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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)

## **JURISDICTION WORKING GROUP**

### **REPORT**

#### **1. INTRODUCTION**

1.1 The Jurisdiction Working Group (hereinafter referred to as the "Working Group") held two meetings on 31 August and 1 September 1999. Representatives of the following States attended its meeting as members: Argentina, Austria, Canada, China, Egypt, Finland, France, Germany, Japan, United States. The Aviation Working Group (AWG) attended as observer and adviser to the Working Group. Mr. Antti T. Leinonen (Finland) was elected Chairman of the Group on a proposal by the United States seconded by Germany. Mr. Philippe Lortie was elected Deputy Chairman of the Group on a proposal of Austria seconded by Egypt. The Chairman of the Registry Working Group, Professor Ron C.C. Cuming attended the second meeting of the Working Group.

#### **2. REVIEW OF THE JURISDICTION-RELATED PROVISIONS AND PROBLEM AREAS OF THE DRAFT CONVENTION AND THE DRAFT PROTOCOL**

2.1 It was agreed that the discussions would duly take into consideration the fact that certain delegations were not able to regularly attend the meetings in view of their other commitments in the Drafting Committee. Thus, decisions taken by the Working Group do not prejudice later review of the issues by those delegations.'

2.2 With reference to **Article 40** of the draft Convention, the Working Group considered whether it would be feasible and necessary to distinguish the basis of jurisdiction according to the judicial relief sought under Article 14(1), i.e. in rem and in personam reliefs. The Working Group concluded to maintain the current approach having regard to the fact that the reliefs listed in **Article 14(1)** were to be agreed upon by the parties. It also agreed not to make reference in Article 40 to Article 14(4) as suggested by The Hague Conference in document ICAO Ref. LSC/ME/2-WP/8 (UN DROIT CGE/Int.Int./2-WP/8). As a matter of general policy in the context of judicial reliefs enumerated in Article 14(1), the Working Group agreed that the interested party on its own should not unnecessarily be limited as to the choice of forum. It was understood that this policy decision in no way prejudiced the position of the delegations with regard to issues related to general jurisdiction and recognition, enforcement of decisions by foreign courts.

2.3 In light of the policy decision taken, there was a consensus as to the acceptability, in principle, of bases of jurisdiction listed in **Article 40(1) subparagraphs (a) to (c)**. Furthermore, it was the common understanding of the Working Group that Article 40(1) was not intended to provide an exhaustive list of bases of jurisdiction for the purposes of Article 14(1).

2.4 With reference to **Article 40(1) subparagraph (b)**, the Working Group discussed the various ways to establish criteria for the determination of the defendant's location. It concluded that a provision concerning the matter was necessary. It was agreed to use Article 3 of the Draft Hague Convention as a basis to determine the defendant's location, subject to some minor modifications in the light of Article 4 of this draft Convention. Furthermore, it was suggested that the Drafting Committee should attempt to integrate Article 4 of the draft Convention and Article 3 of the Draft Hague Convention as it would then determine both the location of the obligor and that of the defendant. This relationship between **subparagraph (b)** of Article 40(1) and Article 4(1) of the draft Convention was important to address as the defendant may include other persons than the obligor.

2.5 One delegate asked the Secretariat to review the Spanish translation of the English term "defendant" as the current term used in Spanish applied only to the criminal procedure. Another delegate requested a review of the Arabic version on the same issue.

2.6 With regard to **Article 40(1) subparagraph (c)**, it was agreed that the text should provide for a "valid" forum selection clause but not seek to further specify the criteria, thus leaving the determination of the validity to the lex fori. One delegation suggested that the provision explicitly indicate that no nexus between the forum and the subject matter of the dispute was required. The Working Group also agreed that the question of exclusiveness of the forum chosen by\_ the parties should not be addressed but left to the parties' agreement and the applicable law.

2.7 It was the common understanding of the Working Group. for the sake of clarity, that Article 40(2) should be retained subject to review by the Drafting Committee.

2.8 With regard to the general scope of jurisdiction provisions in Article 40. the Working Group took the view that Article 8(1) of the draft Convention was not covered by them.

2.9 The Working Group agreed that the first clause in **Article 41** was intended to provide for general jurisdiction for disputes arising under the draft Convention. It was decided that general jurisdiction would only be available under the draft Convention if the parties had validly agreed to the jurisdiction of a court. The Working Group took the position that the view expressed supra 2.6 as to validity and exclusiveness of such agreement also applied in the context of choice of court clauses providing general jurisdiction.

2.10 It was noted that the second clause of Article 41 had a close relationship to the shape of the International Registry and its immunity. Therefore, it could not be addressed until such time as the structure and the legal nature of the Registry as well as the scope of its immunity had been settled.

2.11 With regard to **Article 25(3)** of the draft Convention (as amended in WP/17) dealing with the jurisdiction of courts having power to issue orders binding on the Registrar to discharge a registration, the Working Group limited its discussion to the situations where:

- 1) the holder of an international interest had failed to respond to a demand by the obligor to discharge the registration; and
- 2) it could not be found for the purpose of acquiring an in personam order against it requiring the registration to be discharged.

2.12 The Working Group concluded that in such a situation the courts of the State where the Registrar was located should have exclusive jurisdiction to make orders binding on the Registrar. In determining whether the obligor was entitled to have the registration discharged, the court concerned should consider the merits of the case only insofar as was necessary to decide upon the making of an order.

2.13 The Working Group discussed whether the draft Convention or draft Protocol should determine which courts were to have jurisdiction in actions for damages brought under **Article H** of the draft Protocol (as amended in WP/17). There was a consensus that the courts of the Contracting State in which the International Registry was located should have jurisdiction in such actions and that the jurisdiction should be exclusive. It was noted that jurisdiction should be based on the legal location of the Registrar irrespective of the physical location of the international registry facilities. One delegation raised the point as to whether the possibility of direct action against the Registrar's insurer should be contemplated in the Article.

2.14 With regard to Article XX of the draft Protocol, one delegation noted that the court indicated therein would not be the appropriate forum for some provisional measures and would be wholly inappropriate as forum vested with general jurisdiction. An observer requested to postpone discussion of the provision pending further consultation on the necessity of retaining the additional basis of jurisdiction. The Working Group concluded that discussion of that Article should take place at a later occasion once delegations and observers had given more consideration to the matter.