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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THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

PUBLIC INTERNATIONAL LAW WORKING GROUP

(Rome, 20 and 21 March 2000):

REPORT

I. INTRODUCTION

1. The Public International Law Working Group met in Rome on 20 and 21 March 2000 to complete the tasks referred to it by the Second Joint Session (cf. the paper *Problem areas to be dealt with by the Public International Law Working Group and Priorities among these (*ICAO Ref LSC/ME/2-UNIDROIT CGE/Int. Int./2/ PILWG-Flimsy No.5 rev.), reproduced hereafter as Appendix I to this Report) and, in particular, the work commenced at its previous session, held in Cape Town / en route to Pretoria from 8 to 11 December 1999 (cf. UNIDROIT CGE/Int.Int./3-WP/3; ICAO Ref. LSC/ME/3-WP/3). Its meeting on the 20th was chaired by Ms G. T. Serobe (South Africa), Chairman of the Working Group. In the absence of the Chairman, its meeting on the 21st was chaired by Mr G. Grall (France), Second Vice-Chairman of the Working Group. The following members of the Working Group attended these meetings: Canada, Egypt, France, Ireland, Japan, Mexico, Republic of Korea, Russian Federation, South Africa, United Kingdom and United States of America. Representatives of the following States attended its meetings as observers: Finland, Greece, Netherlands, Singapore and Tunisia. The following intergovernmental Organisation attended its meetings as an observer: the European Space Agency. The following international non-governmental Organisations and expert attended the meetings as advisers to the Working Group: the Aviation Working Group, the International Air Transport Association, the Rail Working Group, the Space Working Group and Ms C. Chinkin, co-author of the *Discussion paper on the legal relationship between the preliminary draft Convention and its equipment-specific Protocols* (ICAO Ref. LSC/ME/2-WP/2- UNIDROIT CGE/Int. Int./2-WP/2).

2. The Working Group was seised of the following materials (in English only, except where indicated):

(1) Revised discussion paper by Ireland on the relationship between the preliminary draft Convention / Aircraft Protocol and the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft;

(2) Proposal by Ms C. Chinkin for Article W (Adoption of Future Protocols) (in English and in French);

(3) Revised discussion paper by the Republic of Korea and the Aviation Working Group on reciprocity rules in the context of the preliminary draft Convention/Aircraft Protocol;

(4) Revised discussion paper by Canada on Federal State clauses (in English and in French);

(5) Revised joint discussion paper by the United Kingdom and Japan on transitional provisions.

II. CONSIDERATION BY WORKING GROUP OF PROBLEM AREAS REFERRED TO IT BY JOINT SESSION

3. The Working Group completed its consideration of the problem areas referred to it by the Second Joint Session, with the exception of the question of the relationship between the preliminary draft Convention/Aircraft Protocol and the future UNCITRAL Convention on Assignment in Receivables Financing. It agreed to reconvene on 27 March to discuss this outstanding item in the presence of the observer from UNCITRAL.

4. The conclusions reached by the Working Group on the various problem areas referred to it are set out hereunder. With a limited number of exceptions considered to be justified with a view to facilitating consideration of its proposals by Plenary, the Working Group did not see its remit as extending beyond the recommendation of general principles and accordingly avoided encroaching on the competence of the Drafting Committee for all matters relating to the drafting implications of its proposals.

Re relationship between preliminary draft Convention/Aircraft Protocol and Geneva Convention on the International Recognition of Rights in Aircraft (cf. Article XXII of preliminary draft Protocol)

5. The Working Group agreed that an effort should be made to simplify the formulation of Article XXII of the preliminary draft Aircraft Protocol, which was considered to be complex and confusing. It further agreed that the basic principle to be reflected in such a reformulation should be that the future Convention/Aircraft Protocol would supersede the Geneva Convention on the International Recognition of Rights in Aircraft (hereinafter referred to as the ***Geneva Convention***) among States Parties to both, as the later of the two treaties. The question as to whether the approach of Article 30(2) or that of Article 30(3) and (4) of the Vienna Convention on the Law of Treaties (hereinafter referred to as the ***Vienna Convention***) should be followed was left open.

6. The Working Group accordingly reviewed each Article of the Geneva Convention with an eye on those provisions which might or might not be covered by the future Convention/Aircraft Protocol. The Working Group determined, after extensive discussion, that with respect to the aircraft objects covered by the future Convention/Aircraft Protocol, there were no elements of the Geneva Convention worth preserving in the future Convention/Aircraft Protocol. The Working Group accordingly recommended that Article XXII of the preliminary draft Aircraft Protocol should be amended as follows:

"Article XXII

The Convention shall, for a Contracting State that is a party to the Geneva Convention, supersede that Convention as it relates to aircraft objects."

7. In the course of the Working Group's consideration of this item at its first session, one member proposed that the future Convention and Aircraft Protocol provide a dual registration system giving users the choice between registering in the international registration system and continuing to register their rights and interests in the national registry of the State of nationality. At its second session, the Working Group decided that a dual registration system would be impracticable and would defeat the purpose of the future Convention/Aircraft Protocol. The Working Group concluded that the current approach reflected in the preliminary draft Convention/Aircraft Protocol for an International Registry as a single point for the recording of rights and interests in aircraft objects was not only appropriate but also necessary.

Re relationship between preliminary draft Convention/Aircraft Protocol and Rome Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (cf. Article XXIII of preliminary draft Protocol)

8. The Working Group agreed that there were no grounds for incorporating the protections of the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (hereinafter referred to as the ***Rome Convention***) and that that Convention should therefore be superseded by the future Convention/Aircraft Protocol. Relatively few States had become parties to the Rome Convention. It was not therefore clear why its provisions should now be made mandatory in the new instruments, all the more so since the Rome Convention did not include a provision for speedy interim relief of the type provided under Article 14 of the preliminary draft Convention. It was agreed that recourse to the protections afforded under the Rome Convention was best governed by the optional approach contemplated under Article Y(2). Some support was also expressed in the Working Group's discussion of this subject for the idea of the protection afforded by Article Y(2) being expanded to take in also those additional remedies contemplated by Article 13.

Re legal relationship between preliminary draft Convention and preliminary draft Aircraft Protocol (cf. Article U of preliminary draft Convention and Article II of preliminary draft Protocol) and between preliminary draft Convention/Aircraft Protocol and other future Protocols (cf. Article W of preliminary draft Convention)

9. The Working Group took these two issues together, in view of what was seen as their interrelated nature. As regards the legal relationship between the future Convention and the future Aircraft Protocol, the Working Group noted that the Convention/ Protocol structure contemplated by the proposed new international regimen was consistent with existing treaty law and practice and that there was recognised modern precedent for the conclusion of a *basic* Convention containing general principles and forming a framework for the States Parties thereto but to which effect would only be given to the extent provided by Protocols thereto. The Working Group further noted, first, the controlling nature that each future Protocol was intended to have in relation to the future Convention (cf. Article U(1)(b) of the preliminary draft Convention) and, secondly, the fact that the future Convention and each future Protocol were to be read and interpreted as a single instrument in respect of each category of equipment (cf. Article U(2) of the preliminary draft Convention and Article II(2) of the preliminary draft Aircraft Protocol).

10. As requested by the Working Group at its previous session (cf. UNIDROIT CGE/Int.Int./3-WP/3; ICAO Ref. LSC/ME/3-WP/3, § 13), Ms Chinkin had prepared a proposal for Article W relating to the adoption of future Protocols. Regarding this proposal, the Working Group was generally divided as to the preferability of an opting-in fast-track procedure or an expedited form of the traditional diplomatic Conference procedure. The important costing and human resources benefits of a fast-track opting-in procedure were recognised by all. Attention was also drawn to the possible adverse effects of delay in the coming into force of future Protocols, especially for developing countries. A willingness was evinced to explore innovative ways of meeting these needs. However, this was balanced by concerns about the political acceptability of a process that would substantially reduce the scope for governmental control. There was recognition of the importance of UNIDROIT playing a central role in the development of future Protocols and it was suggested that this might be facilitated by designation of UNIDROIT as the depositary of the future Convention and Protocols.

11. Two major concerns nevertheless emerged. The first concerned the need to reflect the differing stages of development reached in relation to the future Rail and Space Property Protocols, on the one hand, and other potential future Protocols, on the other hand. It was recognised that a fast-track opting-in procedure might be appropriate for the future Rail and Space Property Protocols, in view of the more advanced stage reached in work on these. With respect to other future Protocols it was recognised that, in particular in view of the controlling nature of Protocols in the future Convention system, a more traditional, albeit expedited diplomatic Conference might be more politically appropriate. In this context, reference was made to the possibility of the General Assembly of UNIDROIT member States being accorded the power to adopt such future Protocols. This would however be dependent on UNIDROIT member States being prepared to confer plenipotentiary powers on their representatives attending the General Assembly for this purpose.

12. The second concern related to the need to ensure adequate participation by Governments in the pre-adoption process. It was thought that the acceptability of future Protocols might be compromised by failure to provide adequate opportunities for governmental participation in the negotiation thereof. It was therefore recognised that it would be essential for such opportunities to be built into the drafting process leading up to adoption of future Protocols. It was further recognised that such participation would take place subsequently, and would be additional to the preparation of preliminary drafts of future Protocols by equipment-specific working groups.

Attention was drawn to the importance of the central coordinating function of UNIDROIT throughout the drafting and adoption of future Protocols.

13. One adviser drew attention to the advisability of envisaging regional governmental meetings for particular sectors, where the workability of a future Protocol would be dependent upon co-operation among contiguous States.

14. It was agreed that, in recognition of the controlling nature of Protocols in the context of the Convention/Protocol system, the fundamental and only binding review mechanism for the future Convention/Protocol in relation to a particular category of equipment should be through the Protocol relating to that category of equipment (cf. Article XXXIV of the preliminary draft Aircraft Protocol). Only a Review Conference of Contracting States to a given Protocol would thus have the power to propose amendments binding on the Contracting States to that Protocol. Such amendments would only be binding on the Contracting States to that Protocol and would not therefore affect the rights and obligations of Contracting States to other Protocols.

15. At the same time it was agreed that Contracting States to the future Convention should also have the power periodically to call General Review Conferences, although any amendments proposed by such Conferences could only be implemented in relation to a particular category of equipment following confirmation by the Contracting States to the Protocol concerned. It was agreed that it would not be desirable to give Contracting States to the future Convention, which might well include States not Parties to a particular Protocol, the power to determine the review of that Protocol without an opportunity for such States to confirm whether such an amendment was acceptable for the particular category of equipment concerned. This also reflected the fact that the future Convention/Protocol for a particular category of equipment were to be read as a single instrument. It was nevertheless recognised that such General Review Conferences, whilst having only an advisory purpose, could nevertheless play an important part in filtering the latest international commercial finance developments through the Convention/Protocol system.

16. The Working Group took the view that, in the same way as it had indicated its preference for the entry into force of the future Convention/Aircraft Protocol upon the deposit of only a limited number of ratifications/accessions with a view to ensuring their speedy entry into force, the procedure to be established for the entry into force of amendments should also require ratification/accession by only a limited percentage (and in any case less than 50%) of the Contracting States to the future Convention/Protocol in relation to the category of equipment concerned.

17. The Working Group noted that further issues remained to be considered concerning amendments to the future Convention/Protocol system and withdrawals therefrom. In the context of withdrawals, it was noted that this raised the particular question as to whether a State's withdrawal from a Protocol should also entail its withdrawal from the future Convention.

Re entry into force of preliminary draft Convention/Aircraft Protocol (cf. Article U(1) of preliminary draft Convention and Article XXVI of preliminary draft Aircraft Protocol)

18. The Working Group declared itself in favour of the future Convention/Aircraft Protocol entering into force, in common with other international private law instruments, upon the deposit of only a small number of ratifications/accessions (either three or five). The Working Group also considered that in principle the future Convention/Aircraft Protocol should enter into force in respect of a State that had deposited its instruments of ratification/accession only three months (as opposed to the more usual six months) following such deposit. Given the need to leave the affected business and financial parties sufficient time to prepare themselves for entry into force, it did not however believe that the idea of any shorter period of time should be entertained. Some concern was expressed regarding the practicability of providing for such a small number of ratifications/accessions for the entry into force of the future Convention/Aircraft Protocol in view of the significant financial burden implicit in making the future International Registry operational. The future Convention/Aircraft Protocol might enter into force as between States none of which had many aircraft. It was agreed in this connection that it would be necessary to make provision in the relevant registration provisions for the initial fee schedule to be structured in such a way as to amortise the cost of making the International Registry operational over a reasonably long period, say, within five years of the future Convention/Aircraft Protocol entering into force. [1]

Re international liability, immunity and privileges of Supervisory Authority and Registrar (cf. Chapters VI and VII of preliminary draft Convention)

19. The view was expressed that, to the extent that the Supervisory Authority might end up being composed of governmental representatives - fear having been expressed that the idea of setting up a new international Organisation might not be popular with Governments, lending force to the simpler solution, raised in the context of aircraft equipment, of a body made up of members of the ICAO Council and the representatives of certain Contracting States - and that it would be difficult for Governments to accept the principle of their representatives being held liable, provision would need to be made for the Supervisory Authority being granted functional immunity.

20. Agreement on this principle was nevertheless tempered by concern as regards the desirability of conferring such functional immunity on the Supervisory Authority in respect of its power to give directions to the Registrar to rectify act or omissions which were in contravention of the future Convention/Aircraft Protocol or the regulations issued pursuant thereto (cf. second clause of Article 16(2)(d) of the preliminary draft Convention). The view was expressed that the control to be exercised by the Supervisory Authority over the Registrar should be limited to administrative matters and should not involve it in exercising a quasi-judicial role. It was therefore agreed by the Working Group that it would in these circumstances be appropriate for Article 16(2)(d) to be correspondingly reduced in scope. The Canadian and United Kingdom members of the Working Group were invited to prepare a proposal on this point. This proposal is set out in Appendix II to this Report.

21. Equally, the need to establish the credibility of the International Registry in the eyes of potential users meant that there would be a strong case against the Registrar being granted extensive immunities and for it to be made liable for its defaults with insurance providing the solution. For this reason, it was suggested that it would be difficult to grant the Registrar the immunity from liability for default granted to the World Intellectual Property Organization, referred

[1] It was pointed out that this highlighted the cost benefits of the international registration system being computer-driven.

to in the comments submitted by the United Nations Office for Outer Space Affairs. It was suggested that this might also be seen as a strong argument in favour of the International Registry being a separate body from the Supervisory Authority.

22. It was agreed that it would be essential for the commercial viability, and in particular the insurability, of the future international regimen for the future Convention/Aircraft Protocol to spell out the principle and the extent of the Registrar's liability. It was further agreed that, subject to the statement of such liability, it would be appropriate for the future Convention/Aircraft Protocol to grant the Registrar functional immunity. However, it was agreed that such immunity should be limited. It was recognised that the existing provisions of Article 26 *bis* of the preliminary draft Convention regarding liability for damages must require the Registrar to be amenable to the courts in that respect and liable to legal processes (including those seeking the production of documents) in order to permit the determination of the liability of the Registrar to pay damages. It was noted that this conclusion was based on the assumption that the future International Registry would be a very simple, notice-based type of registry. It was recognised that it would not be appropriate for the question of the Registrar's immunity to be dealt with in the host State agreement. It was emphasised that it would be important that the future Convention/Aircraft Protocol send a clear signal that it was not the intention to create full privileges and immunities for persons not otherwise entitled thereto in their professional capacity. The fact that the Registrar was only to be entitled to functional immunity would need to be made clear in the text of the future Convention/Aircraft Protocol.

Re alignment of preliminary draft Convention/Aircraft Protocol, in particular as regards concepts used therein, with Chicago Convention on International Civil Aviation and Annexes thereto (cf. Articles I(2)(a)-(d),(g),(l),(n),(o), II(1), III(2), IX(1)(a) and (b) and XX of preliminary draft Aircraft Protocol)

23. The Working Group, noting that the drafting issues raised by the aligning of the future Convention/Aircraft Protocol with the Chicago Convention on International Civil Aviation and Annexes thereto (hereinafter referred to as the ***Chicago Convention***) raised at its first session had in the meantime been decided upon in Plenary and referred to the Drafting Committee for implementation, concluded that, once the necessary changes had been implemented by the latter, the future Convention/Aircraft Protocol and the Chicago Convention would be perfectly complementary.

Re relationship between preliminary draft Convention/Aircraft Protocol and UNIDROIT Convention on International Financial Leasing (cf. Chapter XIII of preliminary draft Convention and Article XXIV of preliminary draft Aircraft Protocol)

24. The Working Group agreed that, in so far as Article 17 of the UNIDROIT Convention on International Financial Leasing (hereinafter referred to as the ***UNIDROIT Convention***) deferred to all future treaties and that Convention was not equipment-specific, it would be appropriate to include a provision in Chapter XIII of the preliminary draft Convention indicating that the question as to whether the UNIDROIT Convention was indeed to be superseded by the future Convention and its various Protocols was a matter to be provided for in the relevant Protocol. Otherwise the existing UNIDROIT Convention would automatically be superseded even where a Protocol was actually silent on the question. It was agreed that the insertion of such a provision in the preliminary draft

Convention should however be without prejudice to the regulation of the relationship between the existing UNIDROIT Convention and the preliminary draft Convention in the relevant Protocol.

25. One member of the Working Group however suggested that it would be advisable for the text of the UNIDROIT Convention to be thoroughly examined in order to ascertain whether there might be any inconsistencies between that Convention and the future Convention/Aircraft Protocol.

Re transitional provisions (cf. Articles 27 and 38(3) of preliminary draft Convention and Article XI(11) of preliminary draft Aircraft Protocol)

26. The present draft of the future Convention/Aircraft Protocol do not contain transitional provisions.

Re pre-existing interests

27. The Working Group considered that the coming into force of the future Convention and a future Protocol must not affect the priority of pre-existing interests. Such interests include interests that could not have been registered when created (both of the character of international interests and registrable non-consensual rights and interests) and of non-registrable non-consensual rights and interests. The issue of priority arises in respect of Articles 27 and 38(3) of the preliminary draft Convention and Article XI(11) (Alternative A) of the preliminary draft Aircraft Protocol.

28. Two solutions were offered to Plenary for consideration:

Option A

A rule that the application of the future Convention/Aircraft Protocol should not affect the priority of any pre-existing rights and interests without requiring any registration in the International Registry.

Option B

There should be a transitional period by the end of which existing interests (of a registrable kind) would have to be registered in order to maintain their priority. In so far as such interests were registered in a national registry and were re-registered in the International Registry, then the priority date would be the date of the original registration in the national registry. Failure to register by the end of the transitional period would potentially result in the loss of priority to subsequent registered international interests.

Option B would not deal with non-registrable non-consensual rights and interests.

Re non-consensual rights and interests

29. Article 38(3) provides that an international interest has priority over a non-consensual right or interest of a category not covered by a declaration deposited prior to the registration of the international interest.

For example, the future Aircraft Protocol comes into force in State B one year after it comes into force in State A. Upon accession to the future Protocol, State B makes a declaration under Article 38 maintaining the repairer's lien. Where an aircraft that is the subject of a registered international interest registered following State A's accession but before State B's accession lands in State B, the lien should still have priority over the existing international interest.

Re characterisation of existing interests

30. The question was raised as to whether pre-existing interests of the same kind as "international interests" should be treated as international interests under the future Convention/Aircraft Protocol or, alternatively, whether the provisions of the future Convention/Aircraft Protocol (for example, in respect of remedies) should only apply to international interests created after the future Convention/Aircraft Protocol come into force. Only limited discussion of this issue took place and no consensus was reached. On the one hand, it was stated that remedies in respect of an existing interest should not be improved. On the other hand, it was said that it might be anomalous if junior creditors with registered interests were to enjoy better remedies. It was noted that there might be a connection in this regard with the transitional system to be adopted in respect of pre-existing interests. If chargees were to be required to register by the end of a transitional period (cf. Option B, *supra*), the question would arise as to whether that registration should result in the interests then being treated as international interests for all the purposes of the future Convention/Aircraft Protocol.

One solution that was proposed was to leave States free to make their own choice on this subject. It was suggested that Plenary might wish to explore what the effects of such different treatment might be.

Re reciprocity rules in context of preliminary draft Convention/Aircraft Protocol (cf. Article XXX of preliminary draft Aircraft Protocol)

31. The Working Group agreed as to the desirability of a clause being drafted, to be considered for inclusion in the future Final Provisions, designed to clarify beyond any doubt that the reciprocity principle enshrined in Article 21 of the Vienna Convention was not intended to apply to those declarations whereby Contracting States would, under the preliminary draft Aircraft Protocol, be able to opt out of certain provisions thereof. It was suggested that such a clause might be drafted along the following lines:

"Article XXX *bis*
Non-reciprocity of declarations

The provisions of this Protocol subject to any declaration shall be binding on the Contracting States that do not make such declarations in their relations vis-à-vis the declaring Contracting State."

It was suggested that an alternative might be to include similar language in Article XXX.

32. It was however emphasised that the purpose of such a rule was only to confirm what was already an established feature of post-Vienna Convention treaty practice, namely that those territorial non-application declarations whereby Contracting States to international private law Conventions were permitted to opt in or out of certain provisions of such Conventions were not to be considered as reservations for the purposes of Article 2(1)(d) of the Vienna Convention and were not therefore subject to the application of the reciprocity principle. One member noted that it would therefore be advisable for the future Convention/Aircraft Protocol to avoid use of the term "reservation" when referring to such declarations.

Re denunciations in context of preliminary draft Convention/Aircraft Protocol (cf. Article XXXIII of preliminary draft Aircraft Protocol)

33. The Working Group agreed that Contracting States should be given the possibility of denouncing both the future Convention and the future Aircraft Protocol. Contracting States might desire to render the future Convention no longer applicable not only in respect of a given category of equipment but in its entirety, that is, in respect of all categories of high-value mobile equipment. It would accordingly be necessary for provision to be made on this subject in the Final Provisions of both the future Convention and the future Aircraft Protocol.

34. The Working Group further agreed that consideration might usefully be given to a shorter rather than a longer period of time for the taking effect of a denunciation. It was therefore agreed to work on the basis that an instrument of denunciation, whether of the future Convention or of the future Aircraft Protocol, should take effect in respect of the Contracting State in question six months after the depositing of its instrument to that effect.

35. The Working Group also considered a proposal made by the author of the discussion paper to extend the benefit of the rule set forth in Article XXXIII(3) of the preliminary draft Aircraft Protocol to interests registered as prospective international interests prior to the date when a Contracting State's instrument of denunciation takes effect in respect of that State. It was argued that such a rule was necessary to satisfy the need of financiers for predictability. Exception was however taken to the unqualified introduction of such a rule, on the ground that it could lend itself to manipulation by commercial parties. It was feared that such parties might see it as an invitation to register an interest as a prospective international interest when they already knew that an instrument of denunciation was about to come into effect in respect of the relevant State and the prospective international interest in question then only became a full international interest some years later. Concern was expressed that Contracting States might thus find their intentions frustrated. Doubt was moreover expressed as to the fairness of a rule that would permit parties to take advantage of the remedies of the future Convention/ Aircraft Protocol notwithstanding the fact that at the time when they closed their transaction they knew that those instruments no longer applied to new international interests.

36. As a compromise solution, it was agreed to extend the rule set forth in Article XXXIII(3) of the preliminary draft Aircraft Protocol to prospective international interests registered prior to the date when a Contracting State's instrument of denunciation takes effect in respect of that State *but only so long as the registered prospective international interest in question is then*

converted into a full registered international interest within a period of time equal to the period to be provided for the taking of effect of a State's instrument of denunciation.

Re Federal State clauses (cf. Article XXVII of preliminary draft Aircraft Protocol)

37. When considering the type of Federal State clause contemplated by the discussion paper submitted on this subject, the Working Group, while not finding particular difficulty with the Federal State extension clause proposed therein, expressed concern at the scale of the Federal State interpretation clause proposed and noted that most States had not experienced particular problems in practice with the more concise Federal State clauses that had to date featured in international private commercial law Conventions. It further took the view that unnecessary disparity between one such instrument and another of this kind should be avoided. It was accordingly suggested that greater consistency should be sought between the kind of Federal State clause to be proposed for inclusion in the future Convention/Aircraft Protocol and the more concise model featuring in Article 35 of the draft UNCITRAL Convention, cited as the most recent example of this type of clause. While recognising that such clauses would clearly be subject to negotiation at diplomatic Conferences, the Working Group took the view that it would be appropriate for the States for which they would be necessary already to start discussing with one another the minimum number of provisions that would absolutely have to be included in the Federal State interpretation clause to feature in the future Convention/Aircraft Protocol.

38. One Working Group member expressed concern over the need to ensure that the operation of such clauses did not give Federal States an advantage over unitary States.

Re declarations and reservations (cf. Articles XXIX-XXXII of preliminary draft Aircraft Protocol)

39. The Working Group spent most of the time that it devoted to this issue considering the appropriateness or otherwise of the drafting of Article XXIX of the preliminary draft Aircraft Protocol. Confusion arose out of the fact that, whereas Article XXIX seemed to imply that the preliminary draft Protocol already contained authorised declarations and authorised reservations, for the moment it only appeared to contain authorised declarations. It was explained that the term "declaration" was being employed in the sense of those territorial non-application declarations referred to in § 32, *supra,* that is, in a sense quite distinct from the term "reservation" as defined in the Vienna Convention.

40. On the other hand, it was explained that the term "reservations" was employed in Article XXIX in addition to the term "declarations" in order to ensure consistency with other recent international private commercial law Conventions. For instance, Article 22 of the UNIDROIT Convention provided that "[n]o reservations are permitted except those expressly authorised in this Convention," whilst Article 42 of the draft UNCITRAL Convention provided that "[n]o reservations are permitted except those expressly authorized in this Convention". It was pointed out that the employment of the term "reservation" in this context was typically reserved to cover those compromises authorised at an advanced stage in the negotiations leading up to the adoption of a draft Convention, typically at the diplomatic Conference itself, in order to enable one or more States, notwithstanding a fundamental difference of opinion on a particular provision of the draft Convention between them and the other States participating in those negotiations, still to become

Parties to the future Convention. Examples of such authorised reservations were to be found in Article 95 of the 1980 United Nations Convention on Contracts for the International Sale of Goods and Article 28 of the 1983 Geneva Convention on Agency in the International Sale of Goods.

41. It had always been judged necessary to include a final provision along the lines of Article 22 of the UNIDROIT Convention and Article 42 of the draft UNCITRAL Convention in the interest of guaranteeing the maximum degree of uniformity. It would otherwise be open to States to enter any sort of reservation at the moment of becoming Parties to the future Convention/Aircraft Protocol. [2]

42. It was however finally considered desirable in the present state of the text that, in the interest of greater clarity, Article XXIX should deal separately with the two terms "declarations" and "reservations" and carry separate statements regarding, on the one hand, the prohibition of declarations other than those expressly authorised by Article XXX of the preliminary draft Aircraft Protocol and, on the other, the prohibition of reservations other than those that might be expressly authorised by the Protocol. This would signal that the term "declaration" was not being employed in the sense of the term "reservation" as defined by the Vienna Convention. It was agreed that Article XXIX should accordingly be redrafted along the following lines, perhaps as two separate Articles: "No declarations are permitted other than those expressly authorised in this Protocol. No reservations are permitted other than those expressly authorised in this Protocol." It was further suggested that a definition of the term "declaration" might usefully be included in the preliminary draft Aircraft Protocol with a view to underscoring the fact that the term in question was not being employed in the sense of the term "reservation" as defined by the Vienna Convention. It was also pointed out that Article XXIX should logically be relocated in such a way as to appear after Article XXXII.

43. The Working Group agreed that consideration would need to be given in due course to a number of issues concerning Articles XXX to XXXII. It was suggested for a start that some of these provisions might usefully be relocated to the preliminary draft Convention (cf. also § 46, *infra*). It was also suggested that, in line with what had been agreed in respect of denunciations (cf. § 34, *supra*), the period prescribed in Article XXXI(2) should also be reduced to six months. It was further suggested that, in line with the amendment that had been agreed to Article XXXIII(3) in respect of prospective international interests (cf. § 36, *supra*), it would be appropriate to make a similar amendment to Article XXXI(3). Attention was also drawn to the fact that a shorter period of time was prescribed for the taking of effect of a withdrawal of a declaration or a reservation under Article XXXII (three months) than that that was being proposed, for instance, for entry into force under Article XXVI(1) (cf. § 18, *supra*). It was however noted in this connection that the effect of the withdrawal of a declaration or a reservation could actually be to increase rights. Finally, it was proposed that the Secretariats prepare a model ratification instrument of the kind referred to in footnote 24 to the preliminary draft Aircraft Protocol (as reproduced in UNIDROIT CGE/Int.Int/3-WP/2; ICAO Ref. LSC/ME/3-WP/2, Appendix II, Addendum). It was noted that such a model would enhance the degree of uniformity to be achieved in respect of the various declarations that Contracting States would be able to make.

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[2] Cf. *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March-11 April 1980): Official Records*, p.459, where the late Mr Plantard (France) stated: "the rule...was justified, particularly for the purpose of avoiding problems in regard to States which had not participated in the Conference and which might later wish to enter reservations incompatible with the spirit of the text".

Re harmonisation of language used in Final Provisions of preliminary draft Convention/ Aircraft Protocol

44. It was agreed that headings should be provided for the Articles setting forth final provisions in both the preliminary draft Convention and the preliminary draft Aircraft Protocol.

45. Attention was drawn to the fact that different periods of time were provided for the entry into force of the preliminary draft Convention and the preliminary draft Aircraft Protocol (cf. Article U(1) of the former and Article XXVI(1) of the latter). This matter is dealt with elsewhere in this report (cf. § 18, *supra*).

46. Whilst it was agreed that a number of the final provisions currently located in the preliminary draft Aircraft Protocol might usefully be relocated to the preliminary draft Convention and thus made of general application, albeit on the clear understanding that the controlling nature of each Protocol in relation to the preliminary draft Convention be respected, the Working Group took note of the fact that this was a matter that could most usefully be attended to at such time as a full set of final provisions to be considered for inclusion in the final Convention came to be drawn up by the Secretariats. In this context it was noted that it would not be appropriate for such a full set of final provisions to be drawn up until such time as it was possible to have a clearer picture of the final provisions that will be necessary, that is at a time when the current intergovernmental negotiations have reached their final stage prior to the convening of a diplomatic Conference.