



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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DECLARATIONS AND DEROGATIONS

(presented by the ICAO Secretariat)

This working paper examines the scope of potential declarations which States are permitted to make under the draft Convention and the draft Protocol as set out in LSC/ME/3-WP/2 (Appendices I and II), as well as the scope of potential derogations by private parties under the draft instruments, and the administrative and practical implications of these declarations and derogations.

1. DECLARATIONS BY STATES

1.1 Acknowledging the diversity of a number of legal rules which presently exist in different States which are also the subject of the new draft instruments, the draft Convention and the draft Protocol provide for a number of options for States, by virtue of which States can declare, if and to what extent, certain provisions may be applicable or excluded. The way in which these options are exercised is by means of a declaration to the depositary.

1.2 Some declarations are mandatory, for example, Article X of the draft Convention and Article XXX, paragraph 1 (b) of the draft Protocol, others are optional. Further, in accordance with Article XXXII of the draft Protocol, all declarations may be withdrawn at any time by means of written notification addressed to the depositary.

a) Scope of Declarations

Set out below, is a list of declarations presently foreseen under the draft instruments.

i) Declarations permitted or required under the draft Convention:

- Article 37: Declaration as to the categories of non-consensual rights and interests which shall be registrable;

- Article 38: General or specific declaration as to non-registrable non-consensual rights and interests;
- Article V: Declaration with respect to the exclusion of purely internal transactions;
- Article Y (1): Declaration as to the prohibition of a chargee's right to grant a lease;
- Article Y(2): Declaration as to the exclusion of self-help remedies;
- Article Z: Declaration as to the (partial) non-applicability of Article 14 of the draft Convention;

ii) Declarations permitted or required under the draft Protocol:

- Article X (1): Declaration as to the applicable period constituting «speedy relief»;
- Article XI (Alternative A, paragraph 2; Alternative B; paragraph 4):

Declaration as to the applicable period constituting the «waiting period»;
- Article XVIII: Declaration as to the designation of operators of registration facilities;
- Article XXVII: Declaration as to the territorial units to be covered by the instrument;
- Article XXX paragraph 1:
Declarations regarding the non-application of certain provisions of the draft Protocol;
- Article XXX paragraph 2:
Declaration as to the application of Alternative A or Alternative B of Article XI.

b) **Discussion**

1. Although declarations are permissible under Articles 17, paragraph 2, 19 and 20 of the *Vienna Convention on the Law of Treaties*, provided each such declaration is sufficiently clear, the attempt to provide such an amount of built-in flexibility in the draft instruments obviously collides with the objectives of uniformity and legal certainty. It virtually substitutes the consensus on a number of substantive issues by providing States the opportunity to «customize their own law». As a consequence, a number of substantive matters destined to be regulated by the draft instruments themselves would actually be addressed in a «web of declarations», thus being outside of a conventional treaty structure.

2. The large number of declarations impose on Contracting States a considerable amount of decision-making and administrative burden. From a practical viewpoint, and from the viewpoint of an experienced depository, it is doubtful that many States will be in a position to make all required choices before ratification. This will render ratification procedures more complex and lengthy than they already are.

3. Additionally, in a given situation involving several Contracting States having made differing declarations, it may be legally difficult to determine which rule to apply. Potentially serious practical problems with respect to the recognition of remedies are already identified in LSC/ME/3-WP/4, paragraph 2. Further, taking the example of Article X, paragraph 1 of the draft Protocol, some of the envisaged declarations may likely not be exercised due to their impracticability.

4. If declarations **permitted** are not exercised, this will do no harm. However, if declarations **required** are not exercised, then this will have the legal effect that both instruments cannot enter into force for the State concerned, as long as the declaration required has not been made, according to Article 17 of the *Vienna Convention on the Law of Treaties*.

5. **The large number of presently foreseen declarations appears to overreach their intended purpose and raise a number of legal, conceptual and administrative problems. Bearing in mind the expressed desire to establish predictable and uniform rules, the Joint Session is invited to re-assess the number and scope of potential declarations permitted under the draft instruments in order to reduce them to a minimum.**

2. DEROGATIONS BY PRIVATE PARTIES

a) Background

1. Article 5 of the draft Convention permits the parties to derogate from or vary the effect of any of the provisions of Chapter III (Default Remedies), except the following: Articles 8 (2)-(5), 9 (3) and (4), 12 and 14 (2).

2. Furthermore, under paragraph 3 of Article III of the draft Protocol, the parties may exclude the application of Article XI (*Remedies on Insolvency*) and, in their relations with each other, **derogate from or vary the effect of the entire Protocol**, except as stated in Articles IX (2) to (4).

3. In accordance with Article IX (2) of the draft Protocol, the creditor shall not exercise the remedies specified in Article IX (1), without the prior consent of the holder of any registered interest of higher priority.

4. Under Article IX (3), Article 8 (2) of the draft Convention shall not apply to aircraft objects. Article 8 (2) requires certain remedies to be exercised in a commercially reasonable manner. Article IX (3), however, specifies that any (or all) remedies given by the draft Convention shall be exercised in a commercially reasonable manner, but an agreement between a debtor and a creditor as to what is commercially reasonable is conclusive.

5. Article IX (4) sets out what constitutes the period of «reasonable prior notice» required by Article 8 (3) of the draft Convention.

b) **Discussion**

1. The draft Convention, in its Preamble, states that it is desirable to facilitate asset-based financing and leasing transactions by establishing clear rules to govern them. It states further that the Parties believe that such rules must promote the autonomy of the parties necessary in these transactions. Article 6 refers to the need to promote uniformity and predictability in the application of the draft Convention.

2. However, crucial parts of the draft Convention relating to remedies may be derogated from by the private parties to an agreement. The parties are given even more sweeping powers to derogate from the provisions of the draft Protocol, with the limited exceptions referred to above. **Indeed, as an instrument to govern the relationship between private parties, the Protocol is rendered virtually meaningless by such sweeping powers, and without effect. It is clear that the autonomy of the parties as well as commercial practice have been given precedence over the creation of clear and consistent rules to govern asset-based financing and leasing transactions.**

3. Further, of the only three paragraphs of the draft Protocol which are to be mandatory, the content of the most important one, Article IX (3) (remedies to be exercised in a commercially reasonable manner) is left to the agreement of the parties.

4. It is thus clear that the draft Convention and the draft Protocol as they now stand essentially leave the content of these transactions for the parties to determine. Unless modifications are introduced, a commercially weaker party, e.g. an airline of a developing State, is left without effective protection by the draft Convention and the draft Protocol.

5. The problem is compounded by the fact that numerous matters of the two instruments are not dealt with in substance but are left to be governed by the applicable law, which under Article VIII of the draft Protocol may be chosen by the parties.

6. As regards the complexity of the system created thereby, reference may also be made to the various opt-in/opt-out declarations which may be made by Contracting States under Articles Y (2) and Z of the draft Convention and Article XXX of the draft Protocol.

7. The draft Convention and the draft Protocol permit States to make reservations in relation to a number of provisions thereof. In particular, **Article Y(2)** of the draft Convention and **Article XXX** of the draft Protocol permit States to make reservations to exclude the legal effect of certain provisions regarding the possibility of a creditor to exercise non-judicial remedies which may impact on their national law or policy, namely Articles 8 to 10 of the draft Convention and Article XIII of the draft Protocol.

8. The combination of derogations by private parties, choices of applicable law, and declarations regarding opt-in/opt-out which may be made by Contracting States will create a complex and potentially unworkable network of possible relationships between the private parties and between Contracting States which will risk to create uncertainty rather than uniformity and

predictability in the law. Indeed, taken together, these factors render much of the substance of these two instruments little more than guidance material.

30 RECOMMENDATIONS

3.1 Declarations by States:

3.1.1 Bearing in mind the expressed desire to establish predictable and uniform rules, the Joint Session is invited to re-assess the number and scope of declarations under the draft instruments in order to reduce them to a minimum.

3.2 Derogations by Private Parties:

3.2.1 Parties to a contract already have discretion in determining the choice of law to govern their relationship. In light of the above, the Joint Session is invited to limit the extent of derogations and variations by private parties by the following modifications to the text:

- 1) Article 5 of the draft Convention: insert a reference to Article 9 (2) and 10 (b)
- 2) Delete Article III (3) of the draft Protocol.

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