



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)

UNIDROIT CGE/Int.Int./3-WP/12
ICAO Ref. LSC/ME/3-WP/12
12/06/2020
(Original: English/French)

THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

REMEDIES AND INTERIM RELIEF

(submitted by the ICAO Secretariat)

This paper examines the remedies and interim relief clauses set forth in the draft Convention and the draft Protocol, and proposes certain amendments intended to achieve a more balanced approach regarding such remedies and interim relief.

1. REMEDIES

1.1 Default remedies are set out in Chapter III of the draft Convention. These are modified by Article IX of the draft Protocol; Articles X and XI also deal with remedies.

1.2 Article 8 (1) of the draft Convention provides that in the event of a default, the chargee may, to the extent that the chargor has agreed, exercise certain remedies, or alternatively, may apply for a court order authorising these remedies. **If the chargor is commercially weaker than the chargee, it may lead to a situation where the chargor may be forced to agree to the remedies, without even the intervention of the court.**

1.3 Article 10 (a) authorizes the conditional seller or lessor to terminate the agreement and take possession or control of the object, in the event of a default. There is no need to seek a court order and such rights of the seller or lessor flow automatically from the default. **Such a right, without the agreement of the buyer or lessee, and without a court order, unduly favours the seller or lessor.** Further, paragraph (b) then allows the seller or lessor to apply for a Court order directing these acts. **Since paragraph (a) already authorises these acts, paragraph (b) is cosmetic only as there is no reason for the seller/lessor to resort to the court, unless the State has made a declaration under Article Y (2).**

1.4 Article 12 provides that subject to Article Y (2), any remedy provided by Chapter III shall be exercised in conformity with the procedure required by the law of the place where the remedy is to be exercised. The Convention makes clear, *inter alia*, in Articles 8 and 10 that certain remedies may be exercised without the need to apply to a court or alternatively apply to the court for authorization; such a choice is expressly left to the chargee, or conditional seller or lessee, as the case may be. As currently drafted, this freedom of choice is apparently not taken away by Article 12. This is confirmed by Article Y (2), which otherwise would be rendered largely superfluous.

1.5 Article 13 of the draft Convention provides for additional remedies permitted by the applicable law, which may include non-judicial remedies agreed upon by the parties. The possibility of a State making a reservation in relation to Article 13 is not, however, included in Article Y(2) of the draft Convention. It is therefore **recommended** that a reference to **Article 13** be included in **Article Y(2)**.

1.6 Article Y(2), as currently drafted, imposes on each State acceding to the draft Convention the obligation of declaring **whether or not** any remedy available to the creditor may only be exercised with leave of the court. Since the practical effect of this provision is to permit States to exclude the application of provisions permitting the exercise of non-judicial self-help remedies, it should be sufficient that States make declarations only when they wish to exclude self-help remedies. This would avoid filing unnecessary declarations. Accordingly, it is **suggested** to amend **Article Y(2)** of the draft Convention, as set out under **Recommendations** below.

1.7 In accordance with Article 13, additional remedies permitted by the applicable law, including those agreed by the parties, may be exercised. **This leaves open the possibility for a strong creditor to dictate additional remedies in the agreement, as well as choosing an applicable law favourable to it in terms of remedies provided therein.**

1.8 A debtor may at any time agree to waive any of the defences and rights of set-off available to it against an assignee (Article 30 (3)). **It is not clear under what circumstances the debtor should agree to give up his rights.**

1.9 Article IX (1) of the draft Protocol modifies the default remedies provisions of the draft Convention by providing that in addition to the remedies in Articles 8 (1), 10 and 14 (1) the creditor may, to the extent that the debtor has so agreed and in the circumstances specified, de-register the aircraft and export and physically transfer the aircraft object.

1.10 Any remedy given by the draft Convention, and presumably the draft Protocol also, must be exercised in a commercially reasonable manner, **but an agreement between the debtor and the creditor as to what is a commercially reasonable manner is conclusive (Article IX (3)(b))**. Article IX (3) of the draft Protocol which replaces Article 8 (2) of the draft Convention for the purposes of the Aircraft Protocol adopts a markedly different approach than its counterpart in the draft Convention. According to the latter, a remedy is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.

a) **Discussion**

1. Under Article 8 (2) of the draft Convention, it is possible for the debtor to have the manner in which a remedy is exercised reviewed by the court. In contrast, Article IX (3) (b) of the draft Protocol effectively excludes the determination of commercial reasonableness from the purview of the court, leaving it entirely to the discretion of the parties to determine what is commercially reasonable under the circumstances. **In the draft Protocol therefore, the commercially weaker party is left without protection as it may not be able to ensure that commercial aspects affecting its own position are taken into consideration.**

2. In addition, both Article IX (3) (b) of the draft Protocol and Article 8 (3) of the draft Convention limit the applicability of ‘commercially reasonable’ to the exercise of the remedy, while the choice of the remedy is not subject to this requirement of commercial reasonableness.

3. By virtue of Article IX (1) of the preliminary draft Protocol, the creditor has all default remedies referred to in Articles 8 (1), 10, 14 (1) of the preliminary draft Convention, as well as the remedies mentioned in Article IX (1) (a) and (b) at his disposal, without the need for obtaining a court order, authorizing or directing these remedies (self-help remedies). Article Y (2) of the Convention, however, gives Contracting States the option to declare whether the exercise of any of these remedies in their territory requires leave to the court. As outlined in Working Paper LSC/ME/3-WP/4, submitted by France, **this opt-in clause may not entirely alleviate the concerns which were expressed with regard to the choice and exercise of self-help remedies.**

4. Subject to the comments referred to above regarding Article Y (2) of the draft Convention, the exercise of self-help remedies is primarily conditioned by the notion of «commercially reasonable». **This concept in itself is however not necessarily suitable as a procedural safeguard in this respect. Notwithstanding the principle of party autonomy, it is nevertheless desirable to ensure that the exercise of self-help remedies does not forego basic considerations of equity.**

2. **INTERIM RELIEF**

a) **Background**

1. In accordance with Article 14 of the draft Convention, a variety of interim relief measures are at the disposal of the creditor, provided that the creditor adduces *prima facie* evidence with respect to the default by the debtor. The enumeration set out in paragraph 1 (a) - (e) of the said provision shows, as far as the measures mentioned in paragraphs (b) and (d) are concerned, that interim relief is in this context very similar to measures which constitute final relief. See also the comments by France, LSC/ME/3-WP/4, paragraph 3.

2. Further, according to Article 14, paragraph 2 of the draft Convention, presently in square brackets, protective court orders for the benefit of «interested persons» are envisaged only with respect to two of the five proposed interim measures. However, none of these protection orders are available in case an agreement exists between creditor and debtor to exclude the application of Article 14, paragraph 2 (see Article X, paragraph 2 of the draft Protocol).

b) **Discussion**

1. It appears unclear why certain interim measures (which are equally effective if not outright identical to final relief measures) should be made available under the proposed instruments. In many legal systems, interim relief measures can only be conservatory in nature and can only be considered to the extent that the exercise of the creditor's rights is otherwise unreasonably jeopardized.

2. As a consequence, the interim measures referred to in Article 14 paragraph 1 (b) and (d) and the reference to «proceeds» in subparagraph (e) seem conceptually doubtful.

3. The implications of Article X, paragraph 2 of the draft Protocol seem far-reaching. In practice, an agreement as to the exclusion of Article 14, paragraph 2 of the draft Convention could be imposed by the commercially stronger party in the standard sale/lease agreement. **By virtue of this provision, the commercially stronger party may therefore not only unduly restrict the rights of «interested persons» but also render virtually meaningless the discretionary powers of the court as far as protection orders are concerned.**

4. It is observed that by virtue of Article 14, paragraph 5 of the draft Convention, apart from the measures referred to in paragraph 1, additional interim relief measures may also become available to the creditor. **This may run counter to the objective of uniformity enunciated in Article 6, paragraph 1 of the draft Convention.**

5. Based on the above considerations, a revised draft for Article 14 of the draft Convention is set out in paragraph 6.2 of this working paper.

30 **CLARIFICATION OF «DEFAULT»**

3.1 The recourse to default remedies established by virtue of Chapter III of the preliminary draft Convention requires a «default» as defined in Article 11 of the said Convention. According to Article 11 (1), the debtor and the creditor may at any time agree as to what constitutes «default».

3.2 The determination of a crucial term (entailing many rights and obligations) is therefore left to the disposition of the parties. Further, the Convention does not stipulate that the agreement between the debtor and creditor shall be in writing. It appears that these points have not been specifically addressed by the previous two Joint Sessions.

3.3 The above-mentioned situation, in its practical implications, may give rise to a number of concerns:

- (a) in practice, the commercially stronger party may be able to dictate the determination of what constitutes «default» which may result in abuse;
- (b) apart from «default», Article 11 (1) also refers to the term «or otherwise give rise to the rights and remedies» as a valid grounds for default remedies. This term is quite vague and could be potentially abused by the commercially stronger party in the absence of a clear concept of «default»;

- (c) the meaning of «substantial default» in Article 11 (2) (the occurrence of which is required in the absence of the above-mentioned agreement regarding «default») is subject to different interpretations.

3.4 Acknowledging that it is difficult to find a definition for «default» which is suitable for all potential forms of transactions, it is recommended to consider default only in the event of «default with respect to a primary obligation of the agreement». It would therefore not be sufficient to declare a debtor as being in «default» in the event of the non-fulfilment of a secondary/auxiliary obligation (e.g. a notification requirement).

3.5 Taking this point further, it could be envisaged to stipulate - as far as leases or sales involving installment payments are concerned - that the debtor can only be considered as being in «default» if he fails to abide by the payment obligations established by the agreement. The latter condition could also be used for clarification as to the meaning of substantial default, referred to in paragraph 3.3 c) above.

40 ARTICLE 20 (3) DRAFT CONVENTION

4.1 Article 20 (1) of the draft Convention requires consent of the debtor (or chargor, assignor, prospective chargor or prospective assignor, as the case may be) in order for a registration to be effected in the International Registry. In contrast, the same registration may be amended extended or discharged solely by or with consent of the party in whose favour it was made, i.e. **without consent of the debtor**, Article 20 (3) of the draft Convention.

4.2 An amendment or extension of a registration should be subject to the same requirements as the initial registration. ICAO endorses the view of the Aviation Working Group and IATA presented in their Working Paper with regard to Article 20 (3) of the draft Convention (ICAO Ref. LSC/ME/3-WP/7) that consent of the debtor should be required to effect an amendment or extension of a registration.

50 DE-REGISTRATION AND EXPORT AUTHORIZATION

5.1 In addition to the default remedies specified in the draft Convention, Article IX of the draft Protocol gives the creditor the right to de-register the aircraft and physically transfer it from the territory in which it is situated. Pursuant to Article XIII (2), the creditor may do so only in accordance with applicable airworthiness or safety laws or regulations. Article XIII (3) provides that the national registry authority and other administrative authorities in Contracting States shall expeditiously cooperate with and assist the authorized party in the exercise of these remedies. Article X (3) is also related as it imposes an obligation on States to make the mentioned remedies available within a specific time-frame when judicial relief is authorized.

5.2 Annexed to the draft Protocol is a model *Form of Irrevocable De-registration and Export Request Authorization* by which the relevant national registry authority can be informed that the debtor has authorized the creditor to request de-registration and export of the aircraft upon the latter's

request (item (i)). By the model Form the debtor further requests confirmation by the national registry authority that the creditor may de-register and export the aircraft upon the creditor's demand (item (ii)).

5.3 By virtue of Article XXX of the draft Protocol, States may declare that they will not apply any of the provisions of Articles X and XIII of the draft Protocol imposing obligations with respect to the remedy of de-registration and export of the aircraft.

5.4 Existing national laws or public policy considerations may impose limitations on the de-registration and export of the aircraft (e.g. in case the operator of the aircraft is liable to the State of registry for non-payment of tax). On the other hand, applicable international law and national law may effectively prevent the re-registration of the aircraft on another register if there is no genuine link between the aircraft and the State of registry (usually by way of ownership requirements) or if certain conditions for registration prescribed by national law are not met. In order to avoid conflict with obligations under Article XIII (3) and the related model de-registration and export request authorization which requires States to make the remedies available on demand, States have the possibility to opt out of the relevant provisions. However, in light of the desirability to reduce the possibilities of opting out of central provisions of the draft Convention and draft Protocol, which is discussed in LSC/ME/3-WP/11, the obligations of States to assist with the de-registration under the draft Protocol and the requirements of national law would have to be reconciled.

60 RECOMMENDATIONS

6.1 Remedies

- Delete **Article 30**, paragraph 3 of the draft Convention
- Amend **Article IX (3) of the draft Protocol** as follows:

(a) (unchanged)

«(b) In relation to aircraft objets the following provisions shall apply:

(i) Any remedy given by the Convention and this Protocol shall be selected and exercised in a commercially reasonable manner. In determining commercial reasonableness, the creditor shall have due regard to all relevant circumstances, including the position of the debtor.

(ii) The debtor may apply for review by the court if he is of the opinion that the remedy is not exercised in a commercially reasonable manner. Subject to the applicable law, if the debtor has suffered damage as a result of the exercise of a remedy under the Convention and this Protocol, the court may award compensatory damages if the remedy was not exercised in a commercially reasonable manner.»

6.2 Interim Relief

6.2.1 It is recommended to modify Article 14 draft Convention as follows:

Article 14 **Relief pending final determination**

«1. – A Contracting State shall ensure that a creditor who adduces *prima facie* evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain speedy judicial relief in the form of such one or more of the following orders as the creditor requests:

- (a) preservation of the object and its value;
- (b) immobilisation of the object;
- (c) application of the income of the object.

2.- In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:

(a) (unchanged)

(b) (unchanged)

3.- (unchanged)

4.- (unchanged)

5.- Nothing in this Article affects the application of Article 8 (2).»

6.3 Clarification of «Default»

1. It is recommended to modify Article 11 of the draft Convention as follows:

Article 11 **Meaning of default**

«1.- The debtor and the creditor may at any time agree in writing as to the events that constitute a default [or otherwise give rise to the rights and remedies specified] in Articles 8 to 10 and 14. An event shall only be considered by the parties if it is directly concerned with a debtor's default with respect to a primary obligation under the agreement.

2.- In the absence of agreement between the parties in the sense of paragraph 1, first sentence of this Article, «default» for the purposes of Articles 8 to 10 and 14 means a substantial default, which in case of monetary debt, requires the non-fulfilment by the debtor of his payment obligations under the agreement.»

6.4 **Article 20 (3) of the draft Convention:**

6.4.1 Based on Alternative B of Article 20 (3) of the draft Convention, it is recommended to redraft Article 20 (3) as follows, taking into account that in the case of a discharge of a registration the debtor does not require protection:

Article 20

«3.- A registration may be amended or extended prior to its expiry with written consent of the debtor, or assignor, or intending debtor or assignor.»

6.5 **Article Y (2) of the draft Convention**

6.5.1 It is recommended to amend Article Y (2) of the draft Convention as follows:

«A Contracting State at the time of signature, ratification, acceptance, approval of, or accession to the Protocol may declare that any remedy available to the creditor under Articles 8 to 10 and 13 shall only be exercised with leave of the court.»

6.6 **De-registration and Export Authorization**

6.6.1 It is recommended to amend Articles X (3), XIII (3) and item (ii) of the *Form of Irrevocable De-registration and Export Request Authorization* so as to specify that the obligation for States to cooperate and make the remedy of de-registration and the related export authorization available applies only in accordance with the applicable national law and regulations governing the registration of aircraft.

– END –