



ICAO Ref. LSC/ME/2-WP/19  
UNIDROIT CGE/Int.Int./2-WP/19  
26/8/99

Sub-Committee of the ICAO Legal  
Committee on the study of  
international interests in mobile  
equipment (aircraft equipment)

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

## SECOND JOINT SESSION

(Montreal, 24 August – 3 September 1999)

## INSOLVENCY WORKING GROUP

### REPORT

#### 1. INTRODUCTION

1.1 The Informal Insolvency Working Group (hereinafter referred to as «the informal group») set up by the ICAO and Unidroit Secretariats pursuant to the decision taken by the first Joint Session met in Rome on 1 and 2 July 1999. It was unable to complete its review of all the insolvency-related provisions of the preliminary draft Convention (hereinafter referred to as «the draft Convention») and the preliminary draft Protocol (hereinafter referred to as «the draft Protocol»). The second Joint Session decided at its opening Plenary session that the group should be reconvened urgently in order to complete this review.

1.2 In accordance with this decision, the membership of the informal group was enlarged by the addition of Canada, Egypt, the Russian Federation and South Africa. It was also confirmed that meetings of the Insolvency Working Group (hereinafter referred to as «the group») would also be attended by observers of the Aviation Working Group, INSOL International and the International Air Transport Association as advisers.

1.3 The group held five meetings on 24, 25 and 26 August. Representatives of the following States attended its meetings as members: Canada, Egypt, France, Germany, Japan, Netherlands, Russian Federation, Singapore, South Africa, United Kingdom and United States of America, Representatives of China and Sweden attended as observers.

1.4 The first meeting was chaired by Ms C. Allen (United Kingdom), who had been elected Chairman at the Rome meeting. In view of her unavailability to continue in the chair, Mr. B. J. Welch (United Kingdom) was elected Chairman of the Group at the second meeting on a proposal of Germany seconded by Canada.

#### 2. REVIEW OF THE INSOLVENCY-RELATED PROVISIONS OF THE DRAFT PROTOCOL

2.1 The group agreed not to reopen discussion on those issues on which it had been able to reach consensus at the Rome meeting of the informal group; namely those issues reflected in paragraphs 9–21 of the Report on that meeting (hereinafter referred to as «the Report»). The group’s discussion focussed on Articles XI and XII of the draft Protocol. It agreed that, as in Rome, it would not be appropriate for the group to take policy decisions, which fell rather within the competence of the Plenary.

### **Re Article XI**

2.2 As regards Article XI of the draft Protocol, regarding which opinions had been divided at the Rome meeting (cf. paragraphs 22 to 38 of the Report), it was agreed to proceed on the basis of offering Contracting States two alternative approaches. One of these approaches would be based on the «hard option» contained in Article XI of the draft Protocol. The essential feature of this option would be that it provided a fixed period for the giving of possession of the aircraft object to the obligee unless all defaults were cured by the end of that period. The other approach would be based on the proposal submitted by the French delegation at the Rome meeting of the informal group. The essential feature of this approach would be that it provided for judicial control and discretion in the realisation by an obligee of his security interest in an aircraft object.

2.3 The group had before it a proposal by the Aviation Working Group (hereinafter referred to as «A.W.G.») for an amended text of Article XI as contained in the draft Protocol (ICAO Ref. LSC/ME/2 Unidroit CGE/Int. Int./2 IWG – Flimsy No. 1), a proposal by Japan (ICAO Ref. LSC/ME/2 Unidroit CGE/Int. Int./2 IWG – Flimsy No. 2) and a proposal by France (ICAO Ref. LSC/ME/2 Unidroit CGE/Int. Int./2 IWG – Flimsy No. 3). The group agreed that, whilst it would work on the basis of these draft texts, it was not a drafting group. It would therefore be for the Drafting Committee to revise the texts of the insolvency-related provisions of the draft Convention and Protocol following consideration by the Plenary of the report of the informal group and the report of the group.

2.4 Following discussion in the group of these proposals, it was agreed to present to the Plenary the proposal made by the A.W.G. as the basis of the hard option to be offered to States and the proposal by France as the basis of an alternative option.

2.5 The texts of these two options (Option A and Option B (original version)) are reproduced in Appendices I and II respectively to this report.

2.6 The group made a number of remarks and proposals for the amendment and/or clarification of the various paragraphs of Option A. These are set out hereunder:

#### ***Re paragraph 1***

2.6.1 A preliminary point concerned whether a Contracting State could opt out of individual provisions of this Article or whether it was intended to be accepted as a whole. Opinions were divided on this issue, which was recognised to be a policy issue for Plenary, although it was pointed out that Article XI (Option A) would no longer represent a hard option if States could opt out of paragraph 10. The group, recognising that paragraph 10 was the critical paragraph in respect of which some members of the group would wish to opt out, worked with a view to preparing a revised paragraph 10 that would be acceptable to all members of the group (cf. paragraph 2.6.14 of this report).

2.6.2 It was concluded that this raised a question as to the need to redraft Article XXX.

#### **Re paragraph 2**

2.6.3 This paragraph refers to a declaration by a Contracting State being operative in the case where that Contracting State is the State in which the centre of the obligor's main interests is situated. The group agreed that the Drafting Committee in looking at this paragraph should look at the definition of «primary insolvency jurisdiction» in Article I of the draft Protocol with a view to introducing the rebuttable presumption that the relevant jurisdiction is the place of incorporation of a company unless the person commencing the insolvency proceedings could establish that the obligor's main interests were located elsewhere. This definition was based on that of the corresponding definition of primary insolvency jurisdiction in the UNCITRAL Model Law on Cross-Border Insolvency.

2.6.4 One member of the group felt that it would be useful to have a provision regarding which insolvency law would be applicable to the international interest.

### **Re paragraph 3**

2.6.5 Paragraph 3(b) refers to the «otherwise applicable insolvency law». It was agreed that this meant the insolvency law that would apply in the absence of the application of Article XI.

2.6.6 It was agreed that the words «return» and «returned» should be replaced in Article XI generally (e.g. paragraphs 7 and 8) by references to «giving possession», as in the case of some transactions the obligee would never previously have had possession.

2.6.7 It was also agreed that there was no need for a special rule providing for the obligee to return any surplus to the obligor in the context of this paragraph: this point was covered by Articles 8(5) and Y2 of the draft Convention. Article Y2 meant that the remedies available to the obligee following the giving of possession of the aircraft object would be subject to judicial control if a Contracting State had made a declaration under that Article.

### **Re paragraph 4**

2.6.8 Some qualifications were proposed to the obligation to preserve the aircraft object and its value. These included limiting the obligation to taking «all reasonable steps» and that the obligation be qualified by reference to the terms of the agreement. It was further suggested that it should be made clear that that obligation terminates on the obligor giving possession of the aircraft object to the obligee.

2.6.9 A general point made was that, in line with the change already made to paragraph 3, references in the article to «obligor» should be expanded to include the insolvency administrator (to read «the insolvency administrator or the obligor, as applicable»). However it should be made clear that this expansion did not mean that the insolvency administrator was to be personally liable; it was suggested that one method of achieving this result would be to refer to the obligor or insolvency administrator «when acting on behalf of the obligor».

### **Re paragraph 5**

2.6.10 It was decided that paragraph 5 should be deleted as the requirements it contained were necessary in any proceedings in which the obligor sought to rely on his security.

### **Re paragraph 6**

2.6.11 It would be necessary for the Drafting Committee to give effect to the proposal in paragraph 33 of the Report. Some members of the group furthermore felt that it should be made clear that a new waiting period would be available where fresh insolvency proceedings were commenced in respect of the same agreement.

### **Re paragraph 8**

2.6.12 It was agreed that the fact that the object could not be sold prior to the date on which possession was given to the obligee was implicit in paragraph 6. It was therefore agreed that this paragraph should be deleted.

### **Re paragraph 9**

2.6.13 It was agreed that the Drafting Committee should consider introducing a rule, that might be modelled on Article 14(4) of the draft Convention, designed to indicate that nothing in the future Convention was intended to limit the availability of remedies under the applicable insolvency law prior to the expiry of the waiting period.

### **Re paragraph 10**

2.6.14 There was a clear division of opinion as to the acceptability of a general rule prohibiting the modification of the obligor's obligations under the relevant agreement and related transactions. On the basis that this paragraph was an essential feature of the hard option, a more limited version was prepared. This reads as follows:

«10. (a) No obligations of the obligor:

- (i) to return the aircraft object to the obligee under the agreement and related transactions documents or, if applicable, as provided in Article XI(3); or
- (ii) to perform all obligations as set out in the agreement and related transaction documents,

may be modified without the consent of the obligee.

(b) Nothing in this Article XI(10) shall be construed to:

- (i) affect the authority, if any, of the insolvency administrator under the applicable law if the agreement and related transaction documents have been terminated; or
- (ii) permit the conversion of unsecured claims to secured claims or limit the obligee's rights, if any, to the former.»

### **Re paragraph 11**

2.6.15 It was noted that the treatment of non-consensual interests was a policy issue to be considered in Plenary and that this paragraph should therefore appear in square brackets for the time being. Subject to that consideration, paragraph 11 appeared satisfactory.

2.7 Regarding Option B, it was agreed that the French proposal for this option should be completed in line with the suggestions contained in paragraph 38 of the Report. A revised text of this option was accordingly prepared and appears as Appendix III.

## **Re Article XII**

2.8 In considering Article XII, it was agreed that the wording of this paragraph should be brought into line with Articles 25 and 26 of the aforementioned UNCITRAL Model Law. In particular, it was suggested that the reference to «courts» should be expanded to include «the insolvency administrator» and that the duty of co-operation should extend to the courts or authorities administering the insolvency proceedings cooperating with the courts of the Contracting State in which the aircraft object was situated.

2.8.1 As the application of this Article is stated to be «in accordance with the law of the Contracting State», it was suggested that there was no need to provide for a Contracting State to be able to opt out of this Article.

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## APPENDIX I

## Article XI

**Option A**

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval of or accession to this Protocol that it will not apply the provisions of Article XI to all or specified <sup>1</sup> types or certain stages of insolvency proceedings, or to suspensions of payments by obligors that are not eligible for or subject to insolvency proceedings, under its national laws.

2. Any such declaration shall be operative in the case where the declaring Contracting State is the State in which the centre of the obligor's main interests is situated.]<sup>2</sup>

3. Where insolvency proceedings<sup>3</sup> involving the obligor have been commenced, or, alternatively, where the obligor is not eligible for or subject to insolvency proceedings under applicable law and has declared its intention to suspend, or has actually suspended payments to creditors generally, the insolvency administrator or the obligor, as applicable, shall, subject to paragraph 6, return the aircraft object to the obligee no later than the earlier of -

- (a) the end of the waiting period; and
- (b) the date on which the aircraft object would be returned to the obligee under otherwise applicable insolvency law.

For purposes of this Article XI, the "waiting period" shall be the period of time specified in the declaration of the Contracting State referred to in paragraph 1.

4. During the waiting period, the obligor shall preserve the aircraft object and its value.

5. The obligee shall be given the opportunity during the waiting period to adduce evidence that it is the holder of an international interest and provide proof that such international interest has been registered.

<sup>1</sup> This is designed to permit States to limit the application of this Article to liquidation-type proceedings.

<sup>2</sup> Paragraphs 1 and 2 would be moved to the final clauses section but is included here for illustrative purposes.

<sup>3</sup> This term will be defined in the future Convention in line of paragraph 17 of document ICAO Ref LSC/ME/2-WP/10 UNIDROIT CGE/Int. Int./2/-WP/10.

6. The obligor may retain possession of the aircraft object on the date specified in paragraph 3 by curing all defaults, and agreeing to perform all future obligations, under the agreement and the related transaction documents.

7. The remedies specified in Article IX(1)(a) and (b) shall be made available by the national registry authorities and the other administrative authorities, as applicable, no later than [...] working days after the date on which the aircraft object is returned, as notified by the obligee.

8. The returned aircraft object may not be sold prior to the date on which it is returned to the obligee.

9. No exercise of remedies permitted by the Convention may be prevented or delayed after the date specified in paragraph 3.

10. No obligations of the obligor under the agreement and related transactions may be modified [in the insolvency proceedings] without the consent of the obligee.

11. No rights or interests, except for preferred non-consensual rights or interests listed in an instrument deposited under Article 38 of the Convention, shall have priority in the insolvency over registered interests.

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## APPENDIX II

### Article XI

#### Option B (original version)

1. Where insolvency proceedings have been commenced against the obligor, the obligee may request the obligor to permit the obligee to take possession of the secured object and the obligee shall provide evidence of its claim and proof that its international interest has been registered.
2. The court which has commenced insolvency proceedings may require the taking of any additional step or the provision of any additional guarantee and may also permit the obligee to take possession of the secured object upon such terms as the court may order.
3. The secured object shall not be sold pending a decision by a court regarding the claim and the international interest.

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**APPENDIX III****Article XI****Option B** (revised version)

1. Where insolvency proceedings involving the obligor have been commenced, or, alternatively, where the obligor is not eligible for or subject to insolvency proceedings under applicable law and has declared its intention to suspend, or has actually suspended payments to creditors generally, the insolvency administrator or the obligor, as applicable upon the request of the obligee, has to declare within a reasonable time period whether it will:

- (a) cure all defaults and to agree to perform all future obligations, under the agreement and related transaction documents; or
- (b) give possession of the aircraft object to the obligee, in accordance with the applicable law.

2. The applicable law referred to in subparagraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

3. The obligee shall provide evidence of its claims and proof that its international interest has been registered.

4. If the obligor or the insolvency administrator, as applicable, does not make such a declaration within a reasonable time period, or when he has declared that he will give possession of the aircraft object but fails to do so, the court may permit the obligee to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

In any event, the obligor or the insolvency administrator must give possession of the aircraft object to the obligee not later than the end of the waiting period.

For purposes of this Article XI, the "waiting period" shall be the period of time specified in the declaration of the Contracting State referred to in paragraph \_\_.

5. The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.