



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



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

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### COMMENTS

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

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 preliminary draft Convention on International Interests in Mobile Equipment (**Convention**) and the revised preliminary draft Protocol thereto on Matters Specific to Aircraft Equipment (**Aircraft Protocol**).

These joint comments neither (i) take a stance on the desired overall structure of the final international instrument(s) nor (ii) address any procedural matters, except as provided in points 3 and 5 below. *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. Continued Pursuit of Commercial and Diplomatic Objectives

Considerable progress has been made in developing the texts in a manner consistent with the dual objectives of facilitating asset-based financing of aircraft equipment (the commercial objective) and producing instruments likely to be acceptable to States (the diplomatic objective). This goal has been achieved by drafting provisions that reflect the “asset-based financing principles”, as articulated by experts in the field, yet making appropriate use of the reservations, declarations, choice-of-alternatives and other flexibility-enhancing treaty mechanisms.

Examples of this successful approach include (a) the neutrality standard regarding the remedies procedure declaration (Art. Y(2) of the Convention), (b) the “two alternative” approach to the special insolvency provision (Art. XI of the Aircraft Protocol) and (c) the broad-or-narrow declaration options relating to non-consensual rights and interests (Art. 38 of the Convention).

In our view, this formula must be maintained to ensure the success of the proposed instruments. It should also be employed to reach agreement on the one key asset-based financing point that remains in square brackets, namely, **relief pending final determination (Art. 14 of the Convention and Art. X of the Aircraft Protocol)**. These provisions, taken together, reflect a nuanced and balanced approach. We believe they should be approved in their current form with perhaps minor drafting amendments. Reservations are permitted, should States find that necessary.

## **2. Substantive and Technical Comments on the Draft Texts**

The annex hereto contains our substantive and technical comments on the draft Convention and Aircraft Protocol as prepared by the *ad hoc* Drafting Group and distributed as UNIDROIT CGE/Int.Int./3-WP/2 and ICAO Ref. LSC/ME/3-WP/2.

## **3. Select Matters Relating to the International Registration System**

We believe that greater attention needs to be focused on the practical aspects of establishing the international registration system. These matters will have significant implications, including the impact on overall project timing. In particular, a Supervisory Authority and Registrar must be appointed, the actual system with its potential links to civil aviation authorities must be designed, and, not to be overlooked, regulations must be prepared, vetted and adopted. In addition, the particulars of the system will directly affect the aviation sector's level of confidence in the new regime.

After reviewing the requested I.C.A.O. working paper, we suggest that the Third Joint Session agree on a framework and the relevant procedures for addressing these practical matters. Others have suggested that specific proposals could be solicited from those interested in acting as the Registrar and/or hosting the Registry. We believe that approach deserves serious consideration and, if found to be appropriate, specific steps could be taken at this stage.

In our view, it is also important to continue the process of thinking through the textual implications of an electronic, notice-based registration system. For example, we believe that a negligence standard for errors and omissions, suggested as an alternative, is not appropriate for a registry of this kind in which systemic risk is present. In a similar vein, we also question the need for the recent changes made by the *ad hoc* Drafting Group to the relevant provisions relating to completion-filings in respect of prospective interests.

## **4. Primacy of the Convention/Aircraft Protocol**

Since the Convention/Aircraft Protocol should reflect contemporary aviation financing practices and advanced legal principles relating thereto, its terms should be primary vis-à-vis older and/or more generalised international legal instruments. An example of the former is the Geneva Convention of 1948 and of the latter is the draft UNCITRAL Convention on Assignment in Receivables Financing. In our view, the appropriate method to address the UNCITRAL treaty relation is to simply exclude aircraft financing receivables from the scope of the UNCITRAL instrument (and this proposal is being brought to UNCITRAL's attention).

## **5. Completion of Technical Work during the Third Joint Session**

It is imperative that every effort be made to complete work on the draft instruments at the Third Joint Session, and to schedule sessions of the Plenary, Drafting Committee and any other sub-

groups with that objective in mind. This goal is appropriate, we believe, since most of the technical work has already been completed in the two previous readings and the remaining technical matters will be undertaken at the upcoming session.

The points, which we believe will be relatively few in number, that may remain open after the Third Joint Session will be of the kind requiring political and diplomatic decisions. We think it is appropriate that they be presented and addressed as such.

Finally, please note one related matter. With a view to facilitating the work at the Third Joint Session, the A.W.G. had agreed to submit a paper to the Plenary on considerations surrounding the possible inclusion of public aircraft in the Aircraft Protocol. Without prejudice to its future position, at this stage I.A.T.A. does not wish to express an opinion on that paper. I.A.T.A. would, however, agree with the A.W.G.'s conclusion that a condition to including public aircraft is that it not adversely affect the acceptability of the instrument to States or lengthen the timetable leading to the diplomatic Conference.

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## SUBSTANTIVE AND TECHNICAL COMMENTS ON THE CONVENTION AND AIRCRAFT PROTOCOL

With a view to facilitating efforts at the Third Joint Session to finalise the technical work on the Convention and Aircraft Protocol, we set out below detailed and comprehensive comments on these texts. The *vast majority of these comments are technical in nature*. They are made to ensure accuracy, completeness and greater compatibility between the two texts. The balance of the comments express views on the bracketed provisions, and, accordingly, are *more substantive*. Comments in the latter category of particular note are those under **Convention Articles 14** (relief pending final determination), **17(2)** and **19(3)** (priority implications for registrations of prospective interests), **26bis** (liability standard applicable to the Registrar) and **V** (potential domestic transaction exclusion) and **Aircraft Protocol Articles VI** (buyer priority rule), **X** (supplementary provisions regarding relief pending final determination) and **XVIII** (role of registration facilities).

### *Re Convention*

#### *Re Preamble*

Last recital: while we support inclusion of this recital, its contents are implicit in the notion of reservations and declarations. Thus, it is desirable, but not essential.

#### *Re Article 1*

Definition of “associated rights”: we believe that the reference to a “contract of sale” is incorrect.

Definition of “non-consensual right or interest”: consideration should be given to broadening the wording to include rights conferred by law to obtain possession of an object.

Definition of “proceeds”: the predecessor definition, “qualified proceeds”, had an attached footnote stating that consideration should be given to an optional provision requiring compensation prior to a government confiscation or requisition. We question why that footnote has been deleted without discussion and suggest that the issue be raised in the context of the Aircraft Protocol.

Definition of “registrable non-consensual right or interest”: the referenced instrument is deposited “pursuant to” not “under” Article 37, as the declaration is equipment-specific, and, accordingly, is made under the Protocol.

Definition of “security agreement”: this definition refers to an “agreement to grant”, whereas the parallel definitions of leasing agreement and title reservation agreement do not so refer. They should be conformed.

Add a definition of “seller” (under a contract of sale): this definition is the counterpart to the extant definition of “buyer”. The term would be used in the texts.

*Re Article 5*

The reference to Article 14(2) should be in brackets because that provision is bracketed.

*Re Article 6*

In our review of the texts, we find no specific reference to the “applicable law” that would be inconsistent with the main rule in paragraph 3, except, arguably, the one contained in Article 13. (The one reference to the “law” which is intended to refer to substantive law expressly so states. *Cf.* Aircraft Protocol, Article VIII.) Accordingly, we suggest either inserting a reference to Article 13 and deleting the brackets, or, alternatively, deleting the bracketed language.

*Re Article 9*

The recent amendments to the definition of “interested persons” require an amendment to paragraph 1 that follows the approach contained in Article 8(3), namely, limiting the interested persons specified in Article 1(p)(iii) to those who have given reasonable prior notice of their rights to the chargee.

*Re Article 11*

We believe that paragraphs 1 and 2 should include a reference to Article 13 (additional remedies permitted by the applicable law). The same comment concerning the inclusion of a reference to Article 13 also applies to Article Y(2) and Aircraft Protocol, Article IX(1). Perhaps a simpler and more flexible drafting technique would be to refer to “any remedies specified in this Convention” throughout.

*Re Article 12*

Since the Aircraft Protocol contains remedies that are technically not part of Chapter III of the Convention, the word “Chapter” should be replaced by the word “Convention”. The alternative would be to make all remedies in all Protocols expressly part of Chapter III of the Convention.

*Re Article 14*

*We have consistently taken the position that either (1) Article 14(2) and Aircraft Protocol Article X(2) should be deleted or (2) both provisions should be retained, without brackets. From our perspective, the former provision is not acceptable without the latter.* The rationale is straightforward: Article 14(2) can be expected to require the posting of a bond, thereby imposing a cost that, in all probability, will be passed on to airlines. Accordingly, airlines should have the ability to waive this costly “protection” should they believe that, on balance, doing so is advantageous. As far as States are concerned, it should be borne in mind that a reservation on Article 14 is expressly permitted (*see* Article Z).

As “interested persons” would be protected by the notice specified in paragraph 3, we believe that the reference to “interested persons” in paragraph 2 should instead be to the “debtor”, as it was in the previous draft. (A corresponding change would then be made to Aircraft Protocol Article X(2).)

The comment made with respect to Article 9 above regarding “interested persons” also applies to Article 14(3).

The point noted in Footnote 8 is being addressed by the Public International Law Working Group. It need not be mentioned in the context of remedies.

#### *Re Article 17*

This comment will collectively address Article 17(2), Footnote 10, Article 19(3) and Footnote 12 as they are conceptually inseparable. Article 25(2) is relevant. Aircraft Protocol, Article XVIII may also be affected.

We first summarise the core items as follows. Article 17(2) states that a Protocol “may specify” requirements to “convert” a prospective interest into an actual one. If there are any such requirements, Article 19(3) makes their compliance “at any time” a condition to the holder's so-called “relation-back priority” – that is, priority under Article 27 as from the time that the *prospective interest* was originally registered. Footnote 12 suggests that this requirement may be justified if more registration information is required for an actual interest than for a prospective interest.

In assessing the foregoing, the function of a prospective interest should be considered. Its efficiency-driven purpose is to permit a registration prior to completion of a transaction so that (1) parties to that in-progress transaction may finalise it in reliance of the original priority position and (2) parties to any other transaction are on “notice” of the first prospective transaction. The latter can self-protect by not closing their transaction. It follows that what is essential is that sufficient notice-giving information is required in any prospective registration, not that there is evidence on record that a prospective interest has been “completed”. Thus, the above-noted functions are served simply by *requiring minimum information in any prospective registration*, rather than by the rules contained in Articles 17(2) and 19(3).

Any concerns regarding debtor protection in this context are misplaced: Article 25(2) efficiently addresses the situation where a debtor demands removal of a prospective registration.

As the Aircraft Protocol does not contain any additional conditions permitted by Article 17(2), please note that the above comments are being made for information purposes only, and as a signal of our position should consideration be given to extending the concept to aircraft equipment.

One question that remains is whether States that declare use of their “registration facilities” through Aircraft Protocol Article XVIII should be able to set additional “conditions to registration” should they be uncomfortable with prospective registrations. Currently, that ability is not permitted by the terms of the Aircraft Protocol.

#### *Re Article 20*

We support Alternative B for paragraph 1, the provision taken from the Aircraft Protocol. (As noted in Footnote 14, should Alternative A be selected, the Aircraft Protocol would replace the same with wording along the lines of Alternative B.) Alternative B, which requires a debtor's consent to a registration, is a protective provision thought to be appropriate in this context.

Similarly, a debtor's consent would also be required to amend or extend a registration but not to discharge one. This concept would entail a revision to paragraph 3.

*Re Article 21*

The second bracketed alternative, providing the parties with the ability to specify the duration of their registration, is appropriate in the context of aircraft financing. The debtor is adequately protected by Article 25(1).

Should the second alternative be accepted in the Convention, it calls for a substantive rule in the Aircraft Protocol. That rule should embody the party selection principle.

*Re Article 26*

The immunity to be provided to both the Supervisory Authority and the Registrar should be *functional immunity*. That rule should be stated expressly, as the scope of immunity under international law is less than completely clear where, as in this article, an entity is assigned international legal personality. Revisions are required to paragraphs 2 and 4(a). This comment is in line with the thinking of the Public International Law Working Group.

*Re Article 26bis*

We think it is politically unrealistic to attempt to impose liability on the Supervisory Authority and, accordingly, suggest deleting paragraph 1 and the bracketed wording in paragraph 3.

Regarding the options presented for paragraph 2, not only do we support Alternative A, we think Alternative B is fundamentally inconsistent with the nature of the proposed system. The liability standard for a high technology, electronic registry – that will be linked to several civil aviation authorities – must be strict liability. It should be noted that the greatest risk in this context is *systemic risk*. A strict liability standard will signal to users of the system that they are not taking such systemic risk, an important message in the infancy of the new regime.

*Re Article 28*

We do not fully understand what the bracketed wording in paragraph 3 adds to the previously addressed concepts of preferential and fraudulent transfers and, furthermore, believe its broad wording is an opening, if not an invitation, to select insolvency-related attacks against registered international interests. (*Cf.* Footnote 21 (noting a risk of this kind).) Thus, we suggest deletion of this bracketed language, coupled, if necessary, with revised wording or future commentary directly addressing a “transaction at an undervalue” – the assumed focus of the relevant text.

More broadly, it is particularly important that this Article be complemented by detailed commentary with specific examples. Such commentary is needed to avoid an unintended, expansive interpretation.

*Re Article 29*

In line with the drafting convention used elsewhere, the definitions of “assignor” and “assignee” should be moved to Article 1.



To align paragraph 2(c) with its counterpart (Article 7(d)), the words “in accordance with the Protocol” should be deleted from the former.

*Re Article 31*

We note the implications of the decision to be made in paragraph 1(c) on the bracketed wording in Aircraft Protocol Article XV(2). Although not set out in brackets, Aircraft Protocol Article XV(1) would also be affected by that decision.

*Re Article 38*

This declaration must be equipment-specific and thus made through the Protocol. This point has previously been agreed upon in principle. Therefore, it is merely a drafting matter. Wording along the lines of that found in the sister provision, Article 37, would suffice.

*Re Article 40*

Articles 40 and 41 (in contrast to Aircraft Protocol Article XX) are both drafted to *permit an exercise of jurisdiction* by the specified courts, rather than *expressly to establish that jurisdiction*. A possible interpretation of the current wording is that the specified courts must have jurisdiction under national law as a threshold matter. That concept was not the intent. Neither was it the recommendation of the Jurisdiction Working Group. Accordingly, we suggest a redraft, following the approach being used in the draft Hague Convention on Jurisdiction and Foreign Judgments (*see, e.g., Arts. 4, 12 and 13*) (draft adopted by the Special Commission on 30 October 1999)) that states that the specified courts “shall have” or “have” jurisdiction.

As supplemented by Aircraft Protocol Article XX, we are satisfied with the wording in paragraph 1 and note our awareness of the issue raised in Footnote 25. We look forward to contributing to the consideration of that matter.

*Re Article V*

As we have consistently stated, and as noted in Footnote 7 to the Aircraft Protocol, *it is imperative that no so-called “domestic transaction” exclusion be applicable to aircraft equipment*. We believe any such standard – beyond being difficult, if not impossible, to articulate – would be inconsistent with (1) the financing and use patterns in the aviation industry, (2) the Convention's predictability objectives and (3) the potential priority dispute scenarios contemplated by Article 27.

*Re Article W*

As this provision addresses the structure of the instruments, we submit no joint comments thereon.

*Re Article Y*

See comment made under Article 11 above and note, in particular, the point that Article 13 and the Aircraft Protocol contain additional remedies. Consideration should be given to inserting the words “...to the creditor under *the Convention which is not expressed....*”

## *Re Aircraft Protocol*

### *Re Article I*

Definitions of “aircraft engines”, “airframes” and “helicopters”: the AWG has submitted a paper discussing matters relating to the potential inclusion of select public aircraft.

Definition of “guarantor”: this place is the first in the Aircraft Protocol where the change from “obligee” to “creditor” or from “obligor” to “debtor”, as the case may be, has not been made. The others are Articles XIII(1) and (2) and XV(1).

Definition of “insolvency-related event”: sub-clauses (i) and (ii) are disjunctive and should be so expressed. Also, for the reasons noted under Articles 11 and Y, we suggest deleting the words “Chapter III of” from (ii). This deletion would ensure a sufficiently broad reference to all remedies.

Definitions of “national aircraft register” and “national registry authority”: the Public International Law Working Group will be suggesting the removal of the word “national” from these definitions. Doing so would avoid a potential inconsistency with the notion of a common mark registering authority. We suggest inserting the words “Chicago Convention” in its place (i.e., “Chicago Convention aircraft register” and “Chicago Convention registry authority”).

### *Re Article III*

References in paragraph 2 to an “aircraft object” should be to an “aircraft” as aircraft engines do not have Chicago Convention nationality.

### *Re Article IV*

Footnote 8 notes that a drafting proposal will be provided to clarify the intent and effect of the exclusion of Article 27(3) from the reference to Chapter VIII as applied to contracts of sale.

We suggest a provision – specifically replacing the current wording in Article 27(3) – with the following rule:

*“A buyer under a registered contract of sale has priority over an unregistered interest, even if the buyer has actual knowledge of the unregistered interest, but takes its interest subject to previously registered interests.”*

A reference to Article 41 in this Article is necessary to ensure that the general jurisdiction provision picks up disputes relating to contracts of sale.

### *Re Article V*

Paragraph 3 should be revised to conform to the drafting of the counterpart provision in Convention, Article 20 (Alternative B).

*Re Article VI*

The amendments to the Article imply that a contract of sale may be entered into, but not registered, by a person in a representative capacity. As this implication is illogical, we assume that it was not intended. Simplified drafting along the following lines would address this concern:

*"A person may enter into and register an agreement or a contract of sale in an agency...."*

*Re Article VIII*

The current wording in paragraph 1 has given rise to a concern that the parties' choice of law might apply to the proprietary aspects of a transaction. Simplified drafting along the following lines would address this concern:-

*"...which is to govern their contractual rights and obligations, wholly or in part.*

*Re Article IX*

Paragraph 1 should include a reference to Article 13.

For the reasons noted above, consideration should be given to whether Article IX should technically constitute part of Chapter III.

*Re Article X*

*We believe that it is imperative that this Article, as currently drafted, remain in the text with all brackets removed.* Please note the revision to paragraph 2 noted under Article 14 of the Convention.

*Re Article XI*

We support the agreed approach of providing two alternatives in the final text for selection by each State. (*See our comments on Aircraft Protocol, Article XXX.*)

Alternative A is acceptable as drafted.

While we have not been directly involved in the development of Alternative B, we would offer two technical comments. First, use of the new defined term "insolvency-related event" will not only simplify the drafting but would also harmonise the triggering event with that in Alternative A. Second, the concept of a "waiting period" is included but not actually used.

*Re Article XVIII*

This Article should be revised to clarify that the registration facilities may be used for the purpose of effecting registrations but not for that of searching, if that position is the emerging consensus. (Currently, only the Registrar may issue a search certificate. *See Article 22.*) The ultimate acceptability of that arrangement, from our perspective, will depend on the technical and cost aspects of the system.

Paragraph 2 should be revised and simplified, clarifying that *all registrations* – other than those relating to aircraft engines – may be made through the registration facilities of the State of Registry.

A new paragraph is needed to specify the legal relationship between the registration facilities and the International Registry, in particular, for purposes of liability, insurance and conditions to registration. It is assumed that the registration facilities will *not* be part of the international system for these purposes, except, perhaps, for the last item listed in the previous sentence.

#### *Re Article XIX*

We are unclear as to the practical differences between the competing alternatives for paragraph 3, and, in particular, whether Alternative A contemplates a profit component. The proposal process noted in the body of our joint comments may help clarify this point. We reserve our positions on the matter.

Paragraph 5 should include a reference to Article 16(2)(c)-(e), not merely to Article 16(2)(d). The reference to Article 21 will need to be reconsidered following the resolution of the open issue in that Article. We question the need for the reference to Article 23.

#### *Re Articles XX-XXI*

All brackets should be removed from these Articles.

#### *Re Chapters V and VI*

We are contributing to the work of the Public International Law Working Group and withhold our substantive comments on these Chapters pending the completion of that Group's initial work. The following comments relate to the current drafts, independent of the deliberations of that Working Group.

#### *Re Article XXIII*

The amendments to Article Y(2) entail conforming changes to this Article along these lines:

*“...for Contracting States that do not require that remedies be exercised with leave of the court by their declarations...”`*

#### *Re Article XXX*

Paragraph 2 is not as clear as it might be regarding the mandatory nature of the election, yet the ability of States to make different elections for different types of insolvency proceedings.