



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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SECOND JOINT SESSION

(Montreal, 24 August – 3 September 1999)

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:

COMMENTS

(submitted by the Government of Japan)

1. General Observations

The Government of Japan was very pleased with the progress made at the First Joint Session held in Rome in February of this year. We believe that the concerns that we expressed from the perspective of Japanese law and in practice were given due consideration and that there was a genuine effort by all participants to accommodate the sometimes conflicting legal systems of the various contracting States. Thus, we are hopeful that significant further progress can be made at the upcoming Session in Montreal and look forward to continued participation in this important project.

We set out below a few brief supplementary comments with respect to the positions we expressed at the First Joint Session and the subsequent meeting of the Informal Insolvency Working Group in Rome in July of this year.

2. Supplementary Comments

A. Structure

While we recognize the desirability of a unified set of rules that could be expanded over time to cover all classes mobile equipment, we had previously expressed concern that we start with a project that is sufficiently narrow in scope so as to be achievable in the relatively near term. Since the focus of attention has been primarily restricted to aircraft at this stage, we had expressed a preference to concentrate our energies at the outset on developing one set of comprehensive rules for aircraft. In that regard, we find very useful the suggestion of both the Government of the United States and the International Air Transport Association and Aviation Working Group that a “composite” or “consolidated” text be prepared with respect to each class of equipment. We think that this approach should be seriously considered in order to move the project forward towards the initial ratification process by potential member States.

B. Remedies on Insolvency

During the meeting of Informal Insolvency Working Group, there was discussion about the very distinct treatment in many jurisdictions between insolvency proceedings pursuant to which an obligor is to be reorganized and those pursuant to which the obligor is to be liquidated. In Japan, the principal laws governing the two types of proceedings are entirely separate and the treatment of security interests and rights of secured parties are very different under the two types of proceedings – it generally being the case that secured creditors have substantially greater rights in liquidations versus reorganizations. We understand that this is also the case in many other jurisdictions.

Given the foregoing, we believe that it will be important that the Convention recognize the difference between liquidation-type and reorganization-type insolvency proceedings. To begin with, the current definition of “bankruptcy” in Article 29(2)(a) of the draft Convention will need to be clarified on this point so as to make it clear that reorganization-type proceedings are covered by the Convention (*see* footnote 13 to Article 29 of the draft Convention). In addition, further clarification will be need to be made as to the types of remedies afforded to obliges depending on whether the insolvency proceedings involves a reorganization or a liquidation. We believe that a

distinction in the remedies is desirable. Certainly from a Japanese bankruptcy perspective, we believe that greater rights in favor of the obligee would be much more palatable in a liquidation scenario than in the case of reorganization.

We believe that it is likely that a number of Contracting States would have similar views, as it would be difficult to imagine how the current, very creditor-favorable remedies provided in Article VI(3) would be workable in the case of a reorganization without modification, particularly where the obligor is an airline all of whose significant assets might well be mortgaged aircraft. Without Contracting States reserving significant additional rights in favor of the bankruptcy trustee, it is hard to see how reorganization could ever remain a viable option. It might be the case, however, that substantially fewer exceptions would have to be taken by the Contracting States with respect to the remedies provided in connection with a liquidation proceeding.

It has, been suggested that each contracting State should be able to elect whether to make any distinction in the types of remedies available in the two types of insolvency proceedings. It was suggested that some States might find that the more favorable credit terms that might be afforded by making no distinction in remedies would outweigh the obvious burdens that such an election would have on the ability to implement a viable reorganization of an airline in such States. We are concerned, however, that allowing such flexibility in electing remedies would lead to too great a disparity in available credit terms - creating in effect two classes of contracting States. Therefore, consideration should be given as to whether the Convention should instead make a clear distinction in remedies, without States having to rely on an "opt-out" provision in this regard.

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