



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/14
ICAO Ref. LSC/ME/3-WP/14

THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

PROPOSAL

regarding the substantive sphere of application of the preliminary draft Convention

(submitted by the UNIDROIT Secretariat)

The UNIDROIT Secretariat wishes to express its support for the reintroduction of a list of those categories of mobile equipment which the preliminary draft Convention is to cover, as indicated in the comments it addressed to the UNCITRAL Secretariat in respect of the draft UNCITRAL Convention on Assignment [in Receivables Financing] [of Receivables in International Trade], reproduced in an appendix to this document.

Both at the first and the second Joint Sessions the only reason put forward for eliminating the list was delegations' preference for a more concise and hence more elegant drafting. As the UNCITRAL Secretariat correctly points out (cf. UNIDROIT CGE/Int.Int/3-WP/10 – ICAO Ref. LSC/ME/3-WP/10), the current phrasing of Article 2 and the absence of any description of the preliminary draft Convention's sphere of application has raised considerable concern as to the policy implications. In particular, during sessions of the UNCITRAL Working Group as well as on other occasions Governments have asked whether the current wording might not also encompass items such as computers, lorries or indeed motor cars. Likewise, the preliminary comments submitted by the Government of France (cf. UNIDROIT CGE/Int.Int/3-WP/4 – ICAO Ref. LSC/ME/3-WP/4) notes that clarification should be restored and that it would not wish to see the sphere of application of the preliminary draft Convention extended to equipment of lesser importance.

Given that the Organisations representing the interests of the shipping industry do not envisage actively participating in work on the extension of the application of the preliminary draft Convention to ships for the time being, the reference to registered ships featuring inside square brackets in Article 3 of the text of the preliminary draft Convention submitted to the first Joint Session should however be deleted. The catch-all clause contained in the former Article 3(i) should be drafted differently so as to render it less open-ended.

In the light of these comments as well as those of other Governments and international Organisations submitted informally, Article 2 or 3 might be phrased as follows:

“This Convention applies in relation to an object, and associated rights related to an object, of any of the following categories:

- (a) airframes;
- (b) aircraft engines;
- (c) helicopters;
- (d) oil-rigs;
- (e) containers;
- (f) railway rolling stock;
- (g) space property;
- (h) objects of any other category of high-value capital infrastructure equipment each member of which is uniquely identifiable.”

**Draft Convention
on Assignment [in Receivables Financing] [of Receivables in International Trade]:**

COMMENTS
*by the Secretariat of the International Institute for the Unification of Private Law
(UNIDROIT)*

By letter dated 23 November 1999, the Secretary to the United Nations Commission on International Trade Law (UNCITRAL) invited the UNIDROIT Secretariat to submit comments on the draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] (hereinafter referred to as the *draft Convention*) adopted by the Working Group on International Contract Practices at its 31st session with a view to its consideration by the 33rd session of the Commission.

General remarks

The UNIDROIT Secretariat takes this opportunity to compliment the Working Group on the excellent work it has accomplished in this difficult area. *In general, it notes the indirect recognition of the debt owed by the draft Convention to the UNIDROIT Convention on International Factoring in §193 of the Report of the Working Group and would suggest that consideration might usefully be given to this debt being acknowledged more explicitly in the Preamble to the draft Convention, for instance, by the introduction of a clause indicating that the draft Convention has built on the achievements of the UNIDROIT Convention.* It notes furthermore the statement in §194 that “according to general principles of treaty law, the draft Convention would not prevail over the Ottawa Convention on the grounds that the Ottawa Convention was a more specific convention”. *It would suggest that as much be noted in any explanatory memorandum that may in due course be prepared in respect of the draft Convention, once adopted.*

Relationship between the draft Convention and the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment and the preliminary draft Protocols thereto

Regarding the relationship between the draft Convention and the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *preliminary draft Convention*) and the various preliminary draft Protocols thereto under preparation, namely a preliminary draft Protocol on Matters specific to Aircraft Equipment (hereinafter referred to as the *preliminary draft Aircraft Protocol*), a preliminary draft Protocol on Matters specific to Railway Rolling Stock and a preliminary draft Protocol on Matters specific to Space Property, the UNIDROIT Secretariat would first note that this matter was referred to the Public International Law Working Group set up at the Second Joint Session of the UNIDROIT Committee of governmental experts and the Sub-committee of the ICAO Legal Committee considering the preliminary draft Convention and the preliminary draft Aircraft Protocol, held in Montreal from 24 August to 3 September 1999. The Public International Law Working Group held a first session in Cape Town and on the Blue Train en

route to Pretoria from 8 to 11 December 1999. A further session of that Working Group is to be held during the Third Joint Session, to be held in Rome from 20 to 31 March 2000, after which the Report of the Working Group will be considered by Plenary.

In its preparation of the preliminary draft Convention and the various preliminary draft Protocols thereto, the authors of these texts have at all times striven to avoid entering into conflict with the draft Convention. Evidence of this concern is to be seen in the delimitation of the preliminary draft Convention by reference to interests in mobile equipment protected by registration against identified assets. A decision was taken early on not to go for a debtor-based registration system and not to deal with perfection requirements and priority rules relevant to receivables financing detached from the underlying asset.

The sphere of application of the preliminary draft Convention was from the outset delimited by reference to categories of high-value mobile equipment that were by their nature likely to be moving across or beyond national frontiers on a regular basis in the ordinary course of business and that were capable of unique identification. The view was taken that such a limited coverage might reasonably be expected to make the new international regimen that more acceptable to those States for which its innovations might raise the most difficulties. Up until the First Joint Session, held in Rome from 1 to 12 February 1999, the preliminary draft Convention accordingly contained a list of the specific categories of mobile equipment intended to be caught by its provisions (airframes, aircraft engines, helicopters, registered ships - the coverage of which was however only provisional, oil rigs, containers, railway rolling stock, space property) as well as a residual category of "other categories of uniquely identifiable object" (cf. Study LXXII-Doc. 42, *sub* Article 3 (a)-(i)).

It is true that this list no longer features in the preliminary draft Convention and it is the considered opinion of the UNIDROIT Secretariat that therein lies the cause of some of the past difficulties encountered by members of the UNCITRAL Working Group in envisaging the exclusion from the draft Convention of the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of mobile equipment encompassed by the future UNIDROIT Convention on International Interests in Mobile Equipment. §85 of the Report by the Working Group gives the distinct impression that it was essentially the prospect of the potentially infinite scope of such an exclusion, opened up by the decision of the First Joint Session to delete the aforesaid list from the preliminary draft Convention, which had made it most difficult for the Working Group to agree to such an exclusion. For this reason, the UNIDROIT Secretariat intends to propose to the forthcoming Third Joint Session that it reintroduce the list deleted at the First Joint Session.

In these circumstances and on this basis, the UNIDROIT Secretariat's preferred solution would be that the draft Convention specifically exclude from its sphere of application the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of mobile equipment encompassed by the preliminary draft Convention. The different categories of mobile equipment which it contemplates are of a kind traditionally recognised as enjoying special status. Various aspects of the structure of the proposed new international regimen correspond to the specificity of the categories of equipment covered: first, each category of equipment covered by the future Convention will be the subject of a separate Protocol, to contain those rules necessary to adapt the general rules contained in the Convention to the special characteristics particular to the financing of each such category; secondly, for the registration of each category of equipment and the

establishment of priority ranking as between each such registration a separate International Registry will be created. An insistence on the specificity of the assets covered by the proposed new international regimen has been a recurring feature of UNIDROIT's work on this project to date.

Independently of the foregoing, the three Working Groups to date established under the authority of UNIDROIT in order to monitor the application of the preliminary draft Convention to aircraft equipment, railway rolling stock and space property and to act as a conduit for the expertise of each sector (made up of representatives of manufacturers, users and financiers as also the international Organisations concerned), namely, the Aviation Working Group, the Rail Working Group and the Space Working Group respectively, have all called for exclusion from the sphere of application of the draft Convention of the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the future UNIDROIT Convention as implemented by Protocols thereto.

The Aviation, Rail and Space Working Groups have all enunciated a clear desire that assignments of receivables taken as security in aircraft, rail and space financing transactions should be dealt with in equipment-specific instruments, namely the preliminary draft Convention as implemented by the relevant preliminary draft Protocol, rather than in the draft Convention. The Aviation Working Group in particular emphasised the strong interest of the aviation industry in establishing a single regimen that reflected aircraft financing practices and structures.

The value of assets like aircraft equipment, railway rolling stock and space property lies in the income that may be realised from the sale or lease thereof. It would undermine the concept underlying the preliminary draft Convention if the debtor could assign receivables derived from such an asset under a system different from that applicable to the pledging or other encumbering of the asset. The indivisibility of the asset and the income that may be realised from the sale or lease thereof is clearly enshrined in Articles 8(1) and 10 of the preliminary draft Convention, relating to rights on default, and Article 14, relating to interim relief.

In the case of aircraft, rail and space financing structures there is an inextricable link between the aircraft equipment, railway rolling stock and space property, on the one hand, and the associated receivables, on the other. In the case of space financing structures, for instance, much of the value placed on a satellite is derived from the various rights associated with the operation of that satellite, in particular the associated receivables. Such rights are an essential element of the commercial value of a satellite and without such rights the satellite will have very little commercial value. It is therefore appropriate for security rights relating to both the asset and the associated receivables to be subject to a common regimen, in the interest of avoiding not only conflict of laws problems but also the resultant lack of commercial predictability and increases in transaction costs.

Against the alternative solution, which would consist in allowing the preliminary draft Convention and the various preliminary draft Protocols thereto to supersede the draft Convention, the Aviation Working Group noted the following disadvantages:

(1) “Many national legal systems, which include aircraft-specific legislation, currently contain assignment rules that are more in line with aircraft financing practices than those proposed in the [draft] Convention. There is no need to disrupt such national legal systems that work well for aircraft financing unless the resulting changes are specifically designed with aircraft financing requirements in mind.”

(2) “As the [preliminary draft Convention] may be adopted subsequently, unsatisfactory rules may be applicable to transactions entered into in the interim. That being the case, the finalisation and ratification processes relating to the [draft] Convention may be complicated/delayed by virtue of aviation-related objections and/or the need for further national and international consultations.”

(3) “The suggested approach raises rather than resolves potential problems associated with sphere and temporal applications of the two instruments. Commercial predictability will decrease, resulting in increased transaction costs.”

(4) “Such an approach would not address the potential conflict between the [draft] Convention and the Geneva Convention [on the International Recognition of Rights in Aircraft].” In this connection, it is worth noting that the preliminary draft Convention/preliminary draft Aircraft Protocol contain detailed provisions dealing with the co-ordination between the last two texts and the Geneva Convention.

The first three disadvantages would be equally true for railway rolling stock and space property.

Should the Commission not feel able to accede to the UNIDROIT Secretariat’s preferred solution, set forth above, for an exclusion from the sphere of application of the draft Convention of the assignment of receivables to the extent that these become associated rights in connection with the financing of all those categories of mobile equipment encompassed by the preliminary draft Convention, the UNIDROIT Secretariat would propose that it nevertheless accede to the clear desire expressed by the Aviation, Rail and Space Working Groups for an exclusion of the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the future UNIDROIT Convention as implemented by Protocols thereto.