



UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment



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

UNIDROIT CGE/Int.Int./3-WP/26  
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### THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

#### DRAFT REPORT

PLENARY SESSION  
21 March 2000

*paragraphs*

AGENDA ITEMS 3 AND 4: CONSIDERATION OF THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT, AND OF THE PRELIMINARY DRAFT PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT AS REVIEWED BY THE *AD HOC* DRAFTING GROUP, CONSTITUTED BY THE SECOND JOINT SESSION AT ITS MEETING HELD IN ROME FROM 25 TO 27 NOVEMBER 1999 AND IN THE LIGHT OF THE REPORT ON THE SESSION OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP, HELD IN CAPE TOWN AND ON THE BLUE TRAIN FROM 8 TO 10 DECEMBER 1999 *CONTD.*

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#### ARTICLE 2 OF THE PRELIMINARY DRAFT CONVENTION

23. In relation to Article 2 of the preliminary draft Convention, the UNIDROIT Secretariat submitted a paper regarding the substantive sphere of application of the preliminary draft Convention (UNIDROIT CGE/Int.Int./3-WP/14; ICAO Ref. LSC/ME/3-WP/14), which advocated the reinstatement of a list of the categories of mobile equipment that the preliminary draft Convention was intended to cover. This proposal was made in response to the concern expressed in relation to the present open-endedness of the provision, in particular by States engaged in the discussions underway within the United Nations Commission on International Trade Law (UNCITRAL) in relation to its draft Convention on Assignment in Receivables Financing. The list was short, and in addition to airframes (sub-paragraph (a)), aircraft engines (sub-paragraph (b)), helicopters (sub-paragraph (c)), oil-rigs (sub-paragraph (d)), containers (sub-paragraph (e)), railway rolling stock (sub-paragraph (f)), and space property (sub-paragraph (g)), contained a catch-all clause in sub-paragraph (h), which referred to “objects of any other category of high-value capital infrastructure equipment each member of which is uniquely identifiable”.

24. Several delegations expressed support for the proposal by the UNIDROIT Secretariat. One delegation however expressed concern that the proposed formulation could be understood as a political promise to make rules applicable to all the categories listed, which might lead some States to defer ratification of the Convention until protocols had been adopted for all categories of equipment. To obviate this problem, it was suggested that the proposed article might be formulated “[t]his Convention may apply” rather than “applies”. It was however noted that this might raise problems for judges faced with a question as to the applicability of the future Convention. It was therefore agreed that it would be wiser in the circumstances to retain the existing language “shall apply”.

25. A proposal to add the qualification “mobile” to “high-level capital infrastructure equipment” in the proposed sub-paragraph (h) was accepted.

26. One delegation proposed broadening the list of categories of equipment to include “aircraft” as a whole, all the more so since helicopters were treated as aircraft under the Chicago Convention. It was explained that the future Convention was concerned with the financing of aircraft objects and that airframes and aircraft engines were currently typically subject to the taking of separate security.

27. A preference for an even shorter list than that proposed emerged in the course of the discussions, in particular with a view to facilitating co-ordination with the draft UNCITRAL Convention which was expected to be finalised in June 2000. A consensus emerged as to this list comprising only “airframes”, “aircraft engines”, “helicopters”, “railway rolling stock” and “space property”. “Containers” and “oil rigs” would thus fall under the residual category of sub-paragraph (h) for future consideration.

28. It was however agreed that, with a view to addressing the general concerns evoked in the course of Plenary’s discussion of this item, the proposed sub-paragraph (h) should be moved to the Final Provisions, its purpose being to leave open the possibility for the preparation of future Protocols in respect of categories of equipment other than aircraft objects, railway rolling stock and space property.

## ARTICLE II OF THE PRELIMINARY DRAFT PROTOCOL

29. With reference to Article II of the preliminary draft Protocol, the need to harmonise the terminology used with that adopted for the preliminary draft Convention was stressed, as was the need to take the discussion on the proposed list of categories of equipment into consideration.

30. With reference to the citation of the future Convention and Protocol in Article II(2) as the “UNIDROIT Convention on International Interests in Mobile Equipment as applied to aircraft objects”, the ICAO Secretariat observed that it was customary for the plenipotentiaries meeting in Diplomatic Conference to give the official name to the instrument they were adopting. Furthermore, it was not ICAO custom to refer to the Organisation in the title of the instruments it adopted. It therefore expressed its reservation as to the citation.

31. In relation to the comment made by the ICAO Secretariat, it was suggested by one delegation that, as a courtesy to the future Diplomatic Conference, the citation might be placed in square brackets.

## ARTICLE 3 OF THE PRELIMINARY DRAFT CONVENTION

32. With reference to Article 3 of the preliminary draft Convention, one delegation expressed concern in relation to the construction of the sphere of application in that the application of the Convention would heavily depend on the determination of the applicable law by judges applying their own private international law rules. In accordance with private international law rules the determining factor was registration, and courts would, at least until all States became Contracting States to the new Convention, check registration in the national registers. He therefore suggested that it should be made clear that the sphere of application did not refer to the agreement, but to the registration of the object itself.

33. The Rapporteur indicated that it was not possible to wait for registration to see if the Convention would apply, as Chapter III was concerned with default remedies irrespective of registration.

34. A proposal for the re-drafting of Article 3 was submitted with a view to defining the internationality element also in terms of the parties to the transaction, as the present formulation made it possible for purely domestic situations to be covered by the Convention (see UNIDROIT CGE/Int.Int./3-WP/17; ICAO Ref. LSC/ME/3-WP/17).

35. A number of delegations expressed support for the proposal. One delegation however felt it to be necessary to add a priority rule with reference to national mortgages, with a view to informing third parties, possibly by way of a remark entered for this purpose in the register, of the existence of a prior national mortgage.

36. Other delegations and observers however expressed the fear that the proposal if adopted would seriously undermine the Convention. It was also observed that the terms “domestic” and “international” in any event were of no relevance in the context of the Aircraft and Space Protocols.

37. The differences that existed between the air and rail sectors in relation to the determination of internationality were stressed. In the rail sector there was a clear distinction between assets that were capable of travelling across borders and those that were not. This was not the case in the air sector.

38. The Rapporteur recalled that the internationality element had been considered to be adequately satisfied by the concept of mobility, which indeed made it possible that a purely domestic situation might be covered. The reason was that it was impossible to predict whether the equipment would move. It was essential for financiers contemplating advancing funds in respect of such high-value equipment to know in advance which regimen would apply regardless of actual movement. He furthermore observed that it was not possible simply to focus on the debtor and creditor, as there were third parties who might have interests that must be taken into consideration. It had therefore been decided that each Contracting State should have the ability to decide how to determine the internationality of the transaction and how to deal with it.

39. In consideration of the division of opinion among delegates, it was decided to set up a small Working Group, co-ordinated by the Second Vice-Chairman of the Joint Session (Mexico), to examine the proposal and its effects. This Group, the members of which would be France, Mexico, Canada and the United Kingdom, would represent the two positions. The observers of the AWG and RWG were invited to assist the Group in its deliberations. The Group was invited to report back to Plenary, at the opening of the afternoon session of 22 March.

#### ARTICLE III OF THE PRELIMINARY DRAFT PROTOCOL

40. With reference to Article III(2) of the preliminary draft Protocol, it was decided to add “or in the register of a common mark registering authority” after “national aircraft register of a Contracting State” and to add “or the common mark registering authority” at the end of the paragraph, in order to harmonise the formulation with that already adopted in the definitions article.

41. As regards the reference to “aircraft object”, the possibility of modifying this reference to a reference to “aircraft” was considered. It was however pointed out that aircraft were of necessity registered in registries, whereas there were aircraft objects that were not, namely aircraft engines.