



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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SPHERE OF APPLICATION AND MAIN PROVISIONS

(submitted by the Government of Italy)

This working paper examines the sphere of application and the main provisions under the draft Convention and the draft Protocol as set out in Appendices I and II of UNIDROIT CGE/Int.Int./3-WP/2 - ICAO Ref. LSC/ME/3-WP/2.

1. SPHERE OF APPLICATION

1.1 It is of primary importance to clarify the sphere of application of the Draft Convention on International Interests in Mobile Equipment and of the Draft Protocol Specific to Aircraft Equipment. As far as the Convention is concerned we propose to insert again the list of categories of equipment intended to be covered, deleted from the text of the preliminary draft. In the Protocol, we note that , while the title makes reference to aircraft equipment, that notion is lost in the articles of the Protocol that deal with aircraft objects.

1.2 Furthermore the definitions in article 1 of the Protocol seem to exclude aircraft from the scope of the Protocol (aircraft are mentioned only in Art.IX 1.a). The Protocol, in fact, makes reference to “aircraft objects”, defined as “airframes, aircraft engines and helicopters”. While we state that “helicopters” are aircraft and we believe appropriate that the new instruments should cover both aircraft and aircraft objects (or equipment, whatever term we choose), we underline the absolute necessity to clarify this point.

1.3 We acknowledge with satisfaction that the Draft Convention and the Draft Protocol provide for the constitution and effect of international interests in mobile equipment, including the “stand-by letters of credit” , the “lessor’s interests”, etc. Nevertheless the term “interest” should be better defined in order to avoid any misunderstanding when we talk, for example, of “interested person” (Convention art.1) or “interest vested in a person” (Convention art.2.2). Our proposal is that the Conference follows European Central Bank ‘s terminology of “security interests” and finds a more complete definition of this term.

1.4 “International interest” should be defined as follows: “ International interest means the interest based or not in the possess of high value mobile equipment (objects) to secure the performance of a secured obligation.

1.5 The notion of agreement should include the financing agreements relevant to sale/purchase agreements. The definition of agreement should be integrated accordingly.

1.6 The definition of “interested persons” should be expanded so that other interested parties may become surrogated to the rights of a creditor to the extent that they make payments in place of the debtor.

2. MAIN PROVISIONS

2.1 FIDUCIARY TRANSFER OF LEGAL TITLE - The agreement between the chargee and the chargor in the Draft Convention, art. 9.1, that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligation, is not acceptable for the Italian Civil Code. The Italian Civil Code, articles 1963 and 2744, in fact, forbids the so called “patto commissorio” in order to safeguard the debtor from the moral pressure of the creditor and, at the same time, to guarantee the “par conditio” among the creditors.

2.2 ASSIGNMENT OF INTERNATIONAL INTERESTS - In the Italian legal system the assignment of an international interest is not possible without the assignment of the relevant credit obligation to which it is accessory . Assignment of interest in the text of the draft Convention goes in a completely different direction than in the Italian Civil Code and creates problems. The only exception to such principle is constituted by the stand-by letter of credit (Draft Convention, art. 1 (p) (ii))

2.3 OPTIONS BY STATES - The draft Convention and the draft Protocol allow too many options that deprive the two international instruments of the objective to realize legal uniformity and certainty.

2.4 SUBROGATION RIGHTS - The Convention provides a right of subrogation to an “interested person” , such as a guarantor, who discharges a security interest “by paying in full the amount secured”. In such cases the interested person is surrogated to the creditor’s rights against the debtor (Convention, art. 9). This provision recognizes a right generally provided by contracts stipulated in Italy. In fact the Italian contracts go further , in that the guarantor typically becomes surrogated to the creditor’s rights with regard to any payment made on behalf of the debtor, regardless of whether such payment covers the full amount of the secured debt.

There is another situation, frequent in aircraft finance, that is not covered by the present draft Convention. The situation envisioned by the present draft involves three actors only: the debtor (e.g. a lessee or conditional purchaser), a creditor (the seller or lessor), and a guarantor. Aircraft financing arrangements typically involve four or more actors. even in a simple conditional sale, the manufacturer may sell the aircraft first to a special purpose company (SPC), which borrows the purchase price from a financial institution (bank). As a condition to making the loan, the bank demands that the manufacturer guarantee the SPC’s payment obligations. Next, the SPC enters into a conditional sale agreement with the ultimate purchaser (buyer).

In the event that the buyer defaults upon its payment to the SPC, the manufacturer/guarantor may find it useful to cure the default by making payments to the SPC, so as to allow the letter to continue making its payments to the bank. Under the provisions of the existing draft Convention, the manufacturer/guarantor would not be surrogated to the rights of the SPC against the buyer. This is because the manufacturer is contractually the guarantor of the SPC, not of the buyer, even though it has cured the buyer's default. As such, the manufacturer is not entitled to a right of subrogation under the term of the Convention (Convention, art. 9.4).

We propose that the Conference could examine the opportunity to allow for such an expanded right of subrogation.

2.5 THE INTERNATIONAL REGISTRATION SYSTEM - The registration related to international interests should assume, as pre-requisite the registration of mobile equipment, aircraft and aircraft equipment/objects. The new International Register needs to be regulated and special consideration should be given to the constitutional elements of the international interests' registration; to the Aircraft's National Registers; to the way to harmonize the Draft Protocol with article 18 of the Chicago Convention which states that an aircraft cannot be registered in more than one Register. The Chicago principle that the registration of an aircraft may be charged from one State to another should be further elaborated to serve the purpose of the international registration system.

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