



Sub-Committee of the ICAO Legal
Committee on the study of
international interests in mobile
equipment (aircraft equipment)

UNIDROIT Committee of governmental
experts for the preparation of a draft
Convention on International Interests
in Mobile Equipment and a draft
Protocol thereto on Matters specific
to Aircraft Equipment

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PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:

COMMENTS

(submitted by the Government of the United Kingdom)

1. – The United Kingdom would wish to comment on Chapter IX of the preliminary draft Convention - Non-Consensual Rights and Interests.

2. – The preliminary draft Convention does not define “non-consensual rights and interests”. It is essential that there is greater clarity as to the meaning of the term. It is difficult to know how far the term extends and whether some of the rights mentioned in this paper, for example, the right to requisition an aircraft in times of emergency, are intended to be covered. If they are then they will need to be protected in accordance with Article 38. If they are not then it needs to be made clear that the Convention does not interfere with such rights.

Article 37

3. – We understand that Article 37 gives the opportunity to a Contracting State to designate certain categories of non-consensual interest as an international interest. We understand Article 37 to relate to non-consensual interests which when created will not enjoy any priority over existing interests in the aircraft object. The purpose of the Article is to enable non-consensual interests which are not “international interests” to be registered and take priority from the time of their registration. One example of the kind of things that might be registered in this way is charges to secure payment of money owed to a creditor who has obtained a court order for payment of a debt by the owner of the aircraft object. Once registered such interests will enjoy the same rights as other international interests, as set out elsewhere in the preliminary draft Convention. As this Article is concerned with the registration of non-consensual interests that have no existing priority in law we consider that

the Article is generally satisfactory. However, Article 27 (6) appears to impose an unjustified burden which is not placed on those registering other international rights and interests and should be deleted.

Article 38

4. – By contrast Article 38 is intended to allow for non-consensual interests which under the applicable law have priority over secured interests “without any act of publication”. We understand the proposal here to be that a Contracting State would provide for types of non-consensual interests which were to enjoy priority over international interests (including interests registered under Article 37). We assume the declaration under Article 38(1)(a) would be as to the types of interests rather than references to specific laws.

5. – As the text stands, non-consensual interests to which Article 38 applied would have priority over international interests which were entered on the register subsequently. In the case of types of non-consensual interests which were created in the law of a Contracting State after this initial declaration, the proposal is that it would be possible for Contracting States to make subsequent declarations to cover such new interests, but interests of these new types would not have priority over any international interests already on the register.

6. – The regime under Article 38 is unacceptable to the United Kingdom both in principle and on practical grounds. In the United Kingdom there is a wide range of statutory but also non-statutory rights to detain, sell, confiscate, forfeit requisition or otherwise seize assets. Such rights can be exercised in a range of circumstances. For example, under United Kingdom law, goods may be forfeited where there have been breaches of customs and excise legislation and in the specific case of aircraft there are rights of detention and sale for unpaid airport and navigation charges and to secure payment of maintenance and repair work carried out on an aircraft. We imagine that similar public policy provisions exist in the legislation of other countries.

7. – The rights outlined above are well-established and hence are capable of being the subject of a declaration under Article 38. However, it is possible that new legislation might be introduced in the future which would create new rights and remedies. The position of the United Kingdom is that we find the Convention, as drafted, introduces an unacceptable limitation on the legislative power of Parliament, as such rights and remedies could not be applied as against international interests which were already on the register at the time the legislation came into force. We take the view that the wider public interest which is protected by national law must always prevail over the interests of the secured creditor. Moreover, the qualification that a declaration may only be made in respect of non-consensual rights and interests which have priority in national law without any act of publication is unacceptable. It would be helpful to have clarification as to what is meant by “without any act of publication”. Statutes and other legal instruments always require publication before becoming law and our common law rights are well established.

8. – It was suggested at the meeting of governmental experts in Rome in February 1999 that this problem could be overcome by making a declaration on accession to the Convention which covered both current and future rights and interests. We do not consider that this is an acceptable way forward. It is contrary to the purpose of the provisions of Article

38 to have a declaration that covers future types of interests that do not exist at the time of the declaration.

9. – There is also a practical problem with a system which in respect of future types of non-consensual interest confers priority in respect of international interests created after the declaration is deposited as opposed to those created before. Those who wish to exercise these rights would first need to establish whether the right was available in any particular case by consulting the register. This might be impracticable in a situation where speed is of the essence, for example, when an aircraft is standing on the airport tarmac for a limited period.

10. – We have come to the conclusion that it would be preferable for the Convention to leave the matter of non-consensual interests to the applicable national law and to make it clear in the text that the Convention could not override any right established under the law of a Contracting State to detain, sell, confiscate, forfeit, requisition of otherwise seize objects which are the subject of the Convention. As an alternative, we suggest that an opt-out provision is provided for those Governments which wish to maintain their own regime for non-consensual rights and interests. Such an opt-out would need to apply the law of the Contracting State in which the aircraft was located whether the Contracting State of the airline had opted out or not.

11. – Finally, it is clear that there will need to be transitional provisions so that existing rights that apply at the time a State signs the future Aircraft Protocol, for example, are not altered.