



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)

UNIDROIT CGE/Int.Int./3-WP/8  
ICAO Ref. LSC/ME/3-WP/8

## THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

### DISCUSSION-PURPOSE MEMORANDUM ON PUBLIC AIRCRAFT EQUIPMENT

(submitted by the Aviation Working Group)

#### INTRODUCTION

We are pleased to present this discussion-purpose memorandum to the Third Joint Session. It addresses the principal issues associated with the potential inclusion of select *public*<sup>1</sup> aircraft equipment in the proposed international treaty instrument(s).<sup>2</sup> In line with the current texts, and notwithstanding other efforts further to articulate distinctions between civil and state aircraft,<sup>3</sup> this memorandum will address aircraft equipment *used in military, customs and police services*.<sup>4</sup>

***For the reasons stated below, it is our provisional position that including public aircraft equipment on a wholly optional basis has merit, provided that the clear consensus of the Third Joint Session is that such inclusion does not (1) unduly complicate the treaty instruments, (2) reduce the likelihood of their ratification or (3) delay the process for their finalisation.***

---

<sup>1</sup> The scope of the term “state aircraft” and the implications of its use have been the subject of considerable debate, producing less than complete consensus. *See generally* Secretariat Study on Civil/State Aircraft, *infra* note 3. Thus, we have elected to use a different term, namely, “public aircraft”.

<sup>2</sup> *See* Third Joint Session, *Ad hoc* Drafting Group Report, UNIDROIT CGE/Int.Int/3-WP/2; ICAO Ref. LSC/ME/3-WP/2, app. I (“**Convention**”) and app. II (“**Aircraft Protocol**”).

<sup>3</sup> Most noteworthy in this regard was the excellent study prepared by the Secretariat of the International Civil Aviation Organization (“**I.C.A.O.**”) in 1994. *See* Legal Committee, 29<sup>th</sup> Session, Documentation, LC/29-WP/2-1 (Attachment 1) (1994) (“**Secretariat Study on Civil/State Aircraft**”). After consideration of the Secretariat Study on Civil/State Aircraft, the I.C.A.O. Legal Committee “agreed that it was not necessary to take any action in respect of this matter and that the Council should be advised accordingly.” Legal Committee, 29<sup>th</sup> Session, Report, ICAO Doc. 9630 – LC/189, para. 2:15.

<sup>4</sup> *See also* Parts III and IV(2)(a) *infra*.

Given the tension between traditional policies associated with public aircraft equipment on the one hand and the basic principles underlying the Convention/Aircraft Protocol on the other, we question whether such consensus is possible at this stage. If the Plenary is unable to reach a consensus on this matter, consideration should be given to covering public aircraft equipment in a separate, future protocol.

The primary purpose of this memorandum is to assist the Third Joint Session in making the assessments described in the preceding paragraphs. It will do so - in Part IV - by articulating the issues and possible approaches thereto. Further to sharpen the focus, *Appendix 1* to this memorandum sets out a set of discussion-purpose draft provisions that could be contained in either an opt-in annex to the Aircraft Protocol or in a separate, future protocol, as appropriate.

Part I will provide general background. Part II will summarise the relevant drafting history. Part III will provide a general overview of the treatment of public aircraft in select treaty law.

## I Background

In a number of States, the financing and leasing of certain categories of public aircraft are currently not subject to national commercial laws. Where such transactions are subject to national commercial laws, wide public policy type qualifications are assumed to be applicable, reducing predictability. Even where national laws apply without such qualifications, the issues giving rise to the need for a general mobile equipment Convention (*e.g.*, applicability of rules that are inconsistent with the asset-based financing principles and *lex situs* problems) remain relevant. This is particularly the case since, unlike civil aircraft, public aircraft are not included in relevant international air law instruments, most notably the Geneva Convention.<sup>5</sup>

The problems with the legal framework applicable to the financing of public aircraft are of note given the discernible, if gradual shift in national procurement policies. A few States have implemented, and other States are studying programmes that allow private sector participation in the funding and/or provision of public aircraft.<sup>6</sup>

Including public aircraft equipment within the scope of the Convention/Aircraft Protocol may assist such States in accessing private sources of financing to acquire and lease such equipment.<sup>7</sup>

---

<sup>5</sup> Convention on the International Recognition of Rights in Aircraft, opened for signature 19 June 1948, 310 U.N.T.S. 151 (“**Geneva Convention**”).

<sup>6</sup> See, *e.g.*, Information on the Private Finance Initiative [PFI] in the United Kingdom. PFI Guidelines for Ministry of Defence [MoD], available on the internet at [www.mod.uk/commercial/pfi/guidelines/content.html](http://www.mod.uk/commercial/pfi/guidelines/content.html). This programme “is a procurement approach, based upon a set of principles and techniques, aimed at determining the feasibility and cost effectiveness of allowing the private sector to provide the MoD with certain capabilities and services.” *Id.* para. 1.5. “It differs from other initiatives in that the private sector is required to invest in, manage and operate any capital asset(s) necessary to deliver the service.” *Id.* para. 1.7. The guidelines note that a benefit of the programme is “encouraging a wider range of potential providers to compete for MoD business across a range of activities, thus benefiting from the latest commercial techniques.” *Id.* para. 1.15. An example of a programme contemplated under the PFI is the Future Strategic Tanker Aircraft project. This project seeks “the private sector to provide an air-to-air refuelling service for the RAF . . . [and to] design, supply, manage, operate and fund a service to replace the RAF’s existing air tanker fleet.” “Bidders Sought for Ground-Breaking Air Tanker Private Finance Deal,” Press Release, 13 Sept. 1999, available on the internet at [www.mod.uk/news/prs/333\\_99.htm](http://www.mod.uk/news/prs/333_99.htm).

<sup>7</sup> As the Economic Impact Assessment of the Convention/Aircraft Protocol did not include public aircraft equipment in its analysis, this statement is based on anecdotal evidence and general principles, rather than hard data.

The extent to which it does so would largely depend on the particulars of the special rules needed to address the traditional policies associated with public aircraft.<sup>8</sup>

## II Relevant Drafting History

The current draft of the Aircraft Protocol excludes certain public aircraft equipment. The definitions of “aircraft engines”, “airframes” and “helicopters”, all “aircraft objects”, contain bracketed language exempting “those [aircraft objects] used in military, customs or police services.”<sup>9</sup> At the Second Joint Session, the issue was raised as to whether the Aircraft Protocol should apply to “State” aircraft, with an opt-out reservation procedure available.<sup>10</sup>

The Plenary asked the Drafting Group to address the matter of public aircraft. That group, however, thought the relevant issues were of a policy nature, and, thus, outside its terms of reference. Footnote 2 to the Aircraft Protocol reflects that conclusion. It also notes that the Aviation Working Group would submit this memorandum as a means of facilitating this policy discussion.<sup>11</sup>

## III Treatment of Public Aircraft in Select Treaty Law

Public aircraft are generally excluded from the scope of the leading international aviation treaties affecting, or otherwise relevant to the financing of aircraft equipment. Under such treaties, the test to determine whether an aircraft is a civil or a public/state aircraft is based on its function or service.<sup>12</sup> While questions remain as to the range of “public/state” functions, it is reasonably clear that aircraft involved in military, police or customs services fall in that category.

The Geneva Convention, the instrument of greatest relevance, states that it “shall not apply to aircraft used in military, customs or police services.”<sup>13</sup> The bracketed language in the Aircraft Protocol definitions was inspired by, and thus tracks the Geneva Convention. In discussing this definition, the Secretariat Study on Civil/State Aircraft noted that “the clear implication is that all aircraft not so used would be subject to the provisions of the [Geneva Convention].”<sup>14</sup>

---

<sup>8</sup> See Part IV *infra* and Appendix 1.

<sup>9</sup> Aircraft Protocol, *supra* note 2, art. I(2)(b), (c) and (l).

<sup>10</sup> See Second Joint Session, Report, ICAO Ref. LSC/ME/2-Report; UNIDROIT CGE/Int.Int./2-Report, para. 5:3. See also *supra* note 1 regarding use of the term “public aircraft” instead of “state aircraft”.

<sup>11</sup> This footnote provides:

At the second Joint Session Plenary [it was] noted that the question whether there should be an opt-in or opt-out for all or certain categories of State aircraft (in particular, those used in military, customs or police services) was a policy question. The Drafting Group noted that, in the event that such categories of State aircraft are included in the preliminary draft Aircraft Protocol, specific rules will be required dealing with the manner in which such aircraft are to be identified and registered and with issues particular to priorities and enforcement. The Drafting Group noted that a paper would be submitted by the Aviation Working Group to the third Joint Session with specific proposals on this subject.

Aircraft Protocol, *supra* note 2, n. 2.

<sup>12</sup> “The usage of the aircraft in question is the determining criterion, and not, by themselves, other factors such as aircraft registration and markings, call sign used, ownership (public or private), type of operator (private/state), except insofar as these criteria go towards showing the type of usage.” Secretariat Study on Civil/State Aircraft, *supra* note 3, para. 1.3.

<sup>13</sup> Geneva Convention, *supra* note 5, art. XIII.

<sup>14</sup> Secretariat Study on Civil/State Aircraft, *supra* note 3, para. 3.1.

Article 3(a) of the Chicago Convention provides that it is not applicable to “state aircraft”.<sup>15</sup> Article 3(b) deems “[a]ircraft used in military, customs and police services” to be state aircraft. It does not, however, address the question of whether other aircraft may be state aircraft.<sup>16</sup>

The one other aviation Convention tangentially related to the commercial financing and leasing of aircraft takes a somewhat different approach, explainable by reference to the practices and theories relevant at the time of its elaboration.<sup>17</sup>

In sum, relevant precedent suggests that the established Geneva Convention wording, which has been employed in subsequent air law instruments,<sup>18</sup> is the prudent starting point in any discussion of public aircraft in the context of the Aircraft Protocol.

#### IV Issues Raised by Including Public Aircraft Objects

The inclusion of public aircraft should *not necessitate any changes to the general framework or rules relating to the creation, perfection or priority*<sup>19</sup> of international interests. The Joint Session would, however, need to consider the following three items. First, is the opt-out or the opt-in approach preferable? Secondly, what technical drafting changes to the Aircraft Protocol would be required? Thirdly, and most difficult, are special rules necessary in the context of the exercise of remedies against public aircraft equipment?

##### 1. *Opt-Out vs. Opt-In*

States could be given the option, through use of an opt-in or an opt-out mechanism, to include within the scope of the Convention/Aircraft Protocol one or more categories of their public aircraft equipment. This approach would be consistent with the way in which the texts currently address other matters with high public policy content.

As between these two mechanisms, the opt-out approach, which the Convention/Aircraft Protocol currently employs, would be easier from drafting and implementation perspectives. The

---

<sup>15</sup> Convention on International Civil Aviation, opened for signature 7 December 1944, 15 U.N.T.S. 295; ICAO Doc. 7300/6 (“**Chicago Convention**”).

<sup>16</sup> “Aircraft used in military, customs and police services are deemed to be state aircraft, but the Article [3 of the Chicago Convention] does not say whether aircraft used in other governmental services can be so deemed. Services which are often undertaken to fulfil a sovereign function includes transportation of heads of States and governments, the transportation of diplomatic personnel and other governmental officers, humanitarian assistance, postal services, meteorological services, agricultural services and fire-fighting.” Secretariat Study on Civil/State Aircraft, *supra* note 3, para. 1.4(b). The Study’s conclusion stated that “[i]t is submitted that a proper interpretation of Article 3 (b) would show that no aircraft used in military, customs or police services should be considered to be civilian under the [Chicago] Convention. Conversely, all aircraft used in other than the specified government services should be so regarded.” *Id.* para 7.1.

<sup>17</sup> That Convention exempts from precautionary attachment “aircraft exclusively appropriated to a state service, including the postal service, but excluding commercial service...”. Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, opened for signature 29 May 1933, 192 L.N.T.S. 289, art. 3(1)(a). (“**Rome Convention**”). Interestingly, the Rome Convention’s restrictions do not apply to a “breach of customs, penal or police regulations.” *Id.* art. 7.

<sup>18</sup> See Secretariat Study on Civil/State Aircraft, *supra* note 3, paras. 3.1 & 3.2 (discussing similar language in other international air law instruments).

<sup>19</sup> This points assumes that the final definition of “non-consensual right or interest” will be broad enough to cover these types of interest in the context of public aircraft. *Cf.* Convention, *supra* note 2, art. I(v).

applicable definitions would not exclude public aircraft equipment.<sup>20</sup> Article XXX of the Aircraft Protocol could then be amended to allow States to enter a reservation for public aircraft equipment, wholly or in part.

The disadvantages of the opt-out approach, however, demonstrate the benefits of the opt-in method. The sensitivity concerning any international regulation of public aircraft objects, particularly rules that include substantive remedies (such as repossession and sale), may make it difficult for States to adopt the treaty, even if a reservation is permitted. Instead, States may be more comfortable with a treaty that would require an affirmative declaration to include public aircraft objects.<sup>21</sup> For States that opt in to these provisions, the rules of the Convention/Aircraft Protocol will apply to its public aircraft equipment, if located in any Contracting State. Conversely, the public aircraft equipment of States not opting-in would fall outside the treaty.

## 2. *Drafting and Technical Matters*

### (a) *Definitions*

As recommended above, when defining “public aircraft object,” the functionality test should be employed. Except as noted below, the use of identical or substantially similar language to that contained in Article XIII of the Geneva Convention (and Article 3(b) of the Chicago Convention) to describe the categories of public aircraft objects is suggested.

To enhance the prospect of its commercial acceptability, the Convention/Aircraft Protocol should treat public aircraft engines separately, as is the case with their civil counterparts under the treaty. Similarly, the Convention/Aircraft Protocol's approach of expressly including the parts, manuals and accessories should also be followed.<sup>22</sup> The language for airframes, aircraft engines and helicopters contained in the current text would likely be sufficient.<sup>23</sup> The logic of having a size limit for civil aircraft would not, however, apply to public aircraft.

### (b) *Search Criteria*

Our preliminary analysis shows that use of the manufacturer's serial number [MSN] as the search criterion for public aircraft objects is feasible. Because systems of MSNs may differ, a

---

<sup>20</sup> In fact, the definitions of “airframes” and “helicopters” would need to be expanded, in the context of public aircraft, by deleting the noted type certification requirements.

<sup>21</sup> Such a clause could read as follows:

Article XXX *bis*

*Optional provisions on public aircraft objects*

1. – A Contracting State, at the time of ratification, acceptance, approval of, or accession to this Protocol may declare that it will apply the provisions contained in Annex I, wholly or in part.

2. – The declaration referred to in the preceding paragraph shall include a listing of which categories of public aircraft object, as defined therein, shall be subject to the declaration.

3. – The provisions subject to such declarations described in the preceding paragraphs shall constitute an integral part of this Protocol for the declaring Contracting State and shall be binding on it, without the need for a reciprocal declaration by any other Contracting States.

Note that the Aviation Working Group, at the Second Joint Session, proposed switching to an opt-in mechanism for all provisions that raise significant public policy concerns.

<sup>22</sup> See section IV(3), *infra*, for a discussion on the treatment of sensitive accessories to public aircraft objects in the context of the exercise of remedies.

<sup>23</sup> See Appendix 1.

concept similar to that contained in Article XIX(1) of the Aircraft Protocol is essential. This provision states that the MSN may be supplemented by the regulations, as necessary, to ensure uniqueness of the MSN.

*(c) Description of the Public Aircraft Object*

Article VII of the Aircraft Protocol provides that “[a] description of an aircraft object that contains its manufacturer’s serial number, the name of the manufacturer and its model designation is necessary and sufficient to identify the object for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.” This provision would also be appropriate for public aircraft objects.

*3. Policy Matters Associated with Remedies*

The Joint Session must determine the extent to which the remedies provisions should be modified or qualified in the context of public aircraft objects. Any such modifications or qualifications should be minimal and circumscribed in order to ensure and maintain predictability. Creditors will factor such exceptions into their risk assessments and pricing.

*(a) Enforcement of Remedies*

Public aircraft objects may contain strategic or otherwise sensitive materials and/or equipment (e.g., codes, radar and tracking systems, weapons, etc.) that States would be unwilling to turn over to creditors. One way to address this issue is (a) to exclude such materials from the relevant definitions (so that no security interest therein is actually given) and (b) to insert a *special procedure for enforcement of remedies in the context of public aircraft objects*.<sup>24</sup>

During a specified period after the creditor gives notice of default, the debtor would have the right to remove the strategic materials installed on the public aircraft object or contained in its records. The debtor would be obliged (1) during that period, to preserve the public aircraft object and its value and (2) at the end of that period, to facilitate the exercise of remedies by the creditor.

*(b) Suspension of the Remedies Provisions during a Declared National Emergency*

A second policy concern would involve the situation faced in the context of a declared *national emergency*. In such circumstances, the debtor may require the public aircraft object to perform emergency duties without the possibility of the asset being repossessed during the crisis.

Taking this issue into account, consideration should be given to including a rule allowing the *temporary suspension* of the remedies provisions during a declared national emergency that necessitates the use of the particular public aircraft object. As a commercial counterweight, such a rule should require the debtor to provide the creditor with *alternative security* reasonably acceptable to the creditor during the suspension period. The text could also include a safe harbour: an independent guarantee or a standby letter of credit issued by an acceptable financial institution (in another State) in the amount of the appraised value of the public aircraft object.

---

<sup>24</sup> This procedure would override the Convention/Aircraft Protocol to the extent of any inconsistency. See e.g., Convention, *supra* note 2, articles 12, 14 and Y.

*(c) Recognition of National Laws on Export Restrictions*

The Convention/Aircraft Protocol allows a creditor to repossess an aircraft object and either sell or lease it to a third party. The treaty instruments also permit the export of the aircraft object. The national laws of some States, however, restrict the sale and export of public aircraft objects manufactured in their territory. These remedies may thus raise public policy concerns.

Taking into consideration the above issue, the treaty could contain a clause stating that “nothing in this Protocol shall affect any national laws of the State of original manufacture or export that restrict the sales or exports of public aircraft objects.” Clearly, that clause would not apply to the State of the debtor, the defaulting party.





**ANNEX I TO THE PROTOCOL TO THE [UNIDROIT] CONVENTION ON  
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO  
AIRCRAFT EQUIPMENT\***

**PUBLIC AIRCRAFT OBJECTS**

Article I  
*Definitions*

The following terms are employed in this Protocol with the meanings set out below:

- (a) “declared national emergency” means a national emergency publicly declared by the debtor's State;
- (b) “public aircraft” means public airframes with public aircraft engines installed thereon or public helicopters;
- (c) “public aircraft engines” means aircraft engines used in military, customs or police services powered by jet propulsion or turbine technology together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto, with the exception of strategic materials;
- (d) “public aircraft objects” means public airframes, public aircraft engines and public helicopters;
- (e) “public airframes” means airframes used in military, customs or police services, together with all modules and other installed, incorporated or attached accessories, parts and equipment (other than public aircraft engines) and all data, manuals and records relating thereto, with the exception of strategic materials;
- (f) “public helicopters” means heavier-than-air machines used in military, customs or police services supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto, with the exception of strategic materials;
- (g) “strategic materials” means any information or materials installed, incorporated or attached on a public aircraft object deemed by a State to be of strategic importance in carrying out its sovereign functions.

Article II

*Non-applicability of certain remedies provisions*

- 1.— The provisions of Article 14 of the Convention shall not apply to public aircraft objects.

---

\* As noted in the Introduction to the base memorandum, tension exists between traditional policies associated with public aircraft equipment on the one hand and the basic principles underlying the Convention/Aircraft Protocol on the other. We therefore question whether consensus on the issue of including public aircraft in the Aircraft Protocol as an opt-in annex is possible at this stage. A second alternative that the Plenary may wish to consider is having a separate, future protocol for public aircraft equipment.

2. – Articles IX(1)(b) and XIII of this Protocol shall not apply to any public aircraft which is not registered in a national registry authority.

### Article III

#### *Special procedures for exercising remedies involving public aircraft objects*

1. – Upon the occurrence of an event of default, the creditor may give notice of such default to the debtor.

2. – The debtor shall have [ . . ] calendar days from the date on which it receives notice under the preceding paragraph to remove any strategic materials from the public aircraft object. During that period, the debtor shall preserve the public aircraft object and maintain it and its value in accordance with the agreement.

3. – At the end of the period specified in the preceding paragraph, the debtor shall, unless all defaults have been cured, give possession of the public aircraft object to the creditor and cooperate with the creditor's exercise of other remedies under the Convention.

### Article IV

#### *Recognition of national laws on export restrictions*

Nothing in the Convention, this Protocol or this Annex shall affect any national laws of the State of original manufacture or export that restrict the sales or exports of public aircraft objects.

### Article V

#### *Declared national emergency*

1. – During the pendency of a declared national emergency necessitating the actual use of the public aircraft object, subject to paragraph 2, the remedies otherwise available under provisions of the Convention shall be suspended.

2. – During the period referred to in the preceding paragraph, the debtor shall provide the creditor with alternative security or credit support reasonably acceptable to the creditor. Such alternative security or credit support may be realised by the creditor during the suspension period.

3. – For the purposes of the preceding paragraph, and without limiting other types of security, an independent guarantee or a standby letter of credit issued by a financial institution acceptable to the creditor in the amount of the appraised value of the public aircraft object shall be deemed acceptable alternative security.