



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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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 <i>AD HOC</i> 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 <i>CONTD.</i>	143 – 153
PRESENTATION OF THE REPORT OF THE SPECIAL WORKING GROUP ON ARTICLE 3 OF THE PRELIMINARY DRAFT CONVENTION <i>CONTD.</i>	154 – 163
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 <i>AD HOC</i> 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 <i>CONTD.</i>	164 – 189

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 27 OF THE PRELIMINARY DRAFT CONVENTION *CONTD.*

143. With reference to Article 27(2)(a), one delegation reiterated its concern as regards the priority of a registered interest over a pre-existing interest which had not been registered but the existence of which was known, as this might lead to behaviour which according to the law of its country might be considered to be criminal. It therefore urged the inclusion of the good faith standard in the provision. Several delegations agreed and stressed that it was not possible for this Convention to legalise illegal transactions.

144. It was observed by other delegations and an observer that the preliminary draft Convention did not address criminal law, just as it did not address tort law. They suggested that it was inappropriate for the future Convention to contain a good faith standard, as it would introduce an element of uncertainty, whereas, as envisaged, the registration system with its system of priorities was intended to provide certainty and predictability. If it were not possible to rely on the Registry, its utility would be reduced. They furthermore indicated that nothing prevented the application of tort law, criminal or other public policy laws in case of fraud or illicit behaviour.

145. The *Rapporteur* indicated that Article 27(2)(a) was intended to preserve the integrity of the registered interest to avoid disputes about whether there was knowledge or not.

146. One observer suggested including a clause saying that nothing in the Convention affected criminal or tort law. This suggestion was taken up by one of the delegations and supported by others.

147. One delegation raised similar concerns with respect to Article 27(3)(b) as had been raised in relation to Article 27(2)(a), as according to this provision a buyer of an interest was placed in a better position than the original acquirer of the interest. Furthermore, Article 27(3)(b) overrode Articles 37 and 38, which dealt with non-consensual rights.

148. One delegation pointed out that Article 1(nn), which defined “unregistered interest”, referred only to Article 38, whereas it should refer also to Article 37. Another delegation suggested deleting the words in brackets in Article 1(nn). The *Rapporteur* however observed that the words in brackets were essential, as their effect was precisely that of ensuring that Article 38 interests were not subordinated to the buyer of the object under Article 27(3)(b).

149. One delegation submitted a written proposal (UNIDROIT CGE/Int.Int./3-WP/16; ICAO Ref. LSC/ME/3-WP/16) relating to cases where registration was contested. This proposal was supported by another delegation.

150. In the end, it was decided that the Drafting Committee should examine this last proposal, as well as the proposal for the inclusion of a reference to criminal and tort law and should examine the possibility of including a reference to good faith in paragraph (3).

ARTICLE 28 OF THE PRELIMINARY DRAFT CONVENTION *CONTD.*

151. One delegation stressed the connection between Article 28 and the insolvency provisions of the future Protocol. As the future Convention and Protocol were intended to be read together, there should be no contradiction between the provisions they contained, and the delegation found that there were inconsistencies between them. It observed that as presently drafted, Article 28 was insufficient if it intended

to cover all kinds of mobile equipment. Clarifications were necessary as regards the meaning of the word “effective” and as regards the time periods indicated in paragraph (1) of Alternative A of Article XI of the future Protocol. Furthermore, it suggested that it would be useful to include the insolvency provision of the Convention in a separate Chapter on insolvency.

152. The *Rapporteur* stated that Article 28 was intended to be very light. The purpose of Article XI of the future Protocol was to modify Article 28 for aircraft. He pointed out that although Article XI was presented in two alternatives, there was also a third alternative, and that was that States might want neither of the two alternatives proposed.

153. It was decided to delete the words in square brackets in Article 28(3).

PRESENTATION OF THE REPORT OF THE SPECIAL WORKING GROUP ON ARTICLE 3 OF THE PRELIMINARY DRAFT CONVENTION *CONTD.*

154. A second Report of the Special Working Group on Article 3 was submitted to Plenary for consideration (UNIDROIT CGE/Int.Int./3-WP/27; ICAO Ref. LSC/ME/3-WP/27). Paragraph 3 of this Report listed three principles upon which the Group had agreed.

155. There was general agreement as to the first and third of the three principles presented.

156. As regards the third principle, one delegation requested clarifications as regards the legal effects of giving notice in the International Registry of the national interest, and as regards which articles were relevant for the first-to-file rule, as it was not clear whether it referred to the notice, to the registration, or to both.

157. The second of the three principles was the subject of considerable debate. A main concern related to the statement that at the time of acceding to the Protocol States may declare “that the Convention will not apply to a purely internal transaction unless the parties decide otherwise and the purely internal transaction is subject to the mandatory rules of that State”.

158. The first question in relation to the above statement related to whether, if a State made a declaration to the effect that the Convention would not apply to a purely internal transaction, the parties themselves could register their interest in the International Registry notwithstanding this declaration.

159. While one delegation clearly considered that it would not be possible for the parties to do so, another felt that it would, but on condition that the mandatory rules of the State applied. Other delegations instead felt that it would be possible for the parties to register their interest.

160. In replying to a question as to the reasons for which a party should enter a national interest on the International Registry, the *Rapporteur* indicated that such a registration gave the holder of the interest the means to protect itself. He observed that the entry on the Registry had nothing to do with the Contracting State. If no entry in the Registry were made, Article 27 would apply.

161. One delegation raised the question of the date of priority of the notice, whether the date would be the date when the notice was placed on the International Registry, or the date of registration in the national registry of the State. One observer having indicated that the system would only work if the date were the former of the two, the delegation suggested that it would be better to state explicitly that it referred to the registering of the international interest in the International Registry.

162. As regards the application of the priority rules of the future Convention to purely internal transactions, one delegation indicated that there had been a clear understanding in the Working Group that they would apply.

163. In the end, it was decided that while there was support for the first and third principles stated in the Report of the Working Group, there was none for the second, also as a result of the fact that its second sentence was picked up by the third principle. The Drafting Committee should therefore redraft Articles 3, 27 and V of the preliminary draft Convention.

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ARTICLE VI OF THE PRELIMINARY DRAFT PROTOCOL

164. With respect to Article VI, one delegation wondered whether the words “to the exclusion” should not be removed and the matter left to national law. If the provision stated that a person had a right to the exclusion of the person or persons represented, a provision allowing the registration of replacement agents for cases when the agent did not agree to sign an assignment had to be included.

165. One delegation stated that it shared the above concern, in particular it had reservations as regards the exclusion of the beneficiary, and wondered whether this should not be deleted from the provision.

ARTICLE IX OF THE PRELIMINARY DRAFT PROTOCOL

166. As regards the term “commercially reasonable manner” in Article IX(3)(b)(ii), one delegation wondered whether the agreement between the parties as to what was a commercially reasonable manner was conclusive as between the parties, or also vis-à-vis the judge.

167. The *Rapporteur* replied that the agreement of the parties could not be challenged, but observed that the consent of the parties must be legally operative. If the consent had been obtained by fraud, it would not be a true consent.

168. The ICAO Secretariat expressed its concern with the determination of commercial reasonableness by the parties to the contract, and referred to the proposal contained in its paper (UNIDROIT CGE/Int.Int./3-WP/12; ICAO Ref. LSC/ME/3-WP/12) regarding paragraph (3)(b).

169. One observer expressed his concern at this suggestion. He indicated that the intention was to promote predictability and the ICAO proposal had the opposite effect. He stated that a typical aircraft contract included ten pages or more stating exactly what the parties agreed and what should be avoided was that this position were moved away from.

170. While one delegation observed that if what the observer had described was ordinary practice, then it could not see how the ICAO suggestion could damage predictability, other delegations urged that attention be focussed on the type of transaction concerned, as the intention was to create certainty and predictability in the aircraft business.

171. One delegation suggested that “de-register” in Article IX(1)(a) be modified to read “obtain de-registration of the aircraft” and that the definition of “de-register” in Article I(2)(h) add “in accordance with the Chicago Convention and in a manner to carry out the purposes of this Protocol”. As regards footnote 9, it suggested that a relationship with the Geneva Convention was not needed.

172. With reference to Article IX(3), one delegation stated that Article 8(2) of the Convention should apply to aircraft as well. If this were not the case, some States would not be able to ratify the Protocol. It also suggested that there were possible conflicts between the person who had an interest in the aircraft on the one hand and the person who had an interest in the aircraft engine on the other.

173. The *Rapporteur* observed that the future Convention did not apply to aircraft at all, it applied to airframes and engines. The only reason aircraft were mentioned in the Protocol was because of the reference to the Chicago Convention for de-registration purposes.

ARTICLE XI OF THE PRELIMINARY DRAFT PROTOCOL

174. With reference to Article XI of the preliminary draft Protocol, one observer drew attention to the inter-relationship between this article and Article XXX. He recalled that one of the main issues was whether States would be required to select either of the two options presented, or whether they would be permitted to select neither.

175. One delegation referred to a paper of comments it had submitted to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/13; ICAO Ref. LSC/ME/3-WP/13). In addition to the points raised in the document, the delegation requested clarifications as regards “the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply” (Alternative A, paragraph (1)(b)), as what was meant by this phrase was not clear.

176. As regards the interpretation of Article XXX(2), which stated that at the time of ratification, acceptance, approval of, or accession to the Protocol, a Contracting State should declare whether it would apply Alternative A or Alternative B to which types of insolvency proceedings, one delegation stated that it would like to see a distinction between liquidation and re-organisation. Alternative B was as unacceptable for both liquidation and re-organisation as Alternative A was for re-organisation. Alternative A was acceptable for liquidation. As regards the “waiting period” referred to in Alternative A paragraph (2), the delegation indicated it would want no waiting period and wondered whether Alternative A would make sense or would apply if there were no waiting period.

177. One delegation referred to a paper it had submitted to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/19; ICAO Ref. LSC/ME/3-WP/19), in which it asked for confirmation that a single Contracting State would have the option to select Alternative A for certain types of insolvency proceedings and Alternative B for other types.

178. Another delegation also referred to a paper it had submitted to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/6; ICAO Ref. LSC/ME/3-WP/6), in which it had considered the possibility that States adopt neither Alternative and apply their national law instead. It stated that it saw the benefits of such a possibility.

179. One delegation indicated that it had a conceptual difficulty with Alternative A, paragraph (4)(a), as when it came to implementation, this provision obliged the insolvency administrator to dip into the pool of unsecured creditors.

180. One delegation wondered if it would be possible to exclude re-organisation proceedings from the future Convention.

181. The *Rapporteur* stated that the Convention applied except to the extent that it was modified by the Protocol. Article XI, Alternative A, was simply concerned with the ability to acquire possession, the power of sale would apply by virtue of the Protocol and not of the Convention, and then Article 8 of the Convention would come into play. He indicated that Alternative A was confined to an insolvency-related event, whereas Alternative B applied to two different situations, namely where the insolvency proceedings involving the debtor had been commenced, or where the debtor was not eligible for or subject to insolvency proceedings under the applicable law, and had declared its intention to suspend, or had actually suspended, payments to creditors generally.

182. One delegation suggested that the Drafting Committee might consider the priority provisions in this context, as it should flow from those provisions that the holder of a registered international interest had priority over an execution or attaching creditor, but this was not stated.

183. The *Rapporteur* felt that the situation was clear, as the attachment creditor's interest was an unregistered interest unless the State had made a declaration in accordance with Article 37. Article 27(1) of the future Convention stated clearly that a registered interest had priority over a non-registered interest.

184. It was decided that the Drafting Committee should improve the wording of Article XI, taking into consideration the proposals in Working Paper 13 and the discussion that had taken place.

ARTICLE XIII OF THE PRELIMINARY DRAFT PROTOCOL

185. The ICAO Secretariat referred to its paper (UNIDROIT CGE/Int.Int./3-WP/12; ICAO Ref. LSC/ME/3-WP/12) and suggested that Articles XIII(3), X(3) and Section (ii) of the Form appended to the Protocol should be amended in order to state that the actions required from administrative authorities should be taken in accordance with the applicable national law and regulations, considering that registration of aircraft was subject to such national laws and regulations pursuant to Article 19 of the Chicago Convention.

186. One delegate indicated that a reference to national laws in Article XIII would increase understanding of the provision.

187. In the end, it was decided that the Drafting Committee should take the comments of ICAO into consideration, but should not change the substance of Article XIII.

ARTICLE XVI OF THE PRELIMINARY DRAFT PROTOCOL

188. One delegation observed that as regards the appointment of the Registrar, Article XVI(3) stated that the Registrar was appointed for a period of five years, but no indication was given as to whether the Registrar could be re-appointed, and if so for how many terms. Furthermore, reference had earlier in the discussion been made to a process for the appointment of the Registrar that involved the Contracting States. The delegation requested clarifications as to what form such an involvement by States might take.

189. It was decided that the appointment of the Registrar and the procedure to be followed were questions that were best left to be decided by the diplomatic Conference, as they were of an eminently political nature.