

DRAFT REPORT

PLENARY SESSION
1 - 12 February 1999

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OPENING

1. In opening the first Plenary Session of the *Joint Session of the 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* and the *Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment)*, Mr H. Kronke, Secretary-General of Unidroit, and Mr L. Weber, Director of the ICAO Legal Bureau, acting on behalf of the Secretary General of ICAO, reiterated the commitment of the two Organisations to the preparation of the preliminary draft Convention and preliminary draft Protocol, which would be of major importance in economic, financial and legal terms.

2. They expressed appreciation for the collaboration of the private sector in the preparation of the instruments, in the first instance of the Aviation Working Group (A.W.G.), the Rail Working Group, the Space Working Group and the International Air Transport Association (IATA). While stressing the importance of the expertise brought to the project by these Groups, they invited the observers of the private sector to respect the procedures of inter-governmental Organisations, in accordance with which relations with member States came within the exclusive purview of the inter-governmental Organisations concerned.

This was so as to avoid the unacceptable interferences with member Governments that had regrettably occurred in the past.

3. The Secretaries to the Joint Session were Mr M.J. Stanford, Principal Research Officer (Unidroit Secretariat) and Mr S. Espínola, Principal Legal Officer (ICAO Secretariat).

AGENDA ITEM 1: ELECTION OF THE CHAIRMAN

4. Ms E. Chiavarelli, Senior Official, Directorate-General of Civil Aviation, Ministry of Transport (Italy), was elected Chairman of the Joint Session.

5. Ms G. T. Serobe, Ministry of Transport (South Africa), was elected First Vice-Chairman of the Joint Session.

6. Mr J.A. Sánchez Cordero Davila, Public Notary (Mexico), was elected Second Vice-Chairman of the Joint Session.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

7. The agenda was adopted as proposed.

AGENDA ITEM 3: ATTENDANCE OF OBSERVERS

8. It was agreed that representatives of inter-governmental Organisations and international non-governmental Organisations would be admitted to the meetings as observers. The observers from the AWG and IATA would be admitted to participate with advisory status in the meetings of any relevant working groups that might be set up.

AGENDA ITEM 4: ORGANISATION OF WORK

(a) BASIC FEATURES OF THE PROPOSED NEW INTERNATIONAL REGIMEN AND ITS ECONOMIC SIGNIFICANCE: A PROGRAMME OF BACKGROUND PRESENTATIONS

9. Mr H. Kronke (Unidroit) and Mr L. Weber (ICAO) gave introductory presentations illustrating the basic objectives of the new international regimen and how it had developed. These introductory presentations were followed by presentations on the anticipated economic impact of the proposed new regimen with specific reference to the preliminary draft Protocol on matters specific to Aircraft Equipment (Mr L.S. Clark, General Counsel and Corporate Secretary (IATA)); on the novel structure of the proposed new international regimen, with an examination of the relationship between the proposed future Convention and each of the equipment-specific Protocols thereto (Ms C. Kessedjian, Deputy Secretary-General, Hague Conference on Private International Law); on the basic features of the preliminary draft Convention (Mr R.M. Goode, Chairman of the Unidroit Study Group responsible for the preparation of the preliminary draft Convention); on the basic features of the preliminary draft Protocol on Matters specific to Aircraft Equipment and its relationship to the preliminary draft Convention (Mr J. Wool, Co-ordinator, A.W.G.; Chairman of the working group responsible for the preparation of the preliminary draft Protocol on Matters specific to Aircraft Equipment); on the importance of the preliminary draft Protocol on Matters specific to Space Property for the space industry and specific issues particular to space property treated therein (Mr P.D. Nesgos, Co-ordinator, Space Working Group); and on the importance of the preliminary draft Protocol on Matters specific to Railway Rolling Stock for the railway industry and specific issues

particular to railway rolling stock treated therein (Mr H. Rosen, Co-ordinator, Rail Working Group). The programme of presentations continued with presentations on the options for a modern international registration system, with illustrations being given of the electronic registration under the Quebec personal property registry (Ms S. Potvin Plamondon, Director of the Quebec Registry) and of U.S. experience of a paper-based system (Mr C.W. Mooney, Jr., Member of the Unidroit Study Group). The final presentation examined the key features of the international registration system provided for under the proposed new international regimen (Mr R.C.C. Cuming, Canada, Member of the Unidroit Study Group and Chairman of the working group set up by the Unidroit Study Group to consider the legal and technical issues raised by the creation of an international registration system).

10. Following the programme of presentations, the delegate of Singapore also shared her experience in operating an electronic trade documentation system.

(b) SETTING-UP OF SUB-GROUPS, AS REQUIRED, AND OTHER MATTERS

11. It was agreed to set up a Drafting Committee. The following States were appointed to serve on this Committee: Canada, Egypt, France, Germany, Japan, Mexico, Republic of Korea, Singapore, South Africa and the U.S.A. It was further agreed that the observers from the Hague Conference on Private International Law, the A.W.G. and IATA would attend sessions of the Drafting Committee as advisers.

12. The Drafting Committee elected Mr K.F. Kreuzer (Germany) and Mr G. Lauzon (Canada) as Chairman and Vice-Chairman respectively.

13. It was decided to establish a Registration Working Group (R.W.G.). The following States were appointed as its members: Canada, Egypt, France, Finland, Ireland, Japan, Mexico, Singapore, South Africa and the USA. It was further agreed that the observers from the A.W.G. and IATA would attend sessions of the R.W.G. as advisers.

14. The R.W.G. elected Mr R.C.C. Cuming (Canada) and Ms G. T. Serobe (South Africa) as Chairman and Vice-Chairman respectively.

15. It was agreed to appoint Mr R.M. Goode, who had been Chairman of the Unidroit Study Group and of the Steering and Revisions Committee, as Rapporteur to the Joint Session so as to assist delegates by illustrating the decisions taken by these two bodies and the reasons which had led to their adoption.

AGENDA ITEM 5: CONSIDERATION OF THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (UNIDROIT 1998, STUDY LXXII – Doc. 42) / PRELIMINARY DRAFT [UNIDROIT] CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (ICAO REF. LSC/ME-WP/3) (hereinafter: “the preliminary draft Convention”)

GENERAL DISCUSSION

16. A number of delegations stressed the economic importance of this project for the aviation industry in particular and its possible repercussions not only for the industries concerned, but also for the economies of developing countries and countries with economies in transition in particular. It was however noted that maritime interests in a number of countries did not show particular interest in the project.

17. A number of delegations representing countries with Civil law legal systems expressed their concern at an approach which they saw as excessively inspired by the Common law legal tradition. A result of this approach was that in many instances the preliminary draft Convention as it stood was incompatible with their legal systems. A greater equilibrium had to be attained between the Common law and Civil law traditions.

18. Other delegations stressed the need to prepare instruments that were economically viable and useful, even if a lesser degree of compromise was obtained from the legal point of view.

19. In relation to the structure of the instruments, Ms C. Chinkin (Professor of Public International Law, London School of Economics) presented a discussion paper on the legal relationship between the preliminary draft Convention and its equipment-specific protocols, in particular as regards the implications for public international law (Study LXXII – Doc. 47 and ICAO Ref. LSC/ME-WP/12). She also explained the thinking behind the decision to establish a dual Convention/Protocol system.

20. Questions were raised by a number of delegations as regards the advisability of maintaining the present structure of a basic Convention with Protocols, and a suggestion was made to adopt the system of the 1944 Chicago Convention with a Convention with annexes.

21. The German delegation submitted for discussion a consolidated text of the preliminary draft Convention and the preliminary draft Protocol in a single instrument (Unidroit CGE/Int.Int./WP/9 and ICAO Ref. LSC/ME-WP/20), *inter alia* on the ground that there was no guarantee that other preliminary draft Protocols would emerge. The Secretary-General of Unidroit pointed out that the Intergovernmental Organisation for International Carriage by Rail (OTIF) had already agreed to co-ordinate the intergovernmental consultation procedure in respect of the preliminary draft Protocol on Matters specific to Railway Rolling Stock and that this preliminary draft Protocol, as also that on Space Property, were at an advanced stage of preparation. Attention was also drawn to the letter from the Director General of OTIF urging the maintenance of the dual structure (Unidroit CGE/Int.Int./WP/8 and ICAO Ref. LSC/ME-WP/19).

22. It was agreed that it was premature to decide whether or not to adopt an approach different from the present one as regards the structure of the preliminary draft Convention and its equipment-specific protocols. It was therefore agreed that the structure of the instruments and related questions would be dealt with once the text of the instruments had been examined by the Joint Session. It was decided that the texts of the preliminary draft Convention and preliminary draft Protocol should be examined separately. The German delegation announced that it was reserving its position.

23. The importance of examining the connection between national registry systems and the proposed international registry was stressed.

24. The observer from the European Bank for Reconstruction and Development (E.B.R.D.) saw the texts before the Joint Session as representing a remarkable achievement, which would in due course be most useful for the countries of its operations. For the time being, the basic structure for secured financing in these countries was still being developed on the basis of the Model Law on Secured Transactions prepared by the E.B.R.D.

25. The observer from the Hague Conference on Private International Law pointed out that the preliminary draft Convention contained conflicts and civil procedure rules and that its rules on these subjects were not always accurate. It was suggested that these issues might be examined in the course of the proceedings.

CONSIDERATION OF THE TEXT OF THE PRELIMINARY DRAFT CONVENTION

GENERAL DISCUSSION

26. It was decided that, for ease of consultation, titles should be drafted for the articles of the preliminary draft Convention and a table of contents added at its beginning.

27. One delegation proposed and it was decided that the Drafting Committee should draft a preamble to the preliminary draft Convention.

28. It was agreed to consider the text article by article.

CHAPTER 1: SPHERE OF APPLICATION AND GENERAL PROVISIONS

ARTICLE 1

29. A number of delegations queried some of the definitions contained in Article 1 (“agreement”, “applicable law”, “assignment”, “associated rights”, “court”, “prospective assignment”, “prospective international interest”, “prospective sale”, “security agreement”, “surety”, and “writing”). It was decided that the Drafting Committee should re-examine these definitions and clarify the concepts involved.

ARTICLE 2

30. It was decided that the Drafting Committee should give greater clarity to the reference to “applicable law” in Art. 2(3), as a number of delegations had observed that this reference raised numerous problems.

ARTICLE 3

31. It was suggested that the list of categories contained in Art. 3 should be deleted as it raised a number of problems. It was however felt that the concept contained in Art. 3(i) was important and should be retained in any reformulation of the provision that the Drafting Committee might propose. It was therefore suggested that the Drafting Committee should examine the possibility of deleting the list and modifying the remaining text so as to include within Art. 2 the chapeau of Art. 3 and the concept contained in Art.3(i).

ARTICLE 4

32. The question of the relationship between the nationality register and the State-authorised asset register was raised. Furthermore it was suggested that non-national registries with other functions should be included under this article.

33. It was decided that the Drafting Committee should consider a formulation that would solve the question of the duality in para. (b). The scope of application of the article should however not be extended too much. It should also consider the problems raised by the rendering of the English term “registered” by the French term “immatriculé” as it was uncertain whether the concepts corresponded exactly. It was also decided that the Drafting Committee should examine the concept of “close connection”. The inter-relationship between Arts. 4 and U should also be considered.

ARTICLE 5

34. A proposal to replace the word “party” by “obligor” was accepted.

35. It was decided that the Drafting Committee should consider the question of the determination of the place of incorporation of the obligor in the case of federal States. It should furthermore consider the possibility of adding a reference to the official headquarters of a company.

ARTICLE 6

36. The present text of Art. 6 was accepted, one delegation however expressing its reservations.

ARTICLE 7

37. It was decided to delete Art. 7(2).

38. It was decided that final approval of Art. 7(3) should be deferred until the Drafting Committee had better defined what was to be understood by the references to the “applicable law”.

CHAPTER II: CONSTITUTION OF AN INTERNATIONAL INTEREST

ARTICLE 8

39. It was suggested that the Drafting Committee consider adding the word “and” at the end of each paragraph to indicate that the conditions were cumulative.

40. It was decided that the Drafting Committee should better define the meaning of the word “power” in para. (b). Furthermore it was decided that the decision of whether or not the text presently in square brackets in para. (d) should be retained should be deferred until the Drafting Committee had proposed a new definition of “security agreement”. The Drafting Committee should also consider how to ensure that outright transfers of property were covered by the definition of “security agreement”.

CHAPTER III: DEFAULT REMEDIES

ARTICLE 9

41. The German delegation indicated that it would have great difficulty in accepting Art. 9 and the other articles of Chapter III, as the transposing of these provisions into national law would raise considerable difficulties.

42. The observer from the Hague Conference on Private International Law raised the question of the relationship between Art. 9(1) and Arts. 42 and 43.

43. It was decided that the Drafting Committee should review the question of self-help remedies and consider the advisability of introducing the concepts of “good faith” and “public order” into Art. 9. In reconsidering Art. 9, the Drafting Committee should take the provisions of Art. 15 into account. More specifically, the Drafting Committee should consider whether Art. 9(6)(d) could be considered to cover the content of Art. 9(6)(c).

44. In relation to Art. 9(2), the Drafting Committee should consider whether the concept of “good faith” should be inserted instead of that of “a commercially reasonable manner”. In relation to Art. 9(3), the possibility that the Registrar be provided with a duty to inform all holders of international interests when a new national interest was created should be considered.

ARTICLE 10

45. In order to settle the question of the mandatory or non-mandatory character of Art. 10(1), it was agreed that the Drafting Committee should consider splitting the provision into two parts. The part dealing with court orders would be of mandatory character.

ARTICLE 11

46. It was agreed that the Drafting Committee should reconsider the present wording of the provision, so as to ensure that it dealt with the concerns expressed by some delegations regarding, firstly, whether the terms and conditions for the termination of the leasing agreement or the title reservation agreement were left to the terms of the agreement or to the applicable law and, secondly, whether there must be default before a court order can be sought.

ARTICLE 12

47. It was decided that the present wording of Art. 12 should be retained for the time being. The Plenary Session would take a final decision on this article once the Drafting Committee had specified what would constitute a substantial default and had considered alternative formulations of paragraph (1).

ARTICLE 13

48. There was general agreement on the content of Art. 13. It was however pointed out that there was a need to reformulate the reference to “procedural law”, so as to take into consideration the fact that in some legal systems rules of procedure did not constitute a separate branch of law.

ARTICLE 14

49. There was general agreement on the content of Art. 14. It was suggested that the Drafting Committee should consider inserting a reference to Art. 6.

ARTICLE 15

50. It was decided that the Drafting Committee should consider the relationship between Art. 15 and Art. 9, on the one hand, and between Art. 15 and Art. Z, on the other.

51. It was also decided that the Drafting Committee should consider the relationship between Art. 15(1)(a) and (e), as some delegations felt that sub-para. (e) might be covered by the wording in sub-para. (a). It was further suggested that the sale of an object as an interim measure as specified in sub-para. (c) should be associated with a guarantee.

52. Lastly, it was agreed that the reference to “applicable law” should be considered in the light of the discussions in the Drafting Committee on this matter.

CHAPTER IV: THE INTERNATIONAL REGISTRATION SYSTEM

GENERAL DISCUSSION

53. Mr L. Weber (ICAO) introduced a document prepared by the ICAO Secretariat on the “Establishment of an International Registry for the Registration of International Interests in Aircraft Objects” (Unidroit CGE/Int.Int./WP/3 and ICAO Ref. LSC/ME-WP/9), which considered in particular the issues requiring consideration and the costs involved in the setting up of an International Registry. In this document the ICAO Secretariat also proposed that the Joint Session establish a working group of governmental experts to deal specifically with institutional, legal, operational and other relevant issues of the establishment and operation of the International Registry (Registry Working Group).

54. The proposal to establish a Registration Working Group was accepted by the Joint Session in Plenary (see above, para. 13).

55. Mr J. Wool (AWG) introduced a paper containing a “Summary and Issues Note relating to the International Registry System contemplated by the Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment as applied to aircraft equipment by virtue of the Preliminary Draft Protocol on matters specific to Aircraft Equipment” (Unidroit CGE/Int.Int./WP/4 and ICAO Ref. LSC/ME-WP/13).

ARTICLE 16

56. A number of delegations queried the need to create a new International Registry and suggested that existing registries might fulfil the role assigned to the proposed new International Registry. It was however pointed out that the proposed centralised International Registry represented the core of the preliminary draft Convention. One delegation indicated that, as regards national aircraft registries, there were at present no national registries that would be capable of handling the types of interest that were being considered in the two proposed instruments. The costs of adapting existing registries would be prohibitive, whereas the experience of the country of that delegation indicated that the operational costs of an international registry such as the one proposed would be very low.

ARTICLE 17

57. It was suggested that the unitary or binary character of the system adopted for the Registry should not be specified in the Convention. The different Protocols should be free to adopt the system best suited to the needs of the equipment they dealt with. It was recalled that administrative questions relating to the operation and organisation of the Registry would be laid down in regulations, which would also ensure the transparency of its operation and organisation.

CHAPTER V: MODALITIES OF REGISTRATION

ARTICLES 18 - 19

58. No observations were made on Arts. 18 – 19, a matter on which the R.W.G. was working (cf. Report of the RWG).

ARTICLE 20

59. The question of the relationship between Art. 20 and the priority rules was raised, in particular as regards the moment in time when registration becomes effective. It was recalled that the working hypothesis was an electronic registration system in which registration would become effective as soon as it had been completed.

ARTICLE 21

60. It was agreed that the Drafting Committee should reconsider the formulation of Art. 21(2) and (3) so as to clarify their meaning.

61. It was agreed that Arts. 21(4), 24 and 26(1) should be considered in the context of the discussions on Art. 39.

ARTICLES 22 - 23

62. No observations were made on Arts. 22 – 23 (cf. Report of the RWG).

ARTICLE 24

63. It was agreed that Arts. 21(4), 24 and 26(1) should be considered in the context of the discussions on Art. 39.

ARTICLE 25

64. No observations were made on Art. 25 (cf. Report of the RWG).

ARTICLE 26

65. It was agreed that Arts. 21(4), 24 and 26(1) should be considered in the context of the discussions on Art. 39.

[CHAPTER VI: LIABILITIES AND IMMUNITIES OF THE INTERNATIONAL REGISTRY]

ARTICLE 27

66. It was suggested that the concept of “error” in Art. 27(1) should be better defined, as it was susceptible to different interpretations in different legal systems.

67. As regards the immunity of the international registry, it was proposed that Art. 27(3)(b) be extended to cover also Art. 27(4). Furthermore, a number of delegations recalled that the provisions regulating the immunity of inter-governmental Organisations were traditionally laid down in agreements with the States on whose territory they were situated. They therefore questioned the need to deal with this issue in the proposed Convention.

CHAPTER [VII]: EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

ARTICLE 28

68. The German delegation indicated that it would have great difficulty in accepting Art. 28(2) and (3), as the transposition of these provisions into national law would raise considerable difficulties.

69. A number of delegations raised the question of the relationship between Art. 28 and Arts. 16(1), 39 and 40.

70. It was recalled that registration was not a guarantee that the interest was valid (cf. Art. 8). Registration was a necessary condition for the protection of rights against third parties.

ARTICLE 29

71. Some delegations drew the attention of the Joint Session to the fact that their internal insolvency law had recently been the subject of substantial reform and that their Governments would therefore not be prepared to accept provisions relating to insolvency that would render a further reform of their internal law necessary.

72. It was decided that the Drafting Committee should consider the advisability of defining the term “bankruptcy” in the preliminary draft Convention. It should also consider whether a number of issues presently dealt with in the preliminary draft Protocol, in particular insolvency, should instead be dealt with in the preliminary draft Convention. There was general agreement that the provisions of the preliminary draft Convention dealing with bankruptcy should be generally looked at in the light of the 1995 EU Convention on Insolvency Proceedings, the 1990 European Convention on certain International Aspects of Bankruptcy and the UNCITRAL Model Law on Cross-Border Insolvency.

73. In consideration of the possible overlapping between the preliminary draft Convention and the UNCITRAL draft Convention on Assignment in Receivables Financing, to which the attention of the Joint Session had been drawn by a number of delegations as well as by the observer from UNCITRAL, it was decided that an informal working group should be set up to examine this problem.

CHAPTER [VIII]: ASSIGNMENT OF INTERNATIONAL INTERESTS AND RIGHTS OF SUBROGATION

GENERAL DISCUSSION

74. A number of delegations raised doubts as to the utility of Chapter VIII as a whole. It was pointed out that it might give rise to difficulties with both national legislation and international Conventions. It was however also pointed out that Chapter VIII was necessary, because in the case of an assignment of an interest it was necessary to be able to determine who the present holder was, that is whose name would appear on the Registry in respect of that asset.

ARTICLE 30

75. It was suggested that the Drafting Committee should consider adding the word “and” at the end of each sub-para. of Art 30(2) to indicate that the conditions were cumulative.

76. It was agreed that the formulation of Art. 30 should be brought into line with that of Art. 8.

ARTICLE 31

77. It was suggested that the Drafting Committee should consider deleting the last part of Art. 31(2)(b) (“at the time of receipt of a notice of the assignment under Article 33”) which it was feared might interfere with the draft UNCITRAL Convention on Assignment in Receivables Financing.

78. It was suggested that Art. 31(2) should require an assignment to be clearly subject to any restrictions or contractual rights in favour of the obligor that were contained in the financial documents between the obligor and assignor.

ARTICLE 32

79. It was pointed out that the term “grantor” in Art. 32 should read “chargor”

80. The question of the utility of Art. 32 was raised, in view of the fact that, with the exception of Art. 22, Chapter V specifically provided for assignments. It was agreed that the Drafting Committee should examine this question.

ARTICLE 33

81. It was decided that the Drafting Committee should reconsider the formulation of Art. 33(1)(c), in particular as regards the reference to “[actual] knowledge”.

ARTICLE 34

82. One delegation raised the question whether, under para. (d), if there was default on the part of the assignor but not of the obligor of the first interest, the default remedy would apply not only to the rights that had been assigned, but to the object itself. It was decided that the Drafting Committee should look into this matter.

ARTICLES 35 - 36

83. These articles were approved without discussion.

ARTICLE 37

84. It was suggested that this article should be reviewed with reference to general insolvency law.

ARTICLE 38

85. A number of delegations pointed out that this article expressed concepts that were contrary to their national legislation. It was therefore agreed that the issues dealt with should be studied in greater depth.

86. It was decided that the Drafting Committee should look at the entire Chapter VIII and that the Joint Session should reconsider all the issues raised in relation thereto at its second session.

[CHAPTER [IX]: NON-CONSENSUAL RIGHTS AND INTERESTS]

ARTICLE 39

87. It was noted that both Arts. 39 and 40 raised important policy questions which would need to be decided upon by the Joint Session.

ARTICLE 40

88. A number of delegations raised the problem of declarations made by States indicating the non-consensual interests to which they wished to see priority status granted. It was suggested that the article should make it clear that also non-consensual interests created in the future might be included, and that this might be done either by ensuring that the formulation of the list was sufficiently broad to cover them or by ensuring that the lists could be modified in the future.

[CHAPTER [X]: APPLICATION OF THE CONVENTION TO SALES]

ARTICLE 41

89. It was decided to defer consideration of this article until after the question of the relationship between the preliminary draft Convention and the equipment-specific Protocols had been decided.

CHAPTER [XI]: JURISDICTION

ARTICLES 42 - 43

90. In consideration of the numerous problems that the question of jurisdiction raised, it was agreed that the Secretariats of Unidroit and ICAO should give more thought to these questions in the light of domestic rules and regional Conventions on jurisdiction and the submissions that the Hague Conference on Private International Law had agreed to transmit to the two Secretariats, in the context of its work on the preparation of a universal Convention on jurisdiction and the recognition and enforcement of judgments.

[CHAPTER [XII]: RELATIONSHIP WITH OTHER CONVENTIONS] AND CHAPTER [XIII]: [OTHER] FINAL PROVISIONS

91. It was decided that consideration of these two chapters should be deferred until a moment in time closer to the Diplomatic Conference that would be convened for the adoption of the future draft Convention and draft Protocol.

AGENDA ITEM 6: CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (UNIDROIT 1998, STUDY LXXIID - Doc. 3) / PRELIMINARY DRAFT [UNIDROIT] CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (ICAO REF. LSC/ME-WP/4) (hereinafter : “the preliminary draft Protocol”)

GENERAL DISCUSSION

92. Mr J. Wool (AWG), in his capacity as Chairman of the Aircraft Protocol Group, introduced the preliminary draft Protocol to the preliminary draft Convention on Matters specific to Aircraft Equipment.

CONSIDERATION OF THE TEXT OF THE PRELIMINARY DRAFT PROTOCOL

PREAMBLE

93. In view of the potential overlap between the text of the preamble to the preliminary draft Protocol and the new preamble to the preliminary draft Convention, it was decided that the preamble of the preliminary draft Protocol should be simplified by the Drafting Committee, which should decide which provisions should be absorbed by the preamble to the preliminary draft Convention.

CHAPTER I: SPHERE OF APPLICATION AND GENERAL PROVISIONS

ARTICLE I

94. A number of delegations queried some of the definitions contained in Art. I of the preliminary draft Protocol. In particular, it was felt that the definitions of “aircraft”, “aircraft engines”, “aircraft objects”, “Chicago Convention”, “deregister the aircraft”, “helicopters” and “primary insolvency jurisdiction” should be reconsidered in the light of existing international instruments. The exclusion of airframes and helicopters used in military, customs and police services was also queried by some delegations, who felt that they should be included within the sphere of application of the preliminary draft Protocol. Other delegations instead wanted to see them excluded, but preferred a wording closer to that of the 1944 Chicago Convention on International Civil Aviation.

95. It was finally decided that it was premature to decide whether or not airframes and helicopters used in military, customs or police services should be included within the sphere of application of the preliminary draft Protocol.

ARTICLE II

96. This article was approved without discussion.

ARTICLE III

97. It was agreed that the Drafting Committee should reconsider the formulation of this article, so as to align it with the modifications that had been made to the preliminary draft Convention, in particular Art. 4 thereof.

98. It was also agreed that, with reference to Art. III(3), the Drafting Committee should take into consideration the fact that Art. X of the preliminary draft Protocol, to which reference was made in that provision, was addressed to Contracting States and not to the parties to the transactions under consideration.

99. Finally, it was agreed that the Drafting Committee should consider defining the term “purely domestic transaction”.

ARTICLE IV

100. It was suggested that the use of the term “*mutatis mutandis*” should be reconsidered.

ARTICLE V

101. It was agreed that Art. V should be brought into line with Art. 8 of the preliminary draft Convention as modified. It was also pointed out that the words “by or” in Art. V(3) should be deleted.

ARTICLE VI

102. This article was approved without discussion.

ARTICLE VII

103. It was pointed out that regulations would need to provide the details necessary to identify the aircraft object, in particular as the manufacturer’s serial number and model designation were not sufficient for this purpose.

ARTICLE VIII

104. A number of delegations raised the question of the extent of the autonomy of the parties as to the choice of the law that should govern their rights and obligations under the Convention. It was suggested that regional instruments, such as the Convention on the Law Applicable to Contractual Obligations (Rome, 1980) and the Inter-American Convention on the Law Applicable to International Contracts (Mexico, 1994), should be taken into consideration in the formulation of this provision.

105. In relation to Art. VIII(2), it was suggested that the words “unless otherwise agreed by the parties” be added at the beginning of the paragraph, so as to cover also the case where the parties wished to include the rules of private international law of the State whose law they had chosen to govern their rights and obligations under the Convention, as these would otherwise be excluded by the words “other than its rules of private international law”.

106. It was agreed that the Drafting Committee should find a more suitable expression to express what was intended by “rules of law” in Art. VIII(2). Furthermore, it was decided that the expression “designated State” should be clarified in a specific federal State clause.

CHAPTER II: DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

ARTICLE IX

107. It was agreed that the Drafting Committee should provide clarification regarding the concept of “disruption of air transport”.

ARTICLE X

108. There was general agreement on the need to provide for speedy relief, but the manner in which the preliminary draft Protocol sought to attain it encountered many difficulties as a result of the different standards that were applicable in the different countries. It was therefore agreed that the Drafting Committee should find a more suitable wording for this article.

ARTICLE XI

109. A number of delegations stressed that the adoption of this very detailed article would require substantial modifications to national insolvency laws. Other delegations instead stressed the economic importance of the provision and its centrality in the preliminary draft Protocol system. It was therefore agreed that the Drafting Committee should prepare two alternative formulations of this article for the next session of the Joint Session.

ARTICLE XII

110. It was agreed that the Drafting Committee should reconsider the formulation of this article so as to take into consideration the fact that a number of States required specific bilateral agreements or multilateral Conventions for co-operation between their courts and the courts of other States to be possible. In its consideration of this issue, the Drafting Committee should take existing instruments, such as the 1995 EU Convention on Insolvency Proceedings, the 1990 European Convention on certain International Aspects of Bankruptcy and the UNCITRAL Model Law on Cross-Border Insolvency, into consideration.

ARTICLE XIII

111. It was agreed that in its consideration of Article XIII, the Drafting Committee should clarify how it was linked to Arts. IX, X and XI. It was not clear at what time the submissions had to be made to the civil aviation authorities and what obligations ensued for those authorities. It was pointed out that there was no provision that provided for the removal of the form and that this possibility should instead be provided for.

ARTICLE XIV

112. This article was approved without discussion.

ARTICLE XV

113. It was suggested that the formulation of Art. XV(4) be reconsidered, in particular as regards the effects of the omission of the words after “not held with an international interest” in Art. 36 of the preliminary draft Convention.

CHAPTER III: REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN AIRCRAFT OBJECTS

ARTICLES XVI – XIX

114. The Chairman of the RWG informed the Joint Session that the RWG had closely examined the structures of the proposed Registry and of the International Regulator, and would be presenting proposals in relation thereto. Furthermore, there were many issues presently dealt with in the preliminary draft Convention that the RWG would be proposing moving to the preliminary draft Protocol.

115. It was agreed to delete Alternative B under Art. XVI.

116. The Chairman of the RWG indicated that a number of delegates had expressed the fear that the Registry would be a large, expensive and bureaucratic organisation. The RWG had considered this point

and had reached the conclusion that this would not be the case, and that the Registry would without doubt be self-financing.

117. The Canadian delegation indicated that although Canada did not wish to be the operator of the Aircraft Registry, it would be pleased to host it.

118. Attention was drawn to the fact that under Art. XVII the International Registry Authority or, alternatively, the International Regulator was accountable to Contracting States as regards its regulatory functions. It was suggested that this accountability be extended to cover also financial matters.

119. It was decided that the Drafting Committee should consider Chapter III together with the registration provisions of the preliminary draft Convention. The role of Contracting States should also be considered, in particular as regards the preparation of the regulations and the accountability to Contracting States of the International Registry Authority or International Regulator.

CHAPTER IV: JURISDICTION

ARTICLES XX – XXI

120. It was suggested that Art. XX should be examined together with Arts. 42 and 43 of the preliminary draft Convention, in the light of the comments expected from the Hague Conference on Private International Law in relation to jurisdiction.

121. The utility of Art. XXI was queried, as it was seen as merely stating a generally recognised principle of law. The observer from the AWG however pointed out that the purpose of the provision was to provide certainty in a way that was not contentious.

CHAPTERS V: RELATIONSHIP WITH OTHER CONVENTIONS AND VI: [OTHER] FINAL PROVISIONS

ARTICLES XXII – XXXV

122. It was agreed to defer discussion on Chapters V and VI to the next session of the Joint Session.

123. A general point raised regarded the number of ratifications necessary for the instruments to enter into force. It was suggested that a small number of ratifications should be required, as this would permit an early entry into force of the instruments.

124. It was pointed out that any accession to a Protocol would require prior accession to the future Convention.