



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

ICAO Ref. LSC/ME/2-WP/5
UNIDROIT CGE/Int.Int./2-WP/5
(Original: English)

SECOND JOINT SESSION

(Montreal, 24 August – 3 September 1999)

PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

and

PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT:

COMMENTS

***(submitted jointly by the International Air Transport Association and
the Aviation Working Group)***

**Re: Proposed Convention on International Interests in Mobile Equipment and
associated Draft Protocol/Joint Session, 24 August - 3 September 1999, Montreal**

Dear Professor Kronke and Dr. Weber,

The Aviation Working Group (*A.W.G.*) and the International Air Transport Association (*I.A.T.A.*) are pleased to submit the following joint comments on the revised draft Convention on International Interests in Mobile Equipment (*Convention*) and the Protocol thereto on Matters Specific to Aircraft Equipment (*Aircraft Protocol*).

These joint comments do not (i) take a stance on the desired overall structure of the draft international instruments under consideration at the upcoming session (except for the recommendation in Sec. 3 below), (ii) comment on the specific draft provisions of the revised Convention and Aircraft Protocol, or (iii) address any procedural matters. The A.W.G. and I.A.T.A. each reserve the right to make independent comments and otherwise express views on the foregoing matters.

1 Opt-in Annex to the Aircraft Protocol

We have consistently and publicly taken the position that our support for the project is **dependent upon** the potential of the final texts to facilitate the availability and reduce the cost of aviation credit. In that regard, we have argued that “hard” commercially oriented rules are required. Since such rules may raise matters of policy, the few relevant provisions should expressly permit reservations. We have cautioned against an alternative diplomatic “softening” of these key provisions. A detailed analysis of this line of reasoning may be found in the article entitled *The case for a commercial orientation to the proposed UNIDROIT Convention as applied to aircraft equipment*, (1999-2) *Uniform Law Review* pp. 289-302.

At the Rome Joint Session, held in February 1999, several governmental representatives expressed concern regarding (1) the particulars of these key “asset-based financing” provisions, and (2) the presumption of their applicability, which could require the filing of reservations. These two concerns were often connected.

After informally consulting with a number of Governments, we believe that the preferable route forward would be to retain the hard rules, yet move them into an annex to the Aircraft Protocol that would apply, wholly or in part, only by affirmative declaration by State parties to the Aircraft Protocol.* We attach the proposed draft of an Annex that consists of the text of the following provisions:-

- Art. 1 - Choice of law (former Art. VIII of the Aircraft Protocol);
- Art. 2 - Relief pending final determination (former Art. 14 of the Convention, merged with former Art. X of the Aircraft Protocol);
- Art. 3 - De-registration and export authorisation (former Art. XIII of the Aircraft Protocol);
- Art. 4 - Remedies on insolvency (former Art. XI of the Aircraft Protocol); and
- Art. 5 - Insolvency assistance (former Art. XII of the Aircraft Protocol).

An article in the final clauses of the Aircraft Protocol should specifically permit Contracting States to apply any or all of the above-noted provisions in their territories. To avoid concerns regarding the potential application of the “reciprocity principle” arising by virtue of Article 21(1) of the Vienna Convention on the Law of Treaties, consideration should be given as to whether the Final Clauses in the Aircraft Protocol need to state that a declaration is not conditioned, vis-à-vis any other Contracting State, on that other State's making a similar declaration.

* The Uruguay Round of Multilateral Trade Negotiations included certain associated legal instruments in Annex 4 classified as Plurilateral Trade Agreements. These annexes addressed such issues as Trade in Civil Aircraft and Government Procurement. These provisions were binding only on States that had accepted them and, accordingly, constitute a precedent for our proposed approach.

A related point concerns a presumption in the existing text in favour of non-judicial remedies (Article 12(2) of the Convention). A reservation is permitted where a State objects to “self-help” (Article Y(2) of the Convention). This presumption regarding non-judicial remedies is contentious. Following the logic of the proposed annex approach, we believe that the difficult issue of non-judicial remedies **should be addressed neutrally**. States should thus be invited, on an equipment-specific basis, to declare whether the remedies may be exercised without leave of the court.

2 Registration Provisions to the Aircraft Protocol

We strongly support moving all provisions relating to the aircraft Registry, including associated defined terms, to the Aircraft Protocol. With slight modification, Article 15 of the Convention would remain as the “umbrella” provision.

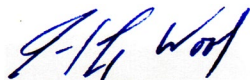
The current subject matter division, in our view and in the view of a number of Governments, is unnecessarily complex and difficult to follow. Combining these provisions will streamline the text and facilitate comprehension. Moreover, duplication will be avoided since the Convention, by its very terms, invites the protocols to address a variety of items. Finally, should the current structure remain, such reorganisation would probably avoid the undesirable drafting, in possible future protocols, of many “superseding” provisions needed to establish yet-to-be-created Registries with unforeseeable characteristics.

3 Official Informal - Consolidated Text

Without prejudice to the question of the final structure of the instrument(s), we strongly support the preparation, at this stage, of an official, informal “working consolidation” of the two texts. In fact, many representatives involved in the process actually work from an unofficial consolidated text, as constantly shifting between the two texts is time-consuming and complex, acknowledging that reality, and, more importantly, avoiding the use of inconsistent “private consolidations”, is in the interest of all. As an informal consolidation presupposes the existence of separate legal texts, its preparation should not raise any fundamental issues of strategy.

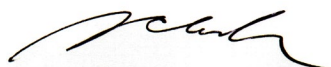
We would be grateful if these comments could be circulated in advance to all participants in the forthcoming Joint Session in Montreal.

Sincerely yours,



Jeffrey Wool
on behalf of the
Aviation Working Group

Sincerely yours,



Lorne S. Clark
General Counsel and Corporate Secretary
International Air Transport Association

PROTOCOL TO THE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

ANNEX 1 - ASSET-BASED FINANCING SUPPLEMENTARY PROVISIONS

The following provisions will apply, wholly or in part, only by affirmative declaration by State parties to the Aircraft Protocol:

Article 1 *Choice of law*

1. – The parties to an agreement or a contract of sale or a related guarantee contract or subordination agreement may agree on the law which is to govern their rights and obligations under the Convention, wholly or in part.

2. – Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the rules of law in force in the designated State or political subdivision of a State other than its rules of private international law.

Article 2 *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 and to the extent that the obligor has at any time so agreed, 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 of the object;
- (c) immobilisation of the object;
- (d) sale, lease or management of the object;
- (e) application of the proceeds or income of the object;
- (f) de-register the aircraft; and
- (g) export and physically transfer the aircraft object from the territory in which it is situated.

2. – For the purposes of the preceding paragraph, “speedy” in the context of obtaining judicial relief means a period not exceeding [...] calendar days from the date on which the instrument initiating the proceedings is lodged with the court or its administrative office.

3. – The remedies specified in Article IX(1) of the Protocol shall be made available by the national registry authority and other administrative authorities, as applicable, in a Contracting

State no later than [...] working days after the judicial relief specified in the preceding paragraphs is authorised or, in the case of judicial relief authorised by a foreign court, approved by courts of that Contracting State.

4. – In making any order under sub-paragraphs (d) or (e) of paragraph (1) of this Article, 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 the Convention; or

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

unless and to the extent that the obligor has at any time waived its rights to the foregoing.

5. – 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 obligee's international interest has priority under the provisions of Article 27 of the Convention.

6. – Judicial relief under paragraph (1) of this Article may be granted in a Contracting State notwithstanding the commencement of insolvency proceedings in another State unless its application would contravene an international instrument binding on that Contracting State.

7. – Nothing in this Article limits the availability of forms of interim judicial relief other than those set out in paragraph 1 of this Article.

Article 3

De-registration and export authorisation

1. – Where the obligor has issued an irrevocable de-registration and export request authorisation substantially in the form appended to this Annex and has submitted such authorisation for recordation to the national registry authority, that authorisation shall be so recorded.

2. – The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) of the Protocol and may do so only in accordance with the authorisation and any applicable airworthiness or safety laws or regulations. Such authorisation may not be revoked by the obligor without the consent in writing of the authorised party. The national registry authority shall remove an authorisation from the registry at the request of the authorised party.

3. – The national registry authority and other administrative authorities in Contracting States shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX of the Protocol.

Article 4 *Remedies on insolvency*

1. – For the purposes of this Article, “insolvency date” means the earliest date on which one of the events specified in paragraph 2 shall have occurred.

2. – This Article applies where:

(a) any insolvency proceedings against the obligor have been commenced by the obligor or another person in a Contracting State which is the primary insolvency jurisdiction of the obligor; or

(b) the obligor is located in a Contracting State and has declared its intention to suspend, or has actually suspended payment to creditors generally.

3. – Within a period not exceeding [. . .] days from the insolvency date the obligor shall:

(a) cure all defaults and agree to perform all future obligations under the agreement and related transaction documents; or

(b) give possession of the aircraft object to the obligee [in accordance with, and in the condition specified in the agreement and related transaction documents].

4. – Where possession has been given to the obligee pursuant to the preceding paragraph, the remedies specified in Article IX(1) of the Protocol shall be made available by the national registry authority and other administrative authorities, as applicable, no later than [. . .] working days after the date on which the aircraft object is returned.

5. – No exercise of remedies permitted by the Convention may be prevented or delayed after the period specified in paragraph 3.

6. – No obligations of the obligor under the agreement and related transactions may be modified [in the insolvency proceedings] without the consent of the obligee.

7. – No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 38 of the Convention, shall have priority in the insolvency over registered interests.

Article 5 *Insolvency assistance*

The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts or other foreign authorities administering the insolvency proceedings referred to in Article 4 of this Annex in carrying out the provisions of that Article.

Addendum

**FORM OF IRREVOCABLE DE-REGISTRATION
AND EXPORT REQUEST AUTHORISATION**

[Insert Date]

To: [Insert Name of National Registry Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]* of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration [number] [mark] [insert registration number/mark] (together with all installed, incorporated or attached accessories, parts and equipment, the “**aircraft**”).

This instrument is an irrevocable de-registration and export request authorisation issued by the undersigned in favour of [insert name of obligee] (“the **authorised party**”) under the authority of Article 3 of Annex 1 to the Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment. In accordance with that Article, the undersigned hereby requests:

(i) recognition that the authorised party or the person it certifies as its designee is the sole person entitled to:

(a) obtain de-registration of the aircraft from the [insert name of national aviation registry] maintained by the [insert name of aviation authority] for the purposes of Chapter III of the Chicago Convention of 1944 on International Civil Aviation; and

(b) export and physically transfer the aircraft from [insert name of country]; and

(ii) confirmation that the authorised party or the person it certifies as its designee may take the action specified in clause (i) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of country] shall co-operate with the authorised party with a view to the speedy completion of such action.

The rights in favour of the authorised party established by this instrument may not be revoked by the undersigned without the written consent of the authorised party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of national registry authority].

[insert name of operator/owner]

Agreed to and lodged this

[insert date]

[insert relevant notational details]

By: [insert name of signatory]

Its: [insert title of signatory]

* Select the term that reflects the relevant nationality registration criterion.