



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

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

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PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

and

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

POSITION PAPER

on

INSOLVENCY-RELATED PROVISIONS

(submitted by Mr Neil Cooper, President, INSOL International)

Introduction

INSOL International participated in the deliberations of an informal working group, which met in Rome (1-2 July 1999) to consider the insolvency-related provisions of the preliminary draft Convention/Protocol. It is understood that a report on the deliberations of that meeting will be made available for consideration at the second Joint Session of UNIDROIT and ICAO in Montreal (24 August – 3 September 1999). INSOL would like to record some of its views on the subject through this position paper for the benefit of participants at the Montreal meeting.

INSOL was established in 1982 as an international representative body of national associations of professional persons who specialise in the practice of insolvency law. It represents 26 member associations and has some 7300 members spread over 67 countries. INSOL has a leading role in international insolvency and related credit issues. Its principal aims are to facilitate the exchange of information and ideas and to encourage greater international co-operation and communication amongst the insolvency profession, credit

community and related constituencies. Consistent with that, INSOL has, amongst other things, participated with UNCITRAL in the development and promotion of the UNCITRAL Model Law on Cross-Border Insolvency.

The proposed Convention on International Interests in Mobile Equipment and the more specific Protocol relating to aircraft equipment are of particular interest to INSOL. It is a significant initiative which involves a consideration of important issues relating to credit financing, international recognition and enforcement of security and other like interests in mobile equipment and proposed provisions that are directly relevant to the application and practice of national insolvency laws and the international application of those laws.

INSOL therefore welcomes the opportunity to participate as an observer body in the development of the proposed Convention and Protocol.

Insolvency-related provisions of the preliminary draft Convention

These are contained in Articles 27, 28, 35 and 38.

Article 27 is concerned with establishing rules of priority between competing security and other like interests in mobile equipment. The priority “system” is largely registration-based. The only observation that INSOL would wish to make is in relation to a proposal to possibly amend this article (see footnote 10) and to require notification on the register of the insolvency administration of a relevant chargor/purchaser/lessee. The view of INSOL is that if this proposal was adopted it would create considerable difficulty for and place an unnecessary burden on an insolvency trustee/administrator. The proposed registration system of security and other like interests is based on the identity of the equipment rather than by reference to the identity of the relevant chargor/purchaser/lessee of the equipment. It would be an unnecessarily onerous task to require that an insolvency trustee/administrator should have to search equipment-based registers and it is questionable whether any real benefit would result from the notification of an insolvency administration on the register.

Article 28 seeks to establish a rule of recognition, based on form and registration, which would, in effect, bind an insolvency trustee/administrator of an insolvent chargor/purchaser/lessee. INSOL understands, however, that this rule does not seek to conclusively determine rights of enforcement so that, for example, the application of domestic insolvency (or other related) laws relating to such things as priority between creditors (wage earners, revenue claims and the like), the avoidance of transactions (fraudulent transfers, preferences, transactions at an under value) and other insolvency-related procedural rules would not be displaced. If that is so, then it is the view of INSOL that the Article should make this fundamentally certain and should not be left to such statements of intention as may be expressed in commentaries or explanatory memoranda which may be published in connection with the Convention.

Additionally, INSOL is of the view that some terms and their definitions presently used in Article 28 (such as “bankruptcy”, “commencement of bankruptcy” and “trustee in bankruptcy”) might be improved. INSOL suggests that like terms and definitions as contained in the UNCITRAL Model Law on Cross-Border Insolvency might be conveniently adopted for this purpose.

Article 35 is concerned with recognition relating to assigned interests in security and other like interests. In that respect it is similar to Article 28 and subject to the comments mentioned above.

Article 38 deals with non-consensual rights or interests and their relationship with other interests in mobile equipment. Having regard to the comments made in relation to Articles 28 and 35, it is suggested that this article might need some drafting changes.

Insolvency-related provisions of the preliminary draft Protocol

These comprise Articles X, XI and XII. Although a number of specific comments, largely of a drafting nature, might be made on these Articles, it seems more appropriate, at this early stage in the development of the future Protocol, to make some observations of a general “policy” nature.

The broad thrust of these provisions (particularly Article XI) is to create a limited moratorium on the enforcement of international recognised security and other like interests in airline equipment in the event that the grantor of such an interest becomes insolvent. Some inevitable tension between the application of the moratorium provisions of a typical domestic insolvency corporate rescue or reorganisation process and the application of the moratorium provisions of the proposed Protocol appears likely to be aroused.

INSOL believes that the concept of corporate rescue/reorganisation is vitally important for all those affected by the insolvency of a corporate debtor, including the providers of finance. There is little doubt that reorganisation, where it is possible, offers the prospect of a far better economic result and benefits to all classes of creditor. The success of reorganisation regimes is very much dependent on maintaining a sensible commercial balance between, in particular, the enforcement rights of secured and other like creditors, the interests of other creditors and the interests of the debtor. In large part this “balance” has been achieved by the creation of moratorium-type provisions within reorganisation insolvency law regimes which, although they vary considerably throughout the world, generally impose common rules upon secured creditors and do not discriminate between creditors in that class. As a result, INSOL would normally counsel against special rules for a particular group of secured creditors.

INSOL was initially concerned that the provisions of the proposed Protocol would have the overall effect of disturbing the integrity of domestic insolvency law regimes. This might be particularly so in relation to the corporate rescue/reorganisation aspects of such regimes and their moratorium provisions which, in many cases, might be more restrictive than those which are proposed in the preliminary draft Protocol. INSOL considered that the proposed provisions would create a special regime that would give advantages to secured aircraft equipment creditors as compared with other secured creditors. This might have the effect of reducing the prospect of a successful reorganisation of an insolvent airline because secured aircraft equipment creditors may have greater rights and powers (and, consequently, greater bargaining power) than other secured creditors.

In some respects that concern is reduced when one considers that an adopting State may exclude the insolvency-related provisions of the preliminary draft Protocol from operation. This, coupled with the fact that the insolvency-related provisions are intended to “follow the assets”, may produce a satisfactory result for those States that do not wish to disturb the integrity of their national insolvency law regimes. This might be best demonstrated by reference to an example.

Suppose an airline company is incorporated in, has its centre of main business located in and otherwise operates out of country A. Country A adopts the Convention and the Protocol but excludes the insolvency-related provisions of the Protocol. The airline becomes insolvent

and is subject to a rescue/reorganisation process under the domestic insolvency law of country A. Clearly, the insolvency-related provisions of the Protocol do not in any way operate in respect of security or other like interests in respect of the aircraft equipment of the airline which is situated in country A. Thus the integrity of the insolvency law regime of country A is preserved in relation to that equipment. But what of equipment and security interests in relation to that equipment which is situated in other countries? Suppose this other equipment is in country B which has adopted the Convention and Protocol, including the insolvency-related provisions of the latter.

As understood by INSOL, the combination of the facts that:

- country A opted out of the insolvency-related provisions;
- country A is the centre of business for the airline company; and
- the insolvency administration of the airline company is taking place in country A,

means that the insolvency-related provisions of the Protocol would not apply to security interests in the aircraft equipment of the airline company, no matter where that equipment might be located.

It would also seem to follow that, if the position was that country A had not opted out of the insolvency-related provisions in adopting the Convention and the Protocol and country B had opted out, the insolvency-related provisions would apply to international recognised security interests in the aircraft equipment of the airline, wherever that equipment might be located.

If the understanding of INSOL is correct, then it may alter views on the overall policy issue outlined earlier. Once understood and properly tested by reference to the application of conflicts rules and other relevant rules of private international law, a more relaxed view of the insolvency-related provisions might be possible. Insol observes, however, that an “opt in /out” structure makes for less commercial certainty.