



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 by the Secretariat of UNCITRAL)

General comments

1. The Secretariat of the United Nations Commission on International Trade Law (“UNCITRAL”) compliments the joint UNIDROIT/ICAO group of governmental experts for the work achieved so far. Like the draft Convention on Assignment of Receivables currently being prepared by UNCITRAL (“the UNCITRAL draft Convention”), the draft Convention being prepared by the joint group (“the draft Convention”) should increase the availability of lower-cost credit.

2. In order to promote legal certainty and uniformity and to avoid conflicts, we would suggest that efforts be made to ensure the highest possible consistency between the draft Convention and the UNCITRAL draft Convention. As to issues with respect to which a different approach might need to be taken in the draft Convention, we would suggest that the reasons be clarified and explicitly stated.

3. The combination of the draft Convention with protocols (most notably, the draft Aircraft Protocol) makes the reading and understanding of those texts particularly difficult. Pending final determination of the issue of the structure of the final texts, the joint group may wish to consider creating a single text, at least, as a conference room paper.

Re relationship with the UNCITRAL draft Convention

4. At its thirty-first session (Vienna, 11-22 October 1999), the UNCITRAL Working Group on International Contract Practices “generally felt that it did not have the specific information necessary to make a decision for a blanket exclusion of aircraft and spacecraft receivables from the scope of the [UNCITRAL] draft Convention” (A/CN.9/466, para. 81). The Working Group decided to leave the matter to Article 36, dealing with conflicts with other Conventions, under which the UNCITRAL draft Convention would not prevail over an international Convention dealing with matters governed by the UNCITRAL draft Convention (*ibid*, paras. 86 and 211). At its next session (New York, 12 June to 7 July 2000), the Commission is expected to review the decision of the Working Group.

Re scope of the draft Convention

5. In the absence of a list of mobile equipment to be covered, the scope of the draft Convention appears to be open-ended. While we appreciate that the draft Convention would apply only to a type of equipment on which a Protocol has been prepared and entered into force, for the sake of clarity, we would suggest that the list contained in a previous version of the draft Convention be reintroduced, without the reference to “any uniquely identifiable equipment”. Such an approach could reduce the potential for conflicts with the UNCITRAL draft Convention by ensuring that the assignment of receivables arising from the sale or lease of other than certain high-value mobile equipment is not covered in the draft Convention.

Re internationality of interest

6. The draft Convention refers to an “international interest”, although there is no need for such an interest to be connected with more than one State (Articles 1 (q) and 2). In addition, the draft Convention gives priority to a registered “international interest” over a “domestic interest”, which may not be registered (with the exception of the non-consensual rights preserved by way of a declaration; Articles 23, 37 and 38). As a result, any lender would need to ensure that its interest is covered by the draft Convention and is registrable under the draft Convention. This result would need to be made clearer, perhaps by referring to an “interest” rather than to an “international interest”. Such an approach would facilitate the understanding of the interplay between the draft Convention and domestic law.

Re Chapter IX

7. Chapter IX is intended to apply to the assignment of an “international interest”, as well as to an assignment of the secured payment obligation (“the principal obligation”), income arising from the lease of mobile equipment and any other related non-monetary performance rights (e.g. maintenance and service rights). With respect to the assignment of the principal obligation and rentals, Chapter IX creates a potential for conflict with the UNCITRAL draft Convention. Such conflicts could arise mainly since, unlike the draft Convention (Articles 31 and 33), the UNCITRAL draft Convention, with the exception of the assignment of certain non-trade receivables, does not require that the debtor consent to the assignment and, most importantly, refers priority issues to the law of the assignor’s location. However, no such conflict would arise if the exception made in the UNCITRAL draft Convention as to other than trade receivables were extended to receivables arising from the sale or lease of certain types of mobile equipment. In addition, with respect to priority issues, the two texts would be compatible with each other, at least, to the extent that, if the assignor is located in a State party to the draft Convention, the priority rules of the draft Convention would apply under the UNCITRAL draft Convention. Conflicts could not arise either with respect to the assignment of an “international interest” (if it were not to affect the principal obligation) or of non-monetary performance rights, since the UNCITRAL draft Convention is intended to apply only to contractual payment rights.

8. However, in treating the “international interest” as an independent right and the principal obligation as an accessory right following the “international interest”, Chapter IX appears to be incompatible with fundamental notions of law in several legal systems and international texts (including Article 7 of the UNIDROIT Convention on International Factoring and Article 12 of the UNCITRAL draft Convention on Assignment of Receivables). Normally, an assignment of a loan secured by a security or other supporting right would entail the transfer of that right (automatically,

if it is an accessory right, or with a new act of transfer if it is an independent right). Under Article 12 (5) of the UNCITRAL draft Convention, such a transfer would be without prejudice to any form or registration requirements in relation to the security right. With regard to rentals, the concept of Chapter IX may be more compatible with current law to the extent that the buyer of a leased object would normally have a right in the rentals (but the person with a secured right in the leased object may not have the same rights).

9. In addition, as a practical matter, treating the principal obligation as a kind of an accessory right, mainly in order to subject conflicts of priority with respect to the principal obligation to registration under the draft Convention, does not appear to be necessary or appropriate. If the “international interest” were formulated as an accessory right, it could not be transferred without the principal obligation and the conflict envisaged in Article 34 could not arise. In addition, to the extent that the assignee of the principal obligation has no way of knowing that an “international interest” exists, the result of Article 34 would be unfair. If, however, the assignee of the principal obligation has a way to discover that such an “international interest” exists, it would not accept an assignment of the principal obligation without the “international interest” and a conflict such as the one envisaged in Article 34 would not arise. Moreover, if the result of Article 34 is in line with normal practice, the matter could be left to parties to negotiate in the context of financing and subordination agreements.

10. The effects of the application of Chapter IX and, in particular, of Article 34, with respect to an assignment of the principal obligation may be better understood by way of the following example. Assignor assigns to assignee 1 a receivable evidenced by a non-negotiable promissory note and secured by an “international interest”. Assignee 1 takes possession of the promissory note. Assignor then assigns the promissory note to Assignee 2 as security. Assignee 2 does not take possession of the note but receives an assignment of the “international interest” on the books of the registry envisaged in the draft Convention. Assignor and the person obliged on the note default. Normally, the assignee on record would have the right to foreclose on the “international interest”. Under law currently existing in many legal systems, assignee 1 would have priority with respect to the proceeds of payment. The draft Convention would give priority to assignee 2. If the UNCITRAL draft Convention were applicable, this conflict of priority would be referred to the law of the assignor’s location (including the draft Convention if the assignor is located in a State party to the draft Convention).

Re Article 31

11. Article 31(1) provides that, upon notification, the debtor has a duty to pay the assignee. It is implied that the notification in itself does not trigger the payment obligation. This result should be stated explicitly either by making payment subject to the contract or by referring to the change, resulting from a notification, in the way the debtor may be discharged rather than to the payment obligation.

Re Articles XVI to XIX of the draft Aircraft Protocol

12. As a matter of principle, we welcome the specificity introduced by Articles XVI to XIX of the draft Aircraft Protocol with regard to the Supervisory Authority, the Registrar, the regulations and the costs of establishing and operating the system. In particular, from the point of view of a State without previous experience of such a notice-filing, priority-oriented system, issues of cost and efficiency would be crucial in determining the acceptability of such a system.