



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

ICAO Ref. LSC/ME/2-WP/10
UNIDROIT CGE/Int.Int./2-WP/10
(Original: English)

JOINT SESSION OF THE 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, AND THE SUB-COMMITTEE OF THE ICAO LEGAL COMMITTEE ON THE STUDY OF INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (AIRCRAFT EQUIPMENT)

INFORMAL INSOLVENCY WORKING GROUP

(Rome, 1 / 2 July 1999):

REPORT

(by the UNIDROIT Secretariat)

I. INTRODUCTION

1. – Pursuant to the decision taken by the first Joint Session (cf. UNIDROIT CGE / Int.Int./Report / ICAO Ref. LSC/ME-Report, § 143), an Informal Insolvency Working Group was convened by the UNIDROIT and ICAO Secretariats in Rome on 1 and 2 July 1999 . The essential purpose of this Working Group was to consider the insolvency-related provisions of the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as *the preliminary draft Convention*) and the preliminary draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as *the preliminary draft Aircraft Protocol*) from the angle of their relationship with existing international instruments on insolvency and insolvency assistance and national law rules pertaining to transnational insolvency.

2. – In determining which States should be invited to participate in this Working Group, the UNIDROIT and ICAO Secretariats had regard essentially to the delegations that had manifested particular interest in the deliberations of the first Joint Session regarding the insolvency-related provisions of the preliminary draft Convention and the preliminary draft

Aircraft Protocol. The following States were invited to participate in the Working Group: France, Germany, Japan, Mexico, Netherlands, Singapore, United Kingdom, United States of America. The following intergovernmental Organisations were invited to attend the meeting of the Working Group as observers: Commission of the European Union, Hague Conference on Private International Law, United Nations Commission on International Trade Law (UNCITRAL). The following international non-governmental Organisations were also invited to attend its meeting as observers: International Bar Association (I.B.A.), International Federation of Insolvency Practitioners (Insol International). In accordance with the decision taken by the first Joint Session (cf. UNIDROIT CGE / Int.Int./Report / ICAO Ref.LSC/ME-Report, § 9), the following international non-governmental Organisations were invited to attend the meeting as advisers: Aviation Working Group (A.W.G.), International Air Transport Association.

3. – The meeting of the Informal Insolvency Working Group was opened at the seat of UNIDROIT in Rome on 1 July 1999 at 9.35 a.m. by Mr H. Kronke, Secretary-General of UNIDROIT. In opening the meeting, Mr Kronke reminded those attending that its task was to review the insolvency-related provisions of the preliminary draft Convention and the preliminary draft Aircraft Protocol with a view to seeking to formulate recommendations on these provisions for the attention of the second Joint Session. He stressed that it was not for the Working Group to seek to redraft any of the existing insolvency-related provisions. On a proposal by the representative of Germany, speaking on behalf of the Council of Ministers of the European Union, Ms C.R. Allen (United Kingdom) was elected Chairman.

4. – The meeting was attended by the following representatives of States, observers and advisers:

MEMBERS OF THE WORKING GROUP

FRANCE

Mr Jean-Luc VALLENS, Judge on secondment from the *Cour d'Appel de Colmar*; Chairman, *Groupement pour l'Informatisation du Livre Foncier d'Alsace et de Moselle* (GILFAM), Colmar

Ms Dominique LARROCHE, Sub-Directorate for Legal Affairs, Directorate-General of Civil Aviation, Ministry of Equipment, Transport and Housing, Issy-les-Moulineaux

Ms Christine ALLAIRE, on secondment to the Sub-Directorate for Legal Affairs, Directorate-General of Civil Aviation, Ministry of Equipment, Transport and Housing, from IFURTA, Issy-les-Moulineaux

GERMANY

Mr Klaus WIMMER, Head of Section, Office RB 5, Federal Ministry of Justice, Berlin

JAPAN	Mr Susumu MASUDA, Attorney-at Law, Mori Sogo Law Offices, Tokyo
NETHERLANDS	Mr André J. BERENDS, Legal Adviser, Legislation Department, Ministry of Justice, The Hague
UNITED KINGDOM	Ms Catherine R. ALLEN, Head, Business Law Unit, Department of Trade & Industry, London; <i>Chairman of the Working Group</i> Mr Bryan J. WELCH, Legal Director, Department of Trade and Industry, London Mr Clifford CALLAGHAN, Policy Advisor, Insolvency Service, Department of Trade and Industry, London Mr Nicholas T. BRAINSBY, Policy Advisor, Insolvency Service, Department of Trade and Industry, London
UNITED STATES OF AMERICA	Mr Robert A. MORIN, Vice-President, Aircraft Finance Division, Export-Import Bank of the United States of America, Washington, D.C.

OBSERVERS

INTERNATIONAL BAR ASSOCIATION	Ms Lisa CURRAN, Attorney, Ughi & Nunziante, Rome; <i>Co-chairman, Sub-committee E 8 of the Section on Business Law (Financing Transactions)</i>
INSOL INTERNATIONAL	Mr Ronald W. HARMER, Consultant, Blake Dawson Waldren, Solicitors, London; <i>Chairman, International Accreditation</i>

ADVISERS

AVIATION WORKING GROUP	Mr Jeffrey WOOL, Partner, Perkins Coie, Washington, D.C.; <i>Co-ordinator, Aviation Working Group</i> Mr Claude POULAIN, Deputy Finance Vice-President, SNECMA, Paris
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5. – The Working Group adopted the draft agenda (reproduced as an Appendix to this Report).

6. – The Working Group was seised of the following materials:

- (1) Draft agenda (I.I.W.G. / Agenda);
- (2) First Joint Session (Rome, 1-12 February 1999): Report (UNIDROIT CGE/Int.Int./Report ICAO Ref. LSC/ME-Report);
- (3) Preliminary observations (submitted by Mr Susumu Masuda) I.I.W.G. /WP/1;
- (4) Insolvency-related provisions of the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment and of the preliminary draft Protocol on Matters specific to Aircraft Equipment (I.I.W.G. / WP/2);
- (5) Proposal by the delegation of France (I.I.W.G. / WP/3);
- (6) (European Union) Convention on Insolvency Proceedings (Brussels, 23 November 1995);
- (7) European Convention on Certain International Aspects of Bankruptcy (Istanbul, 5 June 1990);
- (8) UNCITRAL Model Law on Cross-Border Insolvency (Vienna, 30 May 1997);
- (9) Effects of the international interest in mobile equipment in insolvency – some comments from a German perspective, by Ms Eva-Maria Kieninger (draft of an article to appear in the forthcoming special issue of the *Uniform Law Review*).

7. – In introducing the business of the session, the *Chairman* proposed that, following an opportunity for the making of general comments, the Working Group should first review, one by one, the insolvency-related provisions of the preliminary draft Convention and the preliminary draft Aircraft Protocol, in particular from the point of view of their compatibility with existing international instruments on insolvency and insolvency assistance (that is, the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy and the UNCITRAL Model Law on Cross-Border Insolvency) and national law rules pertaining to transnational insolvency, and then consider the case for the possible moving of certain of these provisions from one instrument to another, that is as between the preliminary draft Convention and the preliminary draft Aircraft Protocol.

8. – In the event, the shortness of the time available and the complexity of the issues involved meant that the Working Group was only able to complete a review of the insolvency-related provisions of the preliminary draft Convention and some of the insolvency-related provisions of the preliminary draft Aircraft Protocol. In particular, it was not able to begin consideration of Article XII of that text and it recognised that its review of the issues dealt with in Article XI would require to be dealt with in greater depth on the occasion of the second Joint Session. Furthermore, it was not able to consider the case for the moving of certain provisions from one instrument to another. The proposals made by the Working Group for the consideration of the Joint Session have been grouped together hereunder under each of the relevant provisions of the preliminary draft Convention and the

preliminary draft Aircraft Protocol which it had time to consider. It was agreed that the UNIDROIT and ICAO Secretariats should give thought to the most appropriate means of ensuring that the work commenced in Rome be carried forward as a matter of priority during the second Joint Session.

II. REVIEW OF THE INSOLVENCY-RELATED PROVISIONS OF THE PRELIMINARY DRAFT CONVENTION

Re: Article 27

9. – Regarding footnote 10 to Article 27, it was agreed that the burden of registering the date of the commencement of the insolvency should not be imposed on the insolvency administrator, particularly given the asset-based nature of the International Registry.

Re: Article 28

10. – It was noted that Article 28 had the limited intention of ensuring the survival in insolvency proceedings of a duly registered international interest. It in no way sought to establish any priority for the international interest in relation to other interests in the obligor's insolvency. Such questions had been expressly left to be dealt with by national law. The purpose of the article was accordingly limited to ensuring that the trustee in bankruptcy would recognise the international interest in the event of the bankruptcy of the obligor and that the international interest did not simply fall within the pool of claims of the obligor's general creditors.

Re: Article 28(1)

11. – Questions were raised as to the suitability of the term "valid" in the English text to achieve this purpose in Article 28(1). Reference was made to the corresponding word "opposable" employed in the French-language version of this provision. It was suggested that this term might be considered to render the idea which it was intended to convey more accurately than the word "valid". Concern was nevertheless expressed as to the inherent ambiguity of the term "opposable" when used in the context of the registered international interest vis-à-vis, on the one hand, the trustee in bankruptcy and, on the other hand, the general creditors of that party. It was pointed out that use of the word "opposable" would have different meanings depending on whether the trustee in bankruptcy or the general creditors were concerned, that is, it would be enforceable against the former but would have priority over the latter.

12. – In the uncertainty surrounding the precise purport of this provision in the contexts envisaged, it was suggested that one solution might be to replace the words "is valid against" by the words:

"...is to be recognised by the trustee in bankruptcy as if it were an analogous security or title-based interest under national law, if any, and, if not, as a valid proprietary interest in the object".

13. – The Working Group considered the question as to whether or not the term "*commencement of bankruptcy*" should be defined. It was recalled that the essential meaning of this term was to pinpoint the moment at which a creditor's rights were adversely affected. The reason for footnote 14 to this term was that one delegation at the first joint Session had wished to go further and to ensure that a creditor should be able to determine when bankruptcy proceedings should commence. Consideration was given to taking the definition of "*foreign representative*" appearing in Article 2(d) of the aforementioned UNCITRAL Model Law as the basis for a definition of "*commencement of the insolvency*". Attention was also given to Article 2(f) of the aforementioned European Union Convention. It was pointed out that this provision, however, failed to cover the case of an interim appointment of an insolvency administrator.

14. – Given the importance of the need to be clear as to the precise moment up until which it would be possible to register an international interest that would be valid against the insolvency administrator, it was finally agreed to define "*commencement of the insolvency*," along the lines of Article 2(d) of the UNCITRAL Model Law, as follows:

““commencement of the insolvency” means the time at which a person or body, including one appointed on an interim basis, is authorised to administer the reorganisation or the liquidation of the obligor’s assets or affairs”.

15. – In addition, concern was expressed regarding the matter referred to in footnote 15 to Article 28 (1). It was explained that the fact that the rule laid down in Article 28 (1) was not intended to displace any special rules of national law regarding bankruptcy proceedings, preferences and fraudulent conveyances had up until the last session of the UNIDROIT Study Group been spelled out in a specific rule, as a fourth paragraph to Article 28. This paragraph had been deleted on the occasion of the final session of the Study Group on the ground that a similar qualification to the main rule laid down in Article 28(1) was not to be found in the Article of the UNIDROIT Convention on International Financial Leasing (Article 7(1)) on which Article 28(1) had been based.

16. – The Working Group, while sensitive to the desirability of avoiding inconsistency between international treaties dealing with the same subject-matter, nevertheless registered the view that such concerns were outweighed by the need to express the intention of the drafters on this point clearly in the body of the future Convention and not simply in an annotation to Article 28(1) to be included in a future explanatory report.

Re: Article 28(2)(a)

17. – It was agreed that the type of proceedings referred to in Article 28(2) (a) needed to be defined more precisely. It was agreed to adopt the definition of “insolvency proceedings” given in Article 2(a) of the aforementioned UNCITRAL Model Law. Article 28(2)(a) as thus amended would read as follows:

“(a) “insolvency” means a collective judicial or administrative proceeding in a State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the obligor are subject to control or supervision by a court, for the purpose of reorganisation or liquidation.”

Re: Article 28(2)(b)

18. – There was agreement that the term “*trustee in bankruptcy*” employed in Article 28(2)(b) should be replaced by a less Common law-oriented expression. The term “*representative*” employed in the aforementioned UNCITRAL Model Law was rejected as being too broad. The term “*insolvency administrator*” was finally agreed upon as being the most appropriate term to replace “*trustee in bankruptcy*”.

Re: Article 35

19. – It was agreed that Article 35 should be brought into line with the changes that had been agreed to Article 28. Consideration was given to the question as to whether the validity of an assignment of an international interest against the insolvency administrator should be left to be determined by national law, along the lines of Article 14 of the aforementioned European Union Convention. It was agreed that this was a question which would need to be decided by the Joint Session.

Re : Article 38

20. – It was agreed that Article 38 raised major policy issues which would first have to be decided upon by the Joint Session and that it was not therefore worthwhile to consider its insolvency implications at this stage.

III. REVIEW OF THE INSOLVENCY-RELATED PROVISIONS OF THE PRELIMINARY DRAFT AIRCRAFT PROTOCOL

Re: Article X(4)

21. – This paragraph was widely criticised and there was general support for its deletion. It was seen as conferring unduly broad powers on the obligee in the event of the obligor’s insolvency and to be inconsistent both with the principle of the recognition of foreign proceedings on the basis of equality of treatment and with the attitude of Article XI regarding the non-exercisability of remedies within the time prescribed in paragraph 3 of that Article.

Re: Article XI

22. – There was considerable discussion of the merits and demerits of the “opt-out” regimen proposed under Article XI as combined with Article XXX. While there was general recognition of the importance of the principle underlying this rule, namely the need to build in a sufficient element of flexibility which would, on the one hand, enable airlines (in particular, the airlines of countries the banking systems of which were not at present able to meet their capital needs) to attract financing in their own right and, on the other, avoid them going bankrupt, this was tempered by concern on the part of all but one of the Governments present as to the acceptability of such discriminating in favour of one sectoral interest group in the insolvency context, considered moreover to be against the Constitution of one State, and the implications this would inevitably have for the preservation of the integrity of domestic insolvency law regimes. It was agreed that these concerns and, in particular, the acceptability

of such innovations in the interest of cheaper aviation financing when measured against the yardstick of the concept of the preservation of the integrity of domestic insolvency law regimes were issues that required a political judgment that the Working Group was not competent to make and which should rather be exercised by the Joint Session.

23. – Concern was moreover expressed as to whether the opt-out regimen would be effective in giving States which chose to opt out of the application of Article XI the protection that they sought to obtain thereby: it was feared that, as at present drafted, it could in a given case produce different effects in States having accepted it and those having opted out of its application. It was agreed that, in order to deal with this problem, the opt-out would need to follow the asset. The applicability of Article XI would thus depend on whether the State which was the primary insolvency jurisdiction of the obligor had opted out, regardless of the attitude of the State where the insolvency proceedings were commenced.

24. – Another issue which proved to be of concern to States with the opt-out regimen concerned the unhappy fate of certain existing Conventions, in particular the aforementioned Istanbul Convention, which had chosen to take the option route on substantive issues that had defied all attempts to reach consensus. It was essential to be sure that the incorporation of an opt-out regimen in the future Protocol would not jeopardise the chances of its acceptance by Governments.

25. – There was a strong feeling in the Working Group that a distinction needed to be drawn in the regimen of Article XI between liquidation and reorganisation proceedings. A major drawback of making the provisions of Article XI apply indiscriminately to both was seen in the difficulty an airline would face in reorganising were its aircraft to be sold. It was proposed that one solution to this problem might consist in States deciding to opt out of the application of Article XI in respect of reorganisation proceedings.

26. – There was general agreement that, to the extent that the Joint Session might decide to endorse the opt-out approach, then all matters not regulated by Article XI, such as its relationship with the UNCITRAL Model Law and the European Union Convention, should be left to be dealt with by the applicable national law. It was moreover suggested by certain Governments that leaving certain matters to be dealt with by national law could permit the injection of valuable flexibility into the whole question of which matters currently dealt with under Article XI needed to be addressed there. For instance, it was noted that in this way all matters relating to the realisation of the international interest could be referred to national insolvency law as an alternative to the “hard” optional rule providing for timetables in the granting of insolvency remedies.

27. – Citing the different insolvency remedies normally applied in respect of security interests, on one hand, and title retention and leasing agreements, on the other hand, one Government raised the question as to whether it was justifiable to provide equal treatment under Article XI for the three different categories of international interest covered by the future Convention.

28. – A number of shortcomings in the drafting of specific paragraphs of Article XI were noted in the course of the Working Group’s review of these provisions.

29. – Regarding Article XI(1), it was suggested that the language of the future Convention and Protocol should be brought more into line.

30. – Regarding Article XI(2)(a), it was suggested that, in so far as this provision was designed to cover both a voluntary and an involuntary commencement of insolvency proceedings, its drafting might be improved were the clause “any insolvency proceedings against the obligor have been commenced” to be replaced by a clause along the lines of “any insolvency proceedings have been commenced with respect to the obligor and its assets”.

31. – Regarding Article XI(2)(b), it was agreed that it needed to be made clear that this provision was concerned with the case where an airline, in particular a State-owned airline, would not be eligible for insolvency proceedings under national insolvency law. It was suggested that a possible solution might be to replace the words “the obligor is located in a Contracting State and” by a clause along the lines of “the obligor is not eligible for insolvency proceedings in the primary insolvency jurisdiction of that party and, being located in a Contracting State,”.

32. – Regarding Article XI(3) in general, it was noted that the duties imposed under this provision were duties that were capable of concerning not only the obligor but also the insolvency administrator.

33. – Regarding Article XI(3)(a), it was agreed that the words “and agree to perform all future obligations ...” were of doubtful interpretation and performance and, assuming that the intention behind them was to provide for a continuing threat over airlines, this was something which should be made more explicit than was currently the case.

It was moreover noted that the combined intention of Article XI(3)(a) and Article XI(5) was to ensure that, should the obligor’s defaults be all cured, say, on the last day of the grace period provided for in the chapeau of Article XI(3) but the obligor then defaulted again some days later, the insolvency remedies provided under Article XI would then become immediately available without the need for another grace period. It was agreed that this intention was not realised by the present drafting of Article XI(3)(a) and Article XI(5) and that their drafting accordingly needed to be looked at afresh with this in mind.

34. – Regarding Article XI(3)(b), it was noted that provision would need to be made for the case where the return of the aircraft resulted in a windfall for the obligee. It was also noted that there was no reference in this provision to any duty on the obligee, in realising the aircraft, to do so on the best possible terms.

35. – Regarding Article XI(4), it was noted that this provision, when read in conjunction with Article IX(1), could give the impression that the obligee was being given powers that were too broad in the absence of judicial control, whereas it was only intended to refer to the remedies of de-registration of the aircraft (Article IX(1)(a)) and export and transfer thereof (Article IX(1)(b)). It was agreed that such a misreading was the fault of the infelicitous drafting of Article XI(4), which, it was accordingly agreed, would need to be amended.

36. – Regarding Article XI(5), it was agreed, as noted above (cf. § 33 *supra*), that the formulation of this sub-paragraph in relation to sub-paragraph 3 would need to be improved.

It was also noted that the reference to “the Convention” in this provision was, by virtue of Article 5 thereof, intended also to cover the principle of the parties’ freedom of contract.

37. – Regarding Article XI(6), certain Governments felt that this provision was going too far and would therefore be unacceptable, in particular for the way in which it proposed in effect to put one creditor above the law. It was explained by the representative of the Aviation Working Group that this provision was *par excellence* intended to be one of those provisions which Governments would be free to opt out of: whereas certain Governments might take the view that it was indeed unacceptable and would therefore opt out of it, others might find the manner in which it would enable them to gain access to the international capital markets so attractive as to accept it.

38. – Certain Governments felt that a major shortcoming of the opt-out regimen lay in its all-or-nothing approach; these Governments, essentially Civil law Governments, thought it would be better to seek agreement on certain basic rules and not try to be so ambitious. It was recognised that this approach, combined possibly with some elements of the opt-out regimen, might usefully form the basis of an Alternative B. Such an alternative text was indeed proposed by the delegation of France (cf. I.I.W.G. / WP/3). While the Working Group was not completely happy with this proposal either, it nevertheless agreed that the basic concepts underlying this proposal should be forwarded to the Joint Session as the possible basis for another attempt at the drafting of an Alternative B. The concepts in question were as follows:

- (a) the aircraft object should only have to be returned to the obligee after the commencement of insolvency proceedings involving the obligor once the obligee had specifically requested this of the insolvency administrator;
- (b) the obligee should have a duty to provide evidence of the *bona fides* of its claim and of the registration of its international interest;
- (c) the need to spell out the role of the court in granting the appropriate remedy;
- (d) the returned aircraft object should not be sold pending a court decision regarding the claim and the international interest.

It was suggested that the concept embodied in sub-paragraph (d) above might work if it were combined with an optional regimen providing for a definite timetable for the granting of remedies on insolvency of the type provided for in Article XI. It was further suggested that an alternative Article XI should also spell out the chargee’s right of separation and make it clear that the insolvency administrator was under an obligation to decide, in the case of an unperformed consensual contract, whether it wished to continue with performance of that contract and, if so, had then to perform all outstanding obligations thereunder.

APPENDIX

AGENDA

1. - Election of the Chairman.
2. - Adoption of the agenda.
3. - Review of the insolvency-related provisions of the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment, as reviewed by the Drafting Committee during the first Joint Session (cf. Report on the first Joint Session, Attachment D, Appendix I), in particular from the perspective of their relationship with existing international instruments on insolvency and insolvency assistance and national law rules pertaining to transnational insolvency.
4. Review of the insolvency-related provisions of the preliminary draft Protocol to the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, as reviewed by the Drafting Committee during the first Joint Session (cf. Report on the first Joint Session, Attachment D, Appendix II), in particular from the perspective of their relationship with existing international instruments on insolvency and insolvency assistance and national law rules pertaining to transnational insolvency.
5. - Any other business.