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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DRAFT REPORT

PLENARY SESSION
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paragraphs

AGENDA ITEMS 3 AND 4 (ICAO AGENDA ITEM 3): 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.*

ARTICLE 4 OF THE PRELIMINARY DRAFT CONVENTION

42. It was observed that as this provision was inspired by Article 3 of the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters under preparation at the Hague Conference on Private International Law, the formulation adopted should also follow that of the preliminary draft Convention.

43. It was suggested that the words “registered office or” be added to “statutory seat” in paragraph (1)(b), as the concept “statutory seat” was foreign to some jurisdictions.

44. It was observed that the debtor could be situated in more than one Contracting State.

ARTICLE 6 OF THE PRELIMINARY DRAFT CONVENTION

45. In relation to Article 6(1), which concerned the interpretation of the Convention, one delegation requested clarifications as to why only the Preamble, and not also the *travaux préparatoires* and other articles, was referred to. He also suggested that a reference to the 1969 Vienna Convention on the Law of Treaties be added.

46. It was suggested that the insertion of the word “namely” in paragraph (1) might take care of the concerns raised.

47. It was observed that the present formulation was the same as that of the 1980 United Nations Convention on Contracts for the International Sale of Goods. All commercial law conventions adopted since 1980 had used that formulation and if it were modified in this instrument it might cast doubt on the other commercial law conventions. Furthermore, not all States were party to the Vienna Convention and a reference to that Convention would be unacceptable to such States.

48. It was decided that no change should be made to the Article, but that the Report should reflect the points raised in the debate. Any State that wished to do so, might raise the question at the diplomatic Conference.

ARTICLE 7 OF THE PRELIMINARY DRAFT CONVENTION

49. It was observed that according to the preliminary draft Convention the agreement creating the interest did not need to state the maximum sum to be secured, which would create problems where the indication of such a maximum sum was required by law.

50. The Rapporteur indicated that the reason no indication of the maximum sum to be secured was given, was that the creditor did not necessarily know in advance how much money was going to be needed or extended under a certain credit. Furthermore, the junior creditor would never know how much had been drawn in practice even if the maximum sum were stated. There was need for flexibility.

51. One delegation wondered how the words “power to dispose” in paragraph (b) should be interpreted and if the case of an object being sold under retention of title and being mounted on an airframe, in which case title was not transferred, would be covered.

52. The Rapporteur indicated that it was necessary to separate the power of disposal and the effect of an object being incorporated in another object. The Convention did not deal with the latter, but observed that whether or not this question should be dealt with in the Convention or be left to the applicable law should perhaps be considered. If under the applicable law the first object became a part of the latter, the power of disposal would be lost, otherwise it would not.

53. Another delegation raised the problem of whether an item which had been installed in an aircraft when security had been taken would continue to be covered by the security if it were removed from the aircraft.

54. In the end, it was decided that the present wording of Article 7 should not be modified, and that the question of the effects of the incorporation of an object in another object should be dealt with in the Protocols.

ARTICLE 11 OF THE PRELIMINARY DRAFT CONVENTION

55. It was suggested to add "or material" after "substantial" in line 2 of paragraph (2).

56. Mr Weber introduced a document prepared by the ICAO Secretariat relating to remedies and interim relief (UNIDROIT CGE/Int.Int./3-WP/12; ICAO Ref. LSC/ME3-WP/12). The purpose of the proposals in this document was to re-establish a certain equilibrium between the parties to a transaction where one might be considered to be commercially weaker. In this respect it was proposed to indicate with greater precision in Article 11 the circumstances which constituted default in accordance with Articles 8 to 10 and 14. It was suggested to limit default to primary obligations.

57. While one delegation queried the appropriateness of the Secretariat of either of the sponsoring inter-governmental Organisations taking such a strong stand, two expressed their appreciation to the ICAO Secretariat for the initiative it had taken. No consensus was however reached in relation to this proposal. A number of delegations indicated that they feared that the benefits of the Convention would be substantially reduced should the proposal be accepted. It was observed that a distinction between primary and secondary obligations was difficult to make in certain types of contract, and in particular in relation to transactions in the aircraft sector. One observer moreover underlined that the notion of "commercially weaker party" was not relevant in relation to the operators of the industries concerned. Furthermore, it was suggested that the proposed modification would have serious effects for the rail sector, in that it would undermine the standard industry agreements that were used in that sector.

58. It was suggested that in order to promote certainty, the addition of the words "in writing" after "agree" in paragraph (1) might be considered, as was suggested in the ICAO paper.

59. In the end it was decided to keep the present formulation of Article 11, with the sole addition of the words "or material" after "substantial" in paragraph (2).

ARTICLE 12 OF THE PRELIMINARY DRAFT CONVENTION

60. In relation to Article 12, one delegation wondered whether the inclusion of a reference to procedural law would exclude other laws such as the law of trespass.

ARTICLE 13 OF THE PRELIMINARY DRAFT CONVENTION

61. One delegation requested clarifications as to whether the applicable law in Article 13 would be the *lex fori* or the *lex contractus*.

62. The Rapporteur referred to Article 6(3), which stated that references to the applicable law were to the domestic rules of law applicable by virtue of the rules of private international law of the forum State, unless exceptions had been specifically decided upon. He suggested that it might not be necessary to make any exception with reference to Article 13.

ARTICLE 14 OF THE PRELIMINARY DRAFT CONVENTION

63. A number of issues were raised in relation to Article 14, amongst which the inclusion of the sale of the object in Article 14(1)(d), which it was suggested was misplaced as the article was intended to deal with relief granted before the final determination of the claim. One delegation observed that the sale of an object in some legal systems was permitted in certain circumstances only, such as when the objects in question were perishable goods. The objection to the inclusion of sale extended also to the inclusion of the proceeds or income of the object in Article 14(1)(e). Furthermore, it was felt that the reference to *prima facie* evidence in the *chapeau* to the article was not a sufficiently high standard considering the effects of the remedies envisaged.

64. Other delegations stressed the importance of Article 14, in particular the provision on sale in paragraph (1), for the Convention, which was intended to facilitate the financing of high-value mobile equipment.

65. The inter-connection of Article 14 and Article X of the Aircraft Protocol was stressed. One observer suggested that the sale element in sub-paragraphs (d) and (e) of paragraph (1) might be moved into the Aircraft Protocol.

66. In view of the opposing views that were expressed by a number of delegations, it was decided to set up a small Working Group to examine Article 14 and its relationship with Article X of the preliminary draft Protocol, which should report back to Plenary at its afternoon session of 23 March. The delegation of Japan was asked to co-ordinate the meeting of this Group, the other members of which were Canada, France, Singapore and Sweden. The observers from the AWG and the RWG were invited to attend as advisers.

ARTICLE 15 OF THE PRELIMINARY DRAFT CONVENTION

67. In reply to a question raised by one delegation regarding the problem of establishing a hierarchy in the rights and interests registered without an authenticated copy of the agreements, it was explained that it would not be consistent with a modern state of the art registry to have a requirement for a hard copy of the documents as part of the registration system.

68. The Chairman of the Registration Working Group indicated that the type of registry envisaged was an electronic remote access registry. For the purposes of such a registry what was required was a notice containing minimal information, the details of the relationship would not be included in the data base. It was intended to be an international registry, and it was therefore reasonable to assume that access would be electronic. He stressed that the Registrar did not have any controlling function as regards the information entered into the data base, but was merely entrusted with the maintenance of the hardware and software.

69. With reference to paragraph (2), one delegation suggested that, considering the definition of "International Registry" under Article 1(r), the last part of the paragraph be deleted, and that it instead be stated that "[d]ifferent international registries may be established for different categories of objects and associated rights". It asked what the difference was between the expressions "discharge registration" and "de-register". The Rapporteur indicated that "deregistration" was used in particular for aircraft, but that the meaning of the two expressions was much the same.

70. The Chairman of the Registration Working Group indicated that in some systems discharge of registration was also registered.

71. One delegation stressed that it should be stated that registration included also the original registration.

72. In relation to subrogation, one delegation wondered whether registration was required for the enjoyment of rights, as Article 15(1)(c) provided for the acquisition of international interests by subrogation to be registered.

73. The Rapporteur indicated that the provision was not intended to interfere with the general effect of subrogation. Article 15 was intended to provide a mechanism by which the subrogated party could have its name put on the register in place of the original creditor if it so wished.

ARTICLE 16 OF THE PRELIMINARY DRAFT CONVENTION

74. One delegation suggested adding "or replace" in paragraph (2)(b).

75. With reference to the establishment and management of the International Registry, one delegation submitted a paper (UNIDROIT CGE/Int.Int/3-WP.16; ICAO Ref. LSC/ME/3-WP.16) which *inter alia* urged the participation of the Contracting States in the drawing up of the regulations to apply to the Registry. In order to do this, it suggested that a Supervisory Board might be established.

76. The idea of the Contracting States participating in the drawing up of the regulations was supported by another delegation, although no strong feelings were expressed as to the means by which this might be achieved. One delegation had reservations with regard to the setting up of yet another body.

77. With reference to paragraph (3), one delegation suggested that any international body would normally have the right to conclude any agreement to fulfil its functions.

ARTICLE 16 *BIS* OF THE PRELIMINARY DRAFT CONVENTION

78. One delegation suggested that the wording needed to be adjusted to make it clear that with the sole exception specified no person would be denied access to the Registry.

ARTICLES 17 AND 19 OF THE PRELIMINARY DRAFT CONVENTION

79. One delegation suggested that the word "or" should be deleted in Article 17(1)(a).

80. With reference to footnote 11, one delegation suggested, and another agreed, that it was necessary to maintain a separation between national and non-national registries.

81. One delegation suggested that paragraph (2) should be deleted as it carried with it potential confusion as the requirements could be viewed as essential to the priority of the interests.

82. One observer suggested that the bracketed language in Article 19(3) might also be deleted.

83. Another delegation however wondered if the deletion of Article 17(2) and of the bracketed language in Article 19(3) would not affect the balance of the system that was being established. Furthermore, with reference to Article 17(2), that same delegation raised the question of when the registration would have legal effect. As presently envisaged, the national registries would have two functions: that of being the national register for the assets concerned, and that of being the correspondent or entry point for the International Registry with respect to the transmission of the registration of international interests. The question was whether the registration of an international interest would have legal effect when it was entered in the national registry, or only when it had been transmitted to the International Registry. As it appeared that it would be possible for a State not to designate a single point of entry to the International Registry, the legal consequences of registration through the national registries had to be made clear. Furthermore, the situation was unclear as regarded future interests.

84. The Chairman of the Registration Working Group and the Rapporteur underlined that the national registries did not form part of the international registry system, that there was no legal relationship between the International Registry and the national registries, that the latter would not be under the control of the former.

85. A question raised by an observer concerned the searchability of the national registries and/or the International Registry. The Chairman of the Registration Working Group shared the concern of the observer, as he felt that there was a dangerous possibility that because of the way a particular facility operated, a record might not be searchable there and this might lead to the conclusion that it had not been registered. He therefore suggested removing the reference to "facility" in Article 19(2)(b).

86. One delegation stressed that the national body forwarding the registration must be responsible as soon as it received the information, that the information should take effect vis-à-vis the creditors as from that moment in time, so that the creditor would not be penalised. As presently formulated

the national registries had no obligations and there was no indication as to whether it was the registration in the national registries or in the International Registry which had a legal effect on the priority issue.

87. The Rapporteur indicated that he had a serious problem with considering a registration effective merely as a result of registration in the national register. He stressed the need to maintain the integrity of the international registration.

ARTICLE 20 OF THE PRELIMINARY DRAFT CONVENTION

88. A preference for Alternative B in Article 20(1) emerged in the course of the discussion. There was however also general agreement that paragraph (1) of Alternative B should be reformulated along the lines indicated in Working Paper 16 (UNIDROIT CGE/Int.Int/3-WP.16; ICAO Ref. LSC/ME/3-WP.16).

89. A proposal for modification of Article 20(3) was put forward by ICAO (UNIDROIT CGE/Int.Int/3-WP.12; ICAO Ref. LSC/ME/3-WP.12), to the effect that the consent of the debtor should be required also for amendments or extensions of the registrations.

90. It was agreed that the Drafting Committee should reformulate the article along the lines agreed.

PRESENTATION OF THE REPORT OF THE *AD HOC* WORKING GROUP ON ARTICLE 3

91. The Chairman of the *ad hoc* Working Group on Article 3 indicated that the Report of the meeting of the Group would reflect the differences in approach. He urged the members of the Group to ease their positions, as it was necessary to reach a compromise.

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