



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>	190 - 196
RELATIONSHIP OF THE PRELIMINARY DRAFT CONVENTION AND PRELIMINARY DRAFT PROTOCOL WITH THE UNCITRAL DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]	197 - 203
EXAMINATION OF THE PUBLIC INTERNATIONAL LAW PROVISIONS AS REVISED BY THE RESTRICTED GROUP OF THE DRAFTING COMMITTEE TAKING INTO CONSIDERATION THE RESULTS OF THE MEETINGS OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP ON 20 AND 21 MARCH 2000 AND THE COMMENTS MADE IN PLENARY ON 23 AND 24 MARCH ON THE REPORT OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP	204 - 257
PROPOSAL FOR THE ESTABLISHMENT OF AN <i>AD HOC</i> TASK FORCE WITH A VIEW TO THE ESTABLISHMENT OF THE INTERNATIONAL REGISTRY	258 - 259

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 XVI OF THE PRELIMINARY DRAFT PROTOCOL *contd.*

190. One delegation indicated that it supported the text as it stood, as it was not possible at this stage to eliminate the uncertainty in the Article. It was not yet known who would be the Supervisory Authority, although it observed that ICAO would be best suited to fulfil that role. The ICAO Council had however not pronounced itself as to whether it would accept a mandate to act as Supervisory Authority. The parts left blank in the Article should therefore be finalised at the ICAO Legal Committee.

191. The ICAO Secretariat recalled that at the last Joint Session ICAO had been requested to examine the question of the possible role of ICAO in relation to the Supervisory Authority and the Registrar. This question had been examined at the last session of the Council, on 1 March 2000. Several different scenarios had been considered: the ICAO assuming the role of Supervisory Authority, the ICAO assuming the role of Supervisory Authority and Registrar, and the ICAO assuming the role of Supervisory Authority and operator of the International Registry in co-operation with an existing registry. The Council had not wanted to pronounce itself as it had felt that a number of questions arising from the present text were still open. One of these questions was liability, as it has been pointed out that the text made reference to liability for the Supervisory Authority even if in principle it should benefit from immunity. The International Registry was itself potentially subject to liability. The contradiction between the principle of immunity and the strict or fault liability envisaged had been pointed out. A number of provisions were furthermore still in square brackets. The Council had therefore decided that it wanted to await further information as to the outcome of the third Joint Session before it pronounced itself. The ICAO Secretariat indicated that only the Council could decide on a matter such as the one considered, and indicated that it might benefit from the advice of the Legal Committee at the appropriate moment in time.

192. One delegation supported the ICAO Secretariat's comments as regards the position of the ICAO Council, and added that concerns had also been expressed as regards the expenditure which the Supervisory Authority would have to face. The question was whether the costs would be compensated by the fees. There was also a question of the link between the drafts under discussion and the basic mandate of ICAO.

193. Mr Kronke indicated that as far as UNIDROIT was concerned, the Governing Council would at its forthcoming meeting in April examine these matters in the light of the outcome of the Joint Session and would decide what its position would be thereafter. He stated that it was however the diplomatic Conference that would take the final decision.

194. The observer from the International Air Transport Association (IATA) indicated that, although the possibility had been aired on a number of occasions, IATA had no interest in being the Registrar or the operator of the International Registry. The concerns his Association had expressed in the past had been allayed by the progress that had been made and by the excellent work that had been accomplished in the registry area by Governments and Governmental bodies. With reference to the last meeting of the ICAO Council, he observed that a fourth scenario that had been examined was that of no involvement whatsoever by ICAO.

195. The delegation of the United States of America stated that the United States was not interested in the management of the International Registry.

196. It was decided that the Drafting Committee should consider Articles XVI to XIX from the technical point of view, whereas the political aspects should be left to be decided at the diplomatic Conference.

RELATIONSHIP OF THE PRELIMINARY DRAFT CONVENTION AND PRELIMINARY DRAFT PROTOCOL WITH THE UNCITRAL DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

197. The observer from the United Nations Commission on International Trade Law (UNCITRAL) referred to the paper submitted by the UNCITRAL Secretariat relating to the relationship of the preliminary draft Convention and Protocol with the UNCITRAL draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] (UNIDROIT CGE/Int.Int./3-WP/10; ICAO Ref. LSC/ME/3-WP/10), in which it had indicated that the UNCITRAL Working Group on International Contract Practices had decided to leave the matter to Article 36, under which the UNCITRAL draft Convention would not prevail over an international Convention dealing with matters governed by the UNCITRAL draft Convention. He stated that the Commission was expected to review the decision at its forthcoming session in June. He indicated that the re-introduction of the list of equipment in Article 2 of the future Convention should limit the conflicts between the instruments. He suggested that the Joint Session might wish to consider the possibility of reducing potential conflicts when it examined the assignment provisions. The potential conflict related to the coverage of payment claims. In relation to the proposal put forward by one delegation in Working Paper 29 (UNIDROIT CGE/Int.Int./3-WP/29; ICAO Ref. LSC/ME/3-WP/29), he indicated that of the two proposals put forward, the first would be the most appropriate.

198. One observer stated that the best approach would be for the UNCITRAL draft Convention to explicitly exclude aircraft receivables.

199. One delegation agreed with the observer, and added that the proposal in Working Paper 29 that a specific provision be included in the preliminary draft Convention stating that it would prevail over any international agreement containing provisions concerning the matters governed by it was acceptable.

200. Two other delegations supported the suggestion of including such a provision in the Convention, also in view of the fact that the UNCITRAL draft Convention was more general in character and the preliminary draft Convention, being more specific, would normally take priority under general rules of law.

201. One delegation suggested that a provision on the relationship between the two Conventions could be included in the draft in square brackets, considering both instruments were still under preparation.

202. Mr Kronke drew attention to Working Paper 14 submitted by the UNIDROIT Secretariat (UNIDROIT CGE/Int.Int./3-WP/14; ICAO Ref. LSC/ME/3-WP/14), in which it was pointed out that the AWG, the RWG and the SWG had “all enunciated a clear desire that assignment of receivables taken as security in aircraft, rail and space financing transactions should be dealt with in equipment-specific instruments, namely the preliminary draft Convention as implemented by the relevant preliminary draft Protocol, rather than in the draft Convention”.

203. In the end, it was decided to reconsider the question of the possible inclusion of a specific provision on the relationship between the preliminary draft Convention and Protocol and the draft UNCITRAL Convention in the context of the Final Clauses.

EXAMINATION OF THE PUBLIC INTERNATIONAL LAW PROVISIONS AS REVISED BY THE RESTRICTED GROUP OF THE DRAFTING COMMITTEE TAKING INTO CONSIDERATION THE RESULTS OF THE MEETINGS OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP ON 20 AND 21 MARCH 2000 AND THE COMMENTS MADE IN PLENARY ON 23 AND 24 MARCH ON THE REPORT OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP

204. The revised articles prepared by the Drafting Committee taking into consideration the results of the meetings of the Public International Law Working Group on 20 and 21 March 2000 and the comments made in Plenary on 23 and 24 March on the Report of the Public International Law Working Group were submitted to Plenary in Working Paper 28 Rev. It was decided to examine the provisions proposed, and to integrate this examination with the continuation of the examination of the preliminary draft Convention.

ARTICLE 2 (WP/28 REV.)

205. With reference to the revised text of Article 2 of the preliminary draft Convention, one delegation suggested that the words “subject to Article W *bis*” should be added to paragraph (3) in order to make a liaison between that paragraph and Article W *bis*.

ARTICLE 26 (WP/28 REV.)

206. With reference to Article 26(2) and (4)(b), a discussion took place as regards the immunity that should be granted the Supervisory Authority and Registrar. Article 26(2) provided for full immunity for the Supervisory Authority, whereas Article 26(4)(b) provided for “functional immunity” for the Registrar.

207. One delegation referred to Appendix II of the Report of the Public International Law Working Group (UNIDROIT CGE/Int.Int./3-WP/18; ICAO Ref. LSC/ME/3-WP/18), the first paragraph of which it felt reflected the agreement that had been reached, and that stated that the “privileges and immunities given to the Supervisory Authority and the Registrar in the text of the convention should be only such as are functionally necessary”, which appeared to contradict the approach of granting full immunity to the Supervisory Authority in Article 26(2).

208. The Rapporteur indicated that there was no inconsistency with Working Paper 18. Paragraph 20 of that Report indicated that the control to be exercised by the Supervisory Authority over the Registrar should be limited to administrative matters, with the consequence that the Supervisory Authority would not be able to modify the data inserted in the data base. If the Supervisory Authority did not have the possibility to affect the data, then there was no need to limit the immunity to functional immunity.

209. One of the delegations that had submitted the Note contained in Appendix II indicated that what was intended with the reference to “immune from legal process” in Article 26(2) was that the Supervisory Authority would operate under United Nations standards, would not be subject to local labour laws and the like. As regards the exception in Article 26 bis referred to in Article 26(4), he suggested that as that exception dealt with improper handling of the Registry and not with immunity, the formulation be changed to “[e]xcept for the purposes of Article 26 *bis*”. This last suggestion was supported by one delegation.

210. Two delegations indicated that they had also understood the immunity of the Supervisory Authority to be limited to functional immunity. One of the delegations indicated that if full immunity were granted, a procedure for the revocation of that immunity would have to be provided for. It suggested that the word “functional” should be inserted in paragraph (2), but that it should be in square brackets. Whether or not it would be retained should be decided by the diplomatic Conference. The other suggested that paragraph (3) should be deleted altogether.

211. One delegation stated that the revised text of paragraph (4)(a) did not reflect the discussions within the Public International Law Working Group. It stressed that while the Supervisory Authority should

have full immunity, the Registrar should in no case benefit from diplomatic-type immunity or immunity from legal process. What the Registrar should benefit from were working conditions which would avoid its being subjected to unfounded interference by the host State.

212. One delegation suggested that the square brackets around the exemption from taxes in paragraph (3) should be deleted, as it was necessary for the Registry to be a low-cost Registry to the greatest extent possible, and cutting expenditure was an important means to attain this. Another delegation instead insisted that the tax exemption remain in brackets

213. Two delegations pointed out that whereas the future Convention/Protocol decided whether or not there should be immunities, these would be implemented by the Headquarters Agreement with the host State. The last part of paragraph (3) was therefore superfluous.

214. In the end, it was decided that the word “functional” should be inserted in square brackets in paragraph (2), as there was no consensus on the possible limits of the immunity. Furthermore, the brackets in paragraph (3) should remain, as there was no consensus for their deletion.

ARTICLE 26 *bis* (WP/28 REV.)

215. The Rapporteur indicated that the liability in Alternative A of Article 26 *bis* was strict liability, whereas the liability in Alternative B was fault liability.

216. A large majority of the delegations that took the floor expressed a preference for Alternative A. One delegation observed that in an electronic environment it was not possible to establish precisely who would bear liability. Furthermore, the strict liability standard would reduce potential litigation and cost of insurance.

217. Two delegations however felt that it was too early to make a selection, and that it was necessary to wait until more information was available as to what the insurance cost would be.

218. Two delegations proposed that the remedies should not be limited to compensation claims, but that it should also be possible to request a correction of the error or omission.

219. In the end, it was decided that both alternatives should remain in the draft, even if there had been large support for Alternative A, so as to permit more detailed information being obtained in relation to the insurance coverage.

ARTICLE 29 OF THE PRELIMINARY DRAFT CONVENTION.

220. One delegation reiterated the strong reservations regarding the Chapter on assignment of international interests it had expressed in the paper it had submitted to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/4; ICAO Ref. LSC/ME/3-WP/4). It indicated that the text of the preliminary draft Convention completely overturned the concept of security interest in that it reversed the principle on which the widely followed principle that the security followed the claim and made the obligation accessory to the international interest.

ARTICLE 30 OF THE PRELIMINARY DRAFT CONVENTION.

221. With reference to Article 30(1)(b) one delegation suggested that in order to meet the objections raised by a number of delegations, the formulation might be modified so as to ensure that the assignment of the associated right carried with it the assignment of the claim, rather than the opposite.

222. The Rapporteur observed that the future Convention was not a Convention that dealt with the independent assignment of claims, that making the proposed modification would make substantial changes to the draft necessary. Furthermore, it would interfere with the draft UNCITRAL Convention.

223. One delegation stated that it believed that the Convention did deal with the assignment of claims, as the assignment of security would be worth nothing if the claim were not assigned at the same time. In substance the Convention dealt with the assignment of certain receivables. It stated that it believed that it was possible to recast the provisions, even if it would take some time to do so.

224. The ICAO Secretariat referred to the Working Paper it had presented to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/12; ICAO Ref. LSC/ME/3-WP/12) and suggested deleting paragraph (3).

225. Whilst three delegations and one observer supported the ICAO proposal to delete paragraph (3), one observer, supported by one delegation, expressed the view that the deletion of paragraph (3) would restrict the ability of the airlines to decide what to waive.

226. Two delegations wondered what difference the deletion of paragraph (3) would make in practice, as if nothing were stated it would always be possible for the airlines to decide what to waive.
ARTICLES 32 AND 35 OF THE PRELIMINARY DRAFT CONVENTION.

227. One delegation referred to the chapeau of Article 32, which it stated would not work in practice. It also pointed out that there was a similar problem with Article 35.

228. It was decided that three assistants to the Chair (United States, France and Canada) should meet to consider the points raised in relation to Chapter IX on Assignment of International Interests and Rights of Subrogation and should submit any proposal they might agree on to the Plenary. Any other delegations that wished to contribute were invited to do so.

ARTICLES 37 AND 38 OF THE PRELIMINARY DRAFT CONVENTION.

229. One delegation requested clarifications as regards the scope of the non-consensual rights and interests, in particular under Article 38. Furthermore, with reference to Article 38(3), it observed that a Contracting State could protect itself against the effects of the paragraph by making a declaration referring to categories of non-consensual rights created in the future. The problem arose when States acceded subsequently. The delegation indicated that a Contracting State should be able to protect its position no matter when it acceded to the Convention.

230. The Rapporteur indicated that the future Convention was a private law Convention and consequently dealt only with private law rights and not with public law rights. As regards the second point, he suggested that it was adequately dealt with in the new Article *Z ter* in Working Paper 28. The delegation that had raised the question however did not feel that this was the case.

231. One observer suggested modifying the definition of non-consensual rights in Article 1(v) by adding as a second sub-paragraph “a right conferred by law to a State to retain or sell an object”. He observed that a declaration under Article XXX of the preliminary draft Protocol would apply to all interests, including international interests.

232. One delegation requested clarifications as to the inter-relationship between Article 37 and the words in brackets in Article 38.

233. The *Rapporteur* stated that Article 37 gave the Contracting State the right to list categories of non-consensual rights or interests and that these would then take their place in the priority system. Article 38 was intended to enable States to protect their rights where they did not wish to make any registration, in which case they had the power to make a declaration. The effect of this declaration was that the interest would have priority even if it was not on the register. The two articles were intended to be mutually exclusive: if a declaration were made under Article 38, Article 37 would not apply.

234. The delegation that had requested the clarification observed that as both Articles dealt with non-consensual rights they could be merged. The ambiguity that existed could be removed if the words in brackets in Article 38 were deleted.

235. It was decided that the Drafting Committee should take all observations into consideration.

ARTICLE 40 OF THE PRELIMINARY DRAFT CONVENTION.

236. One delegation advocated restraint in regulating jurisdiction, as there was a risk of interference with the 1968 Brussels Convention on the Recognition of Judgments in Civil and Commercial Matters and the 1988 Lugano Convention on the same subject-matter, as well as with the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters under preparation at the Hague Conference on Private International Law. It also wondered why Article 40 gave jurisdiction also to non-Contracting States, whereas Article 41 limited jurisdiction to Contracting States.

237. The *Rapporteur* indicated that Article 40 was confined to claims *in rem* and related to Article 14(1). Article 41 was limited to one jurisdiction as it gave jurisdiction for a much wider range of types of claim.

238. One delegation stressed the importance of providing at least limited guidance in the future Convention, considering that the Brussels and Lugano Conventions applied to a limited number of countries and it was not known when work on the preliminary draft Hague Convention would be completed.

239. One delegation referred to the paper it had submitted to the Joint Session (UNIDROIT CGE/Int.Int./3-WP/4; ICAO Ref. LSC/ME/3-WP/4) in which it had warned that the preliminary draft Convention could not, without incurring the risk of grave dysfunction, derogate in such a flagrant manner from the rules normally used by States for the founding of jurisdiction in respect of the granting of interim relief, all the more so since the preliminary draft Convention carried no rule on the recognition of judgments by such courts. The Working Paper furthermore contained proposed wording for Article 40.

240. One delegation indicated that if the brackets were removed in paragraph (1), jurisdiction under Article 40 would be exclusive. This would mean that also a non-Contracting State would have exclusive jurisdiction and that the court of a Contracting State would be obliged to enforce the judgment of a court in a non-Contracting State. It therefore proposed deleting the brackets and adding the words “of a contracting State” after “the courts”. This proposal was supported by another delegation.

241. One delegation suggested that the order of Articles 40 to 41 should be modified, Article 41 being placed first. It furthermore suggested adding the words “for the final determination of the claim” after “trial” in Article 40(2).

242. It was decided that the Drafting Committee should examine how the proposal presented in Working Paper 4 could be accommodated, as it had received some support.

ARTICLE 40 *bis* OF THE PRELIMINARY DRAFT CONVENTION.

243. One delegation suggested broadening the scope of paragraph (2), to give the court wider jurisdiction to allow it to make orders directing the Registrar to proceed with the discharge of registration or the correction of data. This proposal was supported by two other delegations.

ARTICLE 41 OF THE PRELIMINARY DRAFT CONVENTION.

244. One delegation observed that the present version of the text referred to the courts of the forum State and that this created a problem in relation to the determination of the competent forum.

Furthermore, the Article introduced into the system of the preliminary draft Convention the *forum arresti* which would be against to the domestic rules on international civil procedure in a number of countries, the Brussels and Lugano Conventions, as well as the preliminary draft Hague Convention. The Article should be limited to the forum of the place where the debtor was located, or the forum chosen by the parties.

245. One observer indicated that he would not be comfortable with a reference to the forum of the State of the debtor, which he felt was in any event already covered by Article 41(1).

246. The above delegation suggested stating in Article 41(2) that the court had exclusive jurisdiction if it was felt that the debtor's court should not prevail over the court chosen by the parties. If the court had exclusive jurisdiction then what the parties agreed would be compulsory.

ARTICLE 41 *bis* (WP/28 REV.)

247. One delegation suggested that the reference to the "Protocol" should be plural, as the intention was to refer not only to the Aircraft Protocol, but also to the Rail and Space Protocols.

ARTICLE U (WP/28 REV.)

248. The Chairman of the Public International Law Working Group (South Africa) observed that the time limit of the entry into force of the Convention was still indicated as six months in paragraph (1), whereas the Public International Law Working Group had recommended that it be reduced to three months.

249. One delegation explained that it would have constitutional problems with a time-period shorter than six months.

250. One delegation suggested that the word "accession" should be deleted in paragraph (1), as it referred to the procedure following the entry into force of the Convention. This was supported by two other delegations, one of which recalled that the time-period for the coming into force of a Convention following accession was normally dealt with in a separate article.

251. It was agreed that Article V would have to be re-examined when Article 3 was re-considered, in view of the fact that Plenary had only agreed to the principles developed by the Special Working Group on Article 3 in relation to Articles 3, 27 and V.

ARTICLE W (WP/28 REV.)

252. One delegation observed that in paragraph (4) the word "shall" should be used instead of "will".

253. With reference to paragraph (1), one delegation wondered whether it was UNIDROIT that had to decide which other international Organisations should be involved, or whether it was not the Governments that should do so.

254. It was decided to place Article W in square brackets in order to allow for some drafting refinement.

ARTICLE Z *bis* (WP/28 REV.)

255. One delegation indicated that in paragraphs (1) and (2) the term "authorised" should be replaced by "specified or provided for".

ARTICLE *Z ter* (WP/28 REV.)

256. One delegation stated that it had a preference for Alternative A, but observed that it would only work if priority rules were added for internal transactions. This suggestion was supported by three other delegations which also expressed a preference for Alternative A.

257. One delegation felt that both alternatives would require more work and therefore suggested that they should be kept for the time being in brackets. It observed that airlines in different countries often had diametrically opposing views, and that its country's airlines had expressed a preference for Alternative B with a long transitional period.

PROPOSAL FOR THE ESTABLISHMENT OF AN *AD HOC* TASK FORCE WITH A VIEW TO THE ESTABLISHMENT OF THE INTERNATIONAL REGISTRY

258. Two delegations presented a joint proposal for the setting up of an *ad hoc* task force to prepare for the establishment of the International Registry (UNIDROIT CGE/Int.Int/3-WP/30; ICAO Ref. LSC/ME/3-WP/30).

259. This proposal was approved on the understanding that the *ad hoc* task force should keep the Secretariats of UNIDROIT and ICAO at all time informed of its work and that the Secretariat should also in particular be consulted in relation to its composition with a view to satisfying certain criteria.

– END –