



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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## **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 by the Permanent Bureau of the  
Hague Conference on Private International Law***

The UNIDROIT Secretariat has invited the Permanent Bureau of the Hague Conference on Private International Law to comment in particular on the jurisdiction-related provisions of the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment and the preliminary draft Protocol thereto on Matters specific to Aircraft Equipment. The comments submitted hereafter are accordingly limited to these provisions, while nevertheless also looking at Article 14, concerning interim relief, and Article X of the preliminary draft Aircraft Protocol.

## **I. Re the preliminary draft Convention**

As a preliminary comment, it is to be noted that the chargee's right to exercise any of the remedies provided under Article 8 of the preliminary draft Convention, by an application for a court order where the charger does not consent thereto, is not matched by any additional provision regarding the courts having jurisdiction over the granting of such remedies.

The Secretariat of the Hague Conference imagines that this was a conscious omission by the authors of the text, perfectly justified by the specificity of the subject-matter. It is in the nature of the remedies provided under Article 8 that they are not concerned with interim relief, to which Article 14 would be applicable. It must accordingly be possible for them to be granted by any appropriate court.

The appropriate court may well differ depending on the circumstances of the case and of the ensuing litigation. Moreover, the efforts underway within the Hague Conference for the cross-border unification of jurisdiction rules, the first results of which may be gleaned from the text set out in an appendix to these comments,<sup>1</sup> are sufficiently well advanced for it to be likely that these new rules will be available for operators at the time that the future UNIDROIT Convention comes into force.

## 1. Re Article 14

Several comments are called for in relation to Article 14.

First, Article 14(1) makes the obligor's agreement a condition for the obtaining of interim relief. This requirement is astonishing in that it is in the nature of interim relief to permit the freezing of a situation, without the knowledge of the obligor, as a first stage, so as to preserve the rights of the obligee. The essence and the efficacy of interim relief make it necessary for the informing of the obligor to be overlooked in the first stages of such proceedings. Then, once the relief has been ordered, the obligor may be given the chance to raise his rights and objections to the relief ordered.

One explanation of the wording of the text might be that it is necessary in view of the first two orders that may be given under Article 14(1)(d) and of the order that may be granted under Article 14(1)(e). In fact, the orders that may be granted under these provisions differ in nature from those that may be granted under Article 14(1)(a), (b),(c) and the third order that may be granted under Article 14(1)(d). The sale or lease of an asset or the application of the proceeds or income of that asset are permanent, definitive and, at least in the case of sale or the application of proceeds or income, irrevocable in character in a way which is totally at variance with the provisional character of the orders normally covered by Article 14.

In the light of the foregoing, the question arises as to whether it would not be preferable to restrict Article 14 only to those orders which are essentially provisional in character and to leave the other orders to be dealt with under Article 8, where moreover they already appear. This is all the more important in so far as the provisions relating to jurisdiction in the case of interim relief may be incompatible with the rules which should apply to the jurisdiction of the courts requested to order the sale of an asset, for example. We shall revert to this question when we take up the specific matter of the jurisdiction provisions.

Article 14 then provides that the interim relief requested by the obligee is to be "obtained" "speed[il]y". This aspect of the provision raises a difficult question in the sense that States may be expected to be reluctant to assume an international duty of this nature at a

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<sup>1</sup> The working document that emerged from the Special Commission meeting which took place from 7 to 18 June 1999 is set out in an appendix to this paper. It sets out the text of a provisionally adopted preliminary draft Convention. This text is to be completed and amended at the Special Commission meeting due to be held in October 1999, which will be the last meeting prior to the diplomatic Conference envisaged for Autumn 2000.

time when their judicial systems are clogged up and do not necessarily have a special court solely responsible for the ordering of interim relief. It might accordingly make sense to render the rule less strict by making States liable only for an *obligation de moyen* (a duty to achieve a specific result) rather than the *obligation de résultat* (a duty of best efforts in the performance of an activity) which is how the provision reads at present.

As regards paragraph 2, the precautionary steps provided for there would not seem to be of a kind to modify the non-provisional character of the orders provided for under subparagraphs (d) and (e), as noted above. Should Governments persist in seeking to include these orders in Article 14, our view is that paragraph 2 should be retained and confer on the judge a duty rather than a discretion. This would mean that it would be necessary to replace the words “the court may ...” by the words “the court shall ...”.

It seems likely that the reference in paragraph 3 to “the preceding paragraph” should instead be a reference to paragraph 1. The question arises as to whether this is not a provision of general application both in the context of Article 8 and in that of Article 14.

From a drafting point of view, we wonder whether paragraph 4 could not simply be replaced by the adverb “in particular” being added in paragraph 1.

## 2. Re Chapter XI – Jurisdiction

Turning now to Chapter XI, a number of comments may be formulated in relation to the provisions contained in this part of the preliminary draft Convention.

### (A) *Re Article 40*

Article 40(1) refers only to Article 14(1), whereas it would seem preferable that it should also refer to paragraph 4 thereof, should this paragraph be retained. In fact, the freedom which a judge is granted to order other types of interim relief than those to which the future Convention makes express reference does not mean that the future Convention is not also going to wish to define the jurisdiction of such a judge, in particular in those cases in which he uses the room for manoeuvre left him under the future Convention. It is of course true that some types of interim relief known to a particular legal system might well exist by virtue of jurisdiction rules different from those provided under the future Convention. For instance, in order to order a Mareva injunction, an English judge has to have *in personam* jurisdiction over the defendant. However, this is not necessarily a handicap for the proposed amendment, in view of what then follows.

What has just been said raises a more fundamental point concerning the list of the bases of jurisdiction laid down in Article 40(1). In fact, under current practice, in comparative law, it is possible to distinguish the bases of jurisdiction according to the order requested. Some types of relief may be granted by the court of the place where the asset is situated (*in rem* jurisdiction) whereas other types may only be granted by a judge having jurisdiction over the particular defendant (*in personam* jurisdiction). As for the third basis of jurisdiction laid down in Article 40(1), it has the merit of being hybrid in character, founded as it is on the agreement of the parties. The judge selected by the parties therefore has neither *in rem* nor *in personam* jurisdiction or rather, to put it more accurately, he has *in rem* jurisdiction and *in personam* jurisdiction at one and the same time. In other words, the distinction between *in*

*rem* and *in personam* is no longer relevant in those cases where jurisdiction is founded on the parties' agreement.<sup>2</sup>

From the foregoing it emerges that Article 40 needs to distinguish between the bases of jurisdiction according to the kind of relief requested. Thus, in order to grant orders for the preservation of the object and its value (Article 14(1)(a)), the custody of the object (the third type of relief provided for under Article 14(1)(b)), immobilisation of the object (Article 14(1)(c)) or perhaps even the management of the object (the third type of relief provided for under Article 14(1)(d)), only the jurisdiction laid down in Article 40(1)(a) is necessary. On the other hand, this jurisdiction is inadequate for the purposes of granting the other types of relief provided for under Article 14(1)(b) (the first and second types of relief) and under Article 14(1)(d) (the first and second types of relief) as well as the relief provided for under Article 14(1)(e). For these kinds of relief, it would seem to us vital that the judge should have *in personam* jurisdiction or else be the judge chosen by the parties. In any case, this is what emerges from the legal systems the rule of which governing the granting of interim relief we have been able to study.<sup>3</sup>

As regards the words appearing in square brackets in Article 40(1)(a), they appear to refer to a very specific category of objects, satellites, which, although not located on earth, are in reality controlled from the territory of a State. If we are right in this analysis, we accordingly wonder whether this provision should not be left to the future Protocol on Matters specific to Space Property rather than appearing in the general Convention.

The concept of situation employed in Article 40(1)(b) is defined nowhere in the future Convention. In fact, Article 4 only defines the situation of the obligor, whereas Article 40 refers rather to the defendant. The drafters moreover were clearly aware of the problem, since they have drawn attention to it by including the words "other than the provisions of Article 40" inside square brackets in Article 4(1). This exception would appear to be unsatisfactory for the following reasons. In practice, very many disputes will bring the obligor and the obligee face to face. Accordingly, in all these cases, the defendant will in effect be the obligor and Article 4 could apply. Nevertheless, the situation might work out differently, which explains the hesitation expressed by the drafters.

In the light of the foregoing, would it not be preferable to delete Article 4 and to replace it by a definition of the concept of "situation" which would be valid for all the provisions of the future Convention, including Article 40? In fact, the provisions of Article 4 are extremely close to those laid down by Article 3 of the preliminary draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters.<sup>4</sup> The substance is the same: it is only in the drafting that they differ. In the instrument under preparation by the Hague Conference, the drafters have sought to remain as close as possible to the terminology used in other international instruments and in a certain number of national codifications. It is perhaps preferable also for the future UNIDROIT Convention not to depart from this

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<sup>2</sup> Cf. the comments below on the validity of choice of law clauses.

<sup>3</sup> Cf. C. KESSEDJIAN, *Note on provisional and protective measures in private international law and comparative law*, preliminary document No. 10, prepared in October 1998 for the attention of the Special Commission of November 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters.

<sup>4</sup> Cf. the text set out in the Appendix hereto.

terminology, save where there are substantive reasons for doing so, which would not at first sight appear to be the case.

It is likely that Article 40(1)(c) lacks preciseness for the following reason. Where an instrument provides for jurisdiction to be exercised on the basis of a choice of law clause, it is traditional for it to be added that such a choice of law clause must be valid. Not to say so expressly could give rise to an extremely liberal interpretation of the provision in question, meaning that any agreement by the parties, of whatever kind, as to the governing law, regardless of what that law might be, might end up being admitted under the future Convention. The question arises as to whether that would be acceptable.

Should the drafters in effect decide that they might wish to add the concept of the validity of a choice of law clause to the current text, they would need to ask themselves a further question: should the text of the future Convention be completed by a uniform rule setting out the conditions for such validity or should the whole question be left to the law of each of the Contracting States? Our tendency would be to suggest that Governments leave this question to the law of each of the Contracting Parties. It would not be wise to weigh down the text of the future Convention by a provision which would need to be relatively long.<sup>5</sup> Moreover, should the text being prepared by Governments under the auspices of UNIDROIT differ from that proposed in the preliminary draft Hague Convention, annexed hereto, practitioners would find themselves confronted by several standards which would be greatly prejudicial to the efficacy of such choice of law clauses. On the contrary, by refraining from laying down any rule governing the validity of choice of law clauses, the drafters of the future UNIDROIT Convention would avoid the risk of a conflict of Conventions and would give States a good reason to pursue their efforts within the Hague Conference and, subsequently, to ratify the Convention being prepared by that Organisation. This would stand out as a fine example of successful co-ordination in the work of two international Organisations in the best interests of the citizens that both aspire to serve.

Article 40(2) seeks to explain the concept of “its claim” by means of a reference to Article 14(1). One may ask oneself whether the concept of “its claim” really necessitates such a cross-reference. This is a straightforward concept in private judicial law, which is perfectly well understood by all legal systems and which is the natural counterpart of provisional or protective measures. To say so explicitly might raise questions as to the specific meaning which the drafters of the future Convention might have intended to give to this concept.

(B) *Re Article 41*

Article 41 carries, in one and the same paragraph, two provisions which are completely different in character. The first of these provisions is particularly astounding in the context of the development of international comparative law regarding jurisdiction. If we are right in our reading of this provision, the future Convention is proposing to resurrect the *forum arresti*, that is, that jurisdiction conferred on the judge seised of the request for interim relief to pronounce on the claim underlying the application for interim relief.

The first question which arises is whether there is not a contradiction between Article 40(2), which reserves the jurisdiction of the judge trying the claim, and this new provision. In

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<sup>5</sup> Cf. in this respect, Article 4 of the preliminary draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters, as reproduced in the Appendix to this paper.

fact, what is the point of reserving jurisdiction over the claim when the judge hearing the request for interim relief may entertain any other proceedings relating to the Convention.<sup>6</sup> When reading this provision, one wonders what is left to the judge trying the claim.

What is more, this jurisdiction, albeit known to certain legal systems,<sup>7</sup> was excluded from the Brussels<sup>8</sup> and Lugano<sup>9</sup> Conventions and will be banned in the future Hague Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters.<sup>10</sup>

That being said, the exclusion of the *forum arresti* that one encounters nowadays in international comparative law should not preclude the States negotiating the future UNIDROIT Convention from considering whether the specificity of the subject-matter thereof might make the *forum arresti* vital for the smooth operation of the provisions of the future Convention. This is a matter of legislative policy for States to decide. However, in view of the manner in which the law is developing in this respect, the reasons for maintaining such a provision will need to be explained clearly in the report and to carry the conviction of those who will be called upon to interpret it. This is a measure of its value as a precedent which certain States would not fail to cite in other negotiations.

Finally, the provision concerning the International Registry should be moved to a separate provision which might be entitled “Immunity of the International Registry”. In fact, the effect of this rule is to deprive national courts of any authority over the Registry. What is really at issue is therefore no longer a question of jurisdiction.

## **II. The preliminary draft Protocol on Matters specific to Aircraft Equipment**

We intend limiting our comments concerning the preliminary draft Protocol to Articles X, XX, and XXI thereof.

### *(1) Article X*

The heading given to this provision is surprising in so far as the text of the base Convention at no moment refers to “mesures d’urgence” (urgent measures). For it to be

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<sup>6</sup> Note by the UNIDROIT Secretariat: in the French original of these comments this reads as follows: “peut entendre toute autre demande relative à la présente Convention”, whereas the English text of Article 41 provides as follows: “has jurisdiction in all proceedings relating to this Convention”.

<sup>7</sup> Certain legal systems, such as French law, which possessed such a rule, have given it up. In France, the abandonment of this rule was established by the decision in the case *Méridien Brechwaldt et Cie. v. Soc. Cobenam et autres* given by the Court of Cassation on 17 January 1995; cf. *Rev. crit. dr. int. pr.* 1996, p. 133, with note by Y. Lequette.

<sup>8</sup> Exclusion provided for in Article 3. It is to be noted that the Brussels Convention was revised following work by an *ad hoc* working group, but Article 3 was not changed. As a result of the entry into force of the Treaty of Amsterdam, the Convention will shortly be transformed into a Regulation, the final adoption of which is expected before the end of 1999. Initially this instrument will neither apply to Denmark, Great Britain nor Ireland, since these three countries have negotiated a special position in relation to this part of the Treaty of Amsterdam. For these three countries, the Brussels Convention will continue to be in force. At the time at which we are writing, it is unclear whether this will be a revised text of the Convention or the present text thereof.

<sup>9</sup> As with the Brussels Convention, it is Article 3 of the Lugano Convention which is the relevant provision. Neither was this text modified following the revision work conducted in parallel with that conducted on the Brussels Convention. The entry into force of the Treaty of Amsterdam does not affect the Lugano Convention, which will remain a Convention.

<sup>10</sup> Cf. Article 20 of the text reproduced in the Appendix hereto.

possible for such an interpretation to be given to Article 14 of the base Convention, to which reference is made in Article X, it would have been necessary to make urgency a condition for the granting of judicial relief, whereas the reference to “speedy” in Article 14 concerns solely the proceedings themselves and does not imply the need for urgency as a condition for the granting of relief. Consequently, if it is effectively the intention of the future Protocol to reduce the cases in which interim relief may be requested, by requiring that urgency be shown, this should be spelled out expressly, whether in Article X or in Article 14 of the base Convention.

Moreover, the preliminary draft Protocol sets out to clarify the concept of “speedy” by proposing the precise number of days within which a judge is to carry out his duty (Article X(1)). At best, this provision serves no useful purpose; at worst, it is counter-productive and goes against the interests which it is seeking to protect. In fact, even if such a provision is accepted, experience shows unfortunately that it will not prevent judicial systems from operating as they are accustomed, with the means at their disposal. In the absence of any sanction, there is nothing to compel States to put in place the infrastructure necessary to ensure compliance with the probably very short time-limits which the operators would like to impose.

However, the overwhelming evidence of practice is that States, aware of their international responsibilities and the fact that their judicial systems will not comply with such a time-limit, will simply not ratify the future Protocol. Practical evidence of this approach may be seen in those Conventions on mutual judicial assistance which imposed on States duties considered to be over burdensome, even if, in reality, no sanction was laid down in those instruments.<sup>11</sup> Failure to ratify would go directly against the interests that the future Convention is seeking to protect.

Article X(3), in addition to a small error of French,<sup>12</sup> raises the same problem of time-limits that we have commented upon in the context of Article X(1), albeit in a less blunt form, in the sense that it is concerned with enforcement remedies to be carried out by an authority to be created and the role of which will, moreover, be more administrative in nature. More of a problem arises from the fact that this provision envisages the recognition of judicial relief authorised by a foreign court, whereas, most of the time, in order to be enforced a remedy granted abroad must be the subject of proceedings for enforcement, registration or exequatur, depending on the legal system concerned, and may not simply be recognised, as generally takes place without the need for separate proceedings on the occasion of other proceedings. It is true that, here again, it is open to the future Convention to innovate. However, it may do so at the risk of certain States deciding not to ratify it because it would oblige them to modify their law relating to foreign judgments.

As regards Article X(4), two problems emerge at this stage. The first of these concerns the relatively radical modification of the insolvency law of States which might be considered potential Parties to the future UNIDROIT Convention, to the extent that their legal system does not admit any judicial proceedings of whatever kind (including a request for interim relief) once insolvency proceedings have been commenced. Finally, the closing words of this provision are now no longer sufficient to protect the interests of member States of the

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<sup>11</sup> This is the case in particular with the Hague Convention of 25 October 1980 on International Access to Justice, which has been ratified by only 18 States.

<sup>12</sup> The verb “soit” should be replaced by the verb “a été” in lines 4 and 5 of the French text.

European Union, in the sense that the Convention on Insolvency Proceedings, signed in Brussels on 23 November 1995, will take the form of a Community Regulation by virtue of the entry into force of the Treaty of Amsterdam. For this reason, only to provide a reservation in respect of an “international instrument” is no longer sufficient.

(2) *Article XX*

Article XX proposes adding a ground of jurisdiction to those provided for in the base Convention. This would be the State of registration. We naturally fully understand the special, if not the privileged link between aircraft objects and the State of registration. However, in matters concerning jurisdiction, it is always necessary to examine the merits of the link in relation to each type of litigation that may arise and the parties to such litigation.

If we have correctly understood the operation of the registration system, this is compulsory but with States remaining free to decide for themselves which criteria to require before they will agree to register an aircraft object in their national register. It would appear that States are divided into two groups in this regard: those who look to the nationality of the owner of the aircraft and those who look to the place in which it is principally to be operated. It is consequently difficult to define a single link valid for the purposes of determining a jurisdiction rule.

However, we would draw attention to the fact that an unanimously recognised rule would confer jurisdiction on the court of the place of registration for all litigation concerning the registration itself, its validity, its scope and questions relating thereto.<sup>13</sup> However, in the context of the future UNIDROIT Convention, this jurisdiction is not relevant because we are concerned with an International Registry. Moreover, the jurisdiction rules concern interim relief designed to protect the rights of the obligee and, in a subordinate way, subject to what was said above, litigation concerning the obligee’s claim regarding the international interest. Which of the orders for interim relief provided for under Article 14 are capable of falling naturally within the jurisdiction of the judge of the State of registration? All those types of interim relief which may be directly applied against the asset itself may certainly be requested of him, subject to the complications which will arise where the asset is physically located abroad at the time when the order is granted so that the decision will have to be enforced abroad. However, even if problems of enforcement may effectively be taken into consideration when the legislator is defining jurisdiction rules, neither should such problems preclude the choice given to the obligee who, in actual cases, will decide which judge to take his request before according to various criteria, one of which will be the physical location of the asset. Moreover, the State of registration provides a jurisdiction which is foreseeable and, accordingly, equitable for the obligor.

On the other hand, orders *in personam*<sup>14</sup> require a stronger link than the mere presence of the asset. For those States which use the nationality of the owner of the asset as the criterion for registration in their national registry, the question arises as to whether this link is sufficient for the ordering of interim relief *in personam* to the extent that nationality is increasingly excluded from the criteria capable of founding jurisdiction in civil and

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<sup>13</sup> Such jurisdiction is even exclusive under the Brussels and Lugano Conventions (Article 16). See also Article 13 of the preliminary draft Hague Convention reproduced in the Appendix to this document.

<sup>14</sup> See the considerations developed above, at pages 3 and 4, in relation to Article 40.



commercial matters.<sup>15</sup> However, as was stated above in relation to the *forum arresti*, the States negotiating the future UNIDROIT Convention may take the view that the special requirements of the subject-matter are such as to justify a departure from the rules generally applied.

The problem will be less serious for those States which found their decision as to whether or not to register an aircraft object on the place in which it is principally to be operated, in the sense that it is reasonable to imagine that in this case the defendant/obligor will effectively be located in the territory of that State and that as a result the courts of that State may effectively validly exercise *in personam* jurisdiction against him.

(3) *Article XXI*

Apart from the somewhat abstruse drafting of this Article which makes it difficult to read, our only comments concern a possible contradiction between the heading given to this Article and its contents. The heading refers to “[w]aivers of sovereign immunity” whereas the contents deal with enforcement. The law of immunity, regardless of the country concerned, involves two clearly distinct types of immunity: immunity as to jurisdiction and immunity as to enforcement. It is the latter which creates the most difficulties because, even in those countries which accept the restricted theory of immunity as to jurisdiction, there is a reluctance to accept that one may go beyond immunity as to enforcement, failing an express waiver. This Article should therefore be amended so as to provide that the provisions in question will amount to an express waiver. Nevertheless, such a provision may well frighten some States and prevent them from ratifying it.

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<sup>15</sup> See Article 3 of the Brussels and Lugano Conventions and Article 20 of the preliminary draft Hague Convention reproduced in the Appendix to this document.