing and leasing ~~of high-value mobile equipment~~ and (ii) legally ensure the autonomy of parties to ~~allocate risks and benefits to the extent consistent with the policy decisions made by Contracting States in this Convention~~ in these transactions,]

CONSCIOUS of the need to establish an international registration system as an essential feature of the legal framework applicable to international interests in high-value mobile equipment,

HAVE AGREED upon the following provisions:]

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

Definitions

In this Convention the following words are employed with the meanings set out below:

“agreement” means a security agreement, a title reservation agreement or a leasing agreement;

~~“applicable law” means the law applicable by virtue of the rules of private international law;~~

“assignment” means a consensual transfer, whether by way of security or otherwise, which confers on the assignee rights in the international interest;

“associated rights” means all rights to payment or other performance by the obligor under an agreement or contract of sale secured by or associated with the object;

“buyer” means a buyer under a contract of sale;

“chargee” means the grantee of an interest in an object under a security agreement;

“chargor” means the grantor of an interest in an object under a security agreement;

“conditional buyer” means the buyer under a title reservation agreement;

“conditional seller” means the seller under a title reservation agreement;

“contract of sale” means an agreement for the sale of an object which is not an agreement;

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

~~“guarantor” means any guarantor, surety or other credit insurer under a guarantee (including a demand guarantee and a standby letter of credit) or credit insurance given to the chargee;~~

“Intergovernmental Regulator” means the intergovernmental regulator referred to in Article 17(1);

“international interest” means an interest to which Article 2 applies and which is constituted in conformity with Article 8;

“International Registry” means the international registry referred to in Article 16(3);

“leasing agreement” means an agreement by which one person (“the lessor”) grants a right to possession or control of an object (with or without an option to purchase) to another person (“the lessee”) in return for a rental or other payment;

“object” means an object of a category ~~listed in Article 3~~ to which Article 2 applies;

“obligee” means the chargee under a security agreement, the conditional seller under a title reservation agreement or the lessor under a leasing agreement;

“obligor” means the chargor under a security agreement, the conditional buyer under a title reservation agreement, the lessee under a leasing agreement [or the person whose interest in an object is burdened by a registrable non-consensual right or interest];

“prospective assignment” means an assignment that is intended to be made in the future, ~~whether or not upon the occurrence of an uncertain event~~ upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

“prospective international interest” means an interest that is intended to be created or provided for as an international interest in the future, ~~whether or not upon the occurrence of an uncertain event~~ upon the occurrence of a stated event (which may include the obligor’s acquisition of an interest in the asset), whether or not the occurrence of the event is certain;

“prospective sale” means a sale which is intended to be made in the future, ~~whether or not upon the occurrence of an uncertain event~~ upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

“Protocol” means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;

“qualified proceeds” means proceeds of an object payable by reason of the loss or physical destruction of the object or payable by a Government or State entity in respect of the confiscation, condemnation or requisition of the object;

“registered” means registered in the International Registry pursuant to Chapter V;

“registered interest” means an international interest [or a registrable non-consensual right or interest] registered pursuant to Chapter V;

[“registrable non-consensual right or interest” means a right or interest registrable pursuant to an instrument deposited under Article 39;]

“Registrar” means, in respect of any category of object and associated rights to which this Convention applies, the person designated under Article 17(3);

“regulations” means regulations made, pursuant to the Protocol, by the Intergovernmental Regulator under Article 17(4);

"sale" means a transfer of ownership of an object pursuant to a contract of sale;

“secured obligation” means an obligation secured by a security interest;

“security agreement” means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;

"security interest" means an interest created by a security agreement;

~~“surety” means any guarantor, surety or other credit insurer under a guarantee (including a demand guarantee and a standby letter of credit) or credit insurance given to the chargee;~~

“title reservation agreement” means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;

“unregistered interest” means a consensual [or non-consensual right or] interest [(other than an interest to which Article 40(2) applies)] which has not been registered, whether or not it is registrable under this Convention; and

[“writing” means ~~an authenticated~~ record of information (including information sent/obtained by teletransmission) which is in tangible form or is capable of being reproduced in tangible form and which identifies/indicates by reasonable means the person sending the record and that person’s approval of it.]

Article 1 bis
References to the applicable law

In this Convention, except where the context otherwise requires, references to the applicable law are to the law of the forum State (including its rules of private international law).

Article 2
The international interest

1. – This Convention provides for the constitution and effects of an international interest in mobile equipment and associated rights.

2. – For the purposes of this Convention an international interest in mobile equipment is an interest, constituted under Article 8, in a uniquely identifiable object of a category of such objects ~~listed in Article 3~~ designated in a Protocol:

- (a) granted by the chargor under a security agreement;
- (b) vested in a person who is the conditional seller under a title reservation agreement; or
- (c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. – Whether an interest to which the preceding paragraph applies falls within sub-paragraph (a), (b) or (c) of that paragraph is to be determined by the applicable law.

4. – An international interest in an object extends to qualified proceeds of that object.

Article 3

~~This Convention applies in relation to an object, and associated rights relating to an object, of any of the following categories:~~

- ~~(a) — airframes;~~
- ~~(b) — aircraft engines;~~
- ~~(c) — helicopters;~~
- ~~(d) — [registered ships;]~~
- ~~(e) — oil rigs;~~
- ~~(f) — containers;~~
- ~~(g) — railway rolling stock;~~
- ~~(h) — space property;~~
- ~~(i) — other categories of uniquely identifiable object.~~

Article 4

Sphere of application

[1. –] This Convention shall apply when at the time of conclusion of the agreement creating or providing for the international interest:

(a) the obligor is situated in a Contracting State; or

(b) the object to which the international interest relates ~~has been registered in a nationality register [, or a State authorised asset register,] in a Contracting State or otherwise~~ has a close connection, as specified in the Protocol, with a Contracting State.

[2. – The applicability of this Convention is not affected by the place where the obligee or the object is situated or by any other factor not specified in the preceding paragraph.]

Article 5
Where obligor is situated

For the purposes of this Convention, ~~a party~~ the obligor is situated in a Contracting State if it is incorporated or registered or has its principal place of business in that State or has its registered office or centre of control or a place of business in that State or, in the case of an individual having no place of business, resides in that State.

Article 6
Derogation

In their relations with each other the parties may, by agreement in writing, derogate from or vary the effect of any of the provisions of Chapter III, except as stated in Articles 9(2)-(6), 10(3) and (4), 13(1) and 14.

Article 7
Interpretation

1. – In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

~~[2. – In the interpretation of this Convention, regard is to be had to the commentaries on the Convention and the Protocol].~~

3 2.– Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

CHAPTER II

CONSTITUTION OF AN INTERNATIONAL INTEREST

Article 8
Formal requirements

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

- (a) is in writing;

(b) relates to an object ~~in respect~~ of which the chargor, seller or lessor has power to ~~enter into the agreement~~ dispose;

(c) enables the object to be identified in conformity with the Protocol; and

[(d) in the case of a security agreement, enables the secured obligations to be identified [, but without the need to state a sum or maximum sum secured]].

CHAPTER III

DEFAULT REMEDIES

Article 9

Basic remedies of chargee

1. – In the event of default in the performance of [a secured obligation or any of the chargor's obligations under the security agreement], the chargee may, to the extent agreed by the chargor, exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object;

(c) collect or receive any income or profits arising from the management or use of any such object;

(d) apply for a court order authorising or directing any of the above acts.

2. – Any remedy given by sub-paragraph (a), (b) or (c) of the preceding paragraph shall be exercised in a commercially reasonable manner [which does not contravene public order]. 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 ~~the court determines that~~ such a provision is manifestly unreasonable.

3. – A chargee proposing to sell or grant a lease of an object under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed sale or lease to:

(a) interested persons specified in paragraph 6 (a) and (b); and

(b) interested persons specified in paragraph 6 (c) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.

4. – Any sum collected or received by the chargee as a result of exercise of any of the remedies set out under paragraph 1 shall be applied towards discharge of the amount of the secured obligations.

5. – Where the sums collected or received by the chargee as a result of the exercise of any remedy given in paragraph 1 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall pay the excess to the holder of the international interest registered immediately after its own or, if there is none, to the chargor.

6. – In this Article and in Article 10 “interested persons” means:

(a) the chargor;

(b) any surety any person who, for the purpose of assuring performance of the obligations referred to in paragraph 1, gives a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

~~(e) any person entitled to the benefit of any international interest which is registered after that of the chargee;~~

~~(d) (c) any other person having rights subordinate to those of the chargee in or over the object of which notice in writing has been given to the chargee within a reasonable time before exercise of the remedy given by paragraph 1(b) or vesting of the object in the chargee under Article 10(1), as the case may be.~~

Article 10

Vesting of object in satisfaction; redemption

1. – At any time after default in the performance of [a secured obligation or any of the chargor's obligations under the security agreement], the chargee and all the interested persons may agree, ~~or the court may on the application of the chargee order~~, that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. – The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

~~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 reasonably 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.

3 4. –At any time after default in the performance of a secured obligation and before sale of the charged object or the making of an order under paragraph 1, the chargor or any interested person may discharge the security interest by paying the amount secured, subject to any lease granted by the chargee under Article 9(1). Where, after such default, the payment is made in full by an interested person, that person is subrogated to the rights of the chargee.

4 5. –Ownership or any other interest of the chargor passing on a sale under Article 9(1) or passing under paragraph 1 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 28.

Article 11
Basic remedies of conditional seller or lessor

In the event of default by the conditional buyer under a title reservation agreement or by the lessee under a leasing agreement, the conditional seller or the lessor, as the case may be, may:

(a) terminate the agreement and take possession or control of any object to which the agreement relates; ~~or. The conditional seller or the lessor may also~~

(b) apply for a court order authorising or directing either of these acts.

Article 12
Meaning of default

1. – The parties may provide in their agreement for the kind of default, or any event other than default, that will give rise to the rights and remedies specified in Articles 9 to 11 ~~or~~ and 15.

2. – In the absence of such an agreement, “default” for the purposes of Articles 9 to 11 and 15 means a substantial default.

Article 13
Procedural requirements

1. – Subject to paragraph 2, any remedy provided by this Chapter shall be exercised in conformity with the ~~procedural~~ procedure prescribed by the law of the place where the remedy is to be exercised.

2. – Any remedy available to the obligee under Articles 9 to 11 which is not there expressed to require application to the court may be exercised without leave of the court except to the extent that the Contracting State where the remedy is to be exercised has made a declaration under Article Y or in the Protocol.

Article 14
Additional remedies

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 6.

Article 15
Relief pending final determination

1. – A Contracting State shall ensure that an obligee who adduces *prima facie* evidence of default by the obligor may, pending final determination of its claim, obtain speedy judicial relief in the form of such one or more of the following orders as the obligee requests:

- (a) preservation of the object and its value;
- (b) possession, control, or custody ~~or management~~ of the object;
- (c) immobilisation of the object;
- (d) sale, ~~or~~ lease or management of the object;
- (e) application of the proceeds or income of the object.

2. – In making any order under sub-paragraphs d) or e) of the preceding paragraph the court may impose such terms as it considers necessary to protect the obligor in the event that the obligee:

(a) in implementing any order granting such relief, fails to perform any of its obligations to the obligor under this Convention, or

(b) fails to establish its claim, wholly or in part, on the final determination of that claim.

~~2. 3.~~ -Ownership or any other interest of the obligor passing on a sale under the preceding paragraph is free from any other interest over which the chargee's security interest has priority under the provisions of Article 28.

~~3. 4.~~ -Nothing in this Article ~~shall limit~~ limits the availability of ~~any form forms~~ of interim judicial relief ~~under the applicable law~~ other than those set out in paragraph 1.

CHAPTER IV

THE INTERNATIONAL REGISTRATION SYSTEM

Article 16

The International Registry

1.– An International Registry shall be established for registrations of:

- (a) international interests, prospective international interests [and registrable non-consensual rights and interests];
- (b) assignments and prospective assignments of international interests; and
- (c) subordinations of interests referred to in sub-paragraph (a) of this paragraph.

2.– [The International Registry shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes under this Convention.]

3.– Different registries may be established for different categories of object and associated rights. For the purposes of this Convention, “International Registry” means the relevant international registry.

4.– For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration.

[Article 17

The Intergovernmental Regulator and the Registrar

1.– The Protocol shall designate an Intergovernmental Regulator^{**} to exercise the functions assigned to it by this Chapter, Chapter V and the Protocol.

2.– The Protocol may provide for Contracting States to designate operators of registration facilities in their respective territories. Such operators shall be transmitters of the information required for registration and, in such capacity, shall constitute an integral part of the registration system of this Convention. The Protocol may specify the extent to which the designation of such an operator shall preclude alternative access to the International Registry.

^{**} The present text assumes that the Intergovernmental Regulator and the operators of the International Registry will be different bodies. However, as indicated in the preliminary draft Protocol on Matters specific to Aircraft Equipment, an alternative to be considered is an unitary International Registry Authority which would act as both operator and regulator (cf. Article XVI(1) of that text which provides as follows:

Alternative A

[1.– [The International Registry shall be regulated and operated by the International Registry Authority.] [The International Registry shall be regulated by the International Regulator and operated by the Registrar.]]

3. – The Intergovernmental Regulator shall establish the International Registry, designate the Registrar and oversee the International Registry and the operation and administration thereof. ***

4. – The manner in which such oversight is conducted, the responsibilities of the Registrar and operators of registration facilities and the fees to be paid by users of the international registration system shall be prescribed in the Protocol and/or from time to time in the regulations.

5. – The Registrar shall:

- (a) operate the International Registry efficiently and responsibly;
- (b) perform the functions assigned to it under this Convention, the Protocol and the regulations;
- (c) report to the Intergovernmental Regulator on its performance of these functions and otherwise comply with the oversight requirements specified by the Intergovernmental Regulator;
- (d) maintain financial records relating to its functions in a form specified by the Intergovernmental Regulator; and
- (e) insure against liability for its acts and omissions in a manner acceptable to the Intergovernmental Regulator.

6. – The Intergovernmental Regulator shall have power to require acts and omissions which are in contravention of this Convention, the Protocol or the regulations to be rectified.

7. – The Protocol and/or the regulations may prescribe the procedures pursuant to which the Registrar and operators of registration facilities may request advice from the Intergovernmental Regulator regarding the exercise of their respective functions under this Convention, the Protocol and the regulations.]

CHAPTER V

MODALITIES OF REGISTRATION

Article 18

Registration requirements

The Protocol and regulations may contain conditions and requirements, including the criterion or criteria for the identification of the object, which must be fulfilled in order:

- (a) to effect a registration; or
- (b) to convert the registration of a prospective international interest or a prospective assignment of an international interest into registration of an international interest or of an assignment of an international interest.

*** It was noted by the Aircraft Protocol Group that Article 17(3) is an example of the type of provision which was envisaged as being within Article U(b) and which may therefore find itself modified by the terms of a Protocol.

Article 19
Transmission of information

The information required for a registration shall be transmitted, by any medium prescribed by the Protocol or regulations, to the International Registry or registration facility prescribed therein.

Article 20
When registration takes effect

1. – A registration shall take effect upon entry of the required information into the International Registry data base so as to be searchable.

2. – A registration shall be searchable for the purposes of the preceding paragraph at any time when:

- (a) the International Registry has assigned to it a sequentially ordered file number; and
- (b) the registration, including the file number, may be accessed at the International Registry and at each registration facility in which searches may be made at that time.

3. – If an interest first registered as a prospective international interest becomes an international interest, the international interest shall be treated as registered from the time of registration of the prospective international interest.

4. – The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.

5. – The International Registry shall record the date and time a registration takes effect.

6. – A registration shall be searchable in the International Registry data base according to the criteria prescribed by the Protocol.

Article 21
Who may register

1. – An international interest which is a security interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered by or with the consent in writing of the ~~charger~~ grantor or assignor or intending grantor or assignor, as the case may be. Any other type of international interest may be registered by the holder of that interest.

2. – The subordination of an international interest to another international interest may be registered by ~~the person in whose favour the subordination is made~~ or with the written consent of the person whose interest has been subordinated.

3. – A registration may be amended, extended prior to its expiry or discharged, by or with the consent in writing of the party in whose favour it was made.

[4. – A registrable non-consensual right or interest may be registered by the holder thereof].

Article 22
Duration of registration

Registration of an international interest remains effective for the period of time [specified in the Protocol or the regulations as extended in conformity with Article 21(3)] [agreed between the parties in writing].

Article 23
Searches

1. – A person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry concerning interests registered therein.

2. – Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate with respect to any object:

- (a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or
- (b) stating that there is no information in the International Registry relating thereto.

[Article 24
List of declared non-consensual rights or interests

The Registrar shall maintain a list of the categories of non-consensual right or interest declared by Contracting States in conformity with Article 40 and the date of each such declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.]

Article 25
Evidentiary value of certificates

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is *prima facie* proof:

- (a) that it has been so issued; and
- (b) of the facts recited in it, including the date and time of a registration under Article 21.

Article 26
Removal of registration

1. – When the obligations secured by a security interest [or the obligations giving rise to a registrable non-consensual right or interest] have been discharged, or the conditions of transfer of title under a title reservation agreement have been fulfilled, the obligor may, by written demand delivered to the holder of such a registered interest, require the holder to remove the registration relating to the interest.

2. – Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending grantor or assignor may by notice in writing, delivered to the intended grantee or assignee at any time before the latter has given value or incurred a commitment to give value, require the relevant registration to be removed.

[CHAPTER VI

LIABILITIES AND IMMUNITIES OF THE INTERNATIONAL REGISTRY

Article 27
Indemnity and immunity

1. – Any person suffering loss by reason of any error or system malfunction in the International Registry shall be entitled to an indemnity in respect of such loss. The measure of liability shall be compensatory damages for loss incurred as the result of the act or omission.

2. – The courts [of the Contracting State[s] in which the Registrar or the operators of registration facilities, as the case may be, [is] [are] situated] shall have jurisdiction to resolve any disputes arising under this Article.

3. – Subject to paragraph 1, the International Registry, the Registrar and staff of the International Registry, the Intergovernmental Regulator and the operators of registration facilities and the staff thereof shall, in the exercise of their functions, enjoy immunity from legal process except:

- (a) to the extent that the International Registry expressly waives such immunity; or
- (b) as otherwise provided by agreement with a State in which the International Registry is situated.

4. – The assets, documents and archives of the International Registry shall be inviolable and immune from seizure or legal process except to the extent that the International Registry expressly waives such immunity.]

