



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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## THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

### DRAFT REPORT

PLENARY SESSIONS  
from 20 to 30 March 2000

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## OPENING

1. In opening the third Plenary Session of the Joint Session of the 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 and the Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment), Mr H. Kronke, Secretary-General of UNIDROIT, welcomed participants on behalf of the President of UNIDROIT, Mr B. Libonati, and the UNIDROIT Governing Council. He underlined the considerable progress that had been made since the second Joint Session, held in Montreal in August/September 1999, and thanked all those who had contributed to making this progress possible.

2. Mr Kronke stated that the envisaged structure of a “parent” Convention with equipment specific Protocols was no longer a source of concern to States, also as a result of the efforts that had been made to move provisions that made sense for more than one type of equipment to the Convention, which had produced a greater equilibrium between the Convention and the Protocols. There was also a growing awareness that the Protocols were not intended to over-ride the Convention as a whole, but that the Convention instructed users to look for equipment-specific details in the Protocols.

3. The concern about time expressed at the beginning of the process by the aviation Organisations was a legitimate one and provided an incentive to proceed with the greatest speed possible. He stressed that work on the *Protocol on Matters relating to Railway Rolling Stock* and on the *Protocol relating to Matters specific to Space Property* was progressing rapidly. In fact, a Steering and Revisions Committee for the Rail Protocol had met the previous week. He stressed that work on the other Protocols did not interfere with the work on the Aircraft Protocol. Mr Kronke concluded by indicating that a diplomatic Conference for the adoption of the draft Convention and draft Aircraft Protocol might confidently be expected to be held early in 2001.

4. In his opening statement, Mr S. Espínola, Principal Legal Officer of the ICAO Secretariat, welcomed participants on behalf of Mr R.C. Costa Pereira, Secretary General of ICAO, and Mr L. Weber, Director of the ICAO Legal Bureau. He recalled that this third Joint Session was expected to finalise the draft instruments under consideration in order to be submitted to the ICAO Legal Committee. He however drew attention to the fact that the legal and practical implications of a number of provisions had not yet been defined. The provisions that were of more concern to ICAO were those relating to the exercise of self-help remedies and judicial interim relief by the creditor, the broad field of derogation and choice of law, and the plethora of reservations and declarations required or permitted. Mr Espínola suggested that a more balanced approach was needed. In this regard he announced that two working papers prepared by the ICAO Secretariat, one on declarations and derogations (UNIDROIT CGE/Int.Int./3-WP/11; ICAO Ref. LSC/ME/3-WP/11), the other on remedies and interim relief (UNIDROIT CGE/Int.Int./3-WP/12; ICAO Ref. LSC/ME/3-WP/12) were being distributed for the consideration of the meeting. He suggested that attention should be focussed on the outstanding issues so as to arrive at texts capable of obtaining broad acceptance by States, and underlined that in the view of ICAO acceptability and ratifiability were overriding objectives in the finalisation of the texts.

5. Mr Espínola recalled that at the second Joint Session the ICAO Secretariat had been invited to illustrate the ICAO position as to its possible involvement in the future International Registry system for aircraft objects. He stated that the required indications would be provided in the course of the discussions on the Registry.

## AGENDA ITEM 1: ADOPTION OF THE AGENDA

6. The Agenda was adopted as proposed.

AGENDA ITEM 2: ORGANISATION OF WORK

7. It was decided that in order to facilitate the work of the Drafting Committee it would meet in the same composition as the restricted Drafting Group that had met in Rome from 25 to 27 November 1999 (Mr M. Deschamps (Canada), Mr R.M. Goode (United Kingdom/*Rapporteur*), Mr C.W. Mooney, Jr. (United States of America) and Mr O. Tell (France)). In conformity with the decision taken by the second Joint Session (cf. ICAO Ref. LSC/ME/2-Report / UNIDROIT CGE/Int.Int./2-Report, § 6:2) Mr K. El Hussainy (Egypt) and Mr H.-G. Bollweg (Germany) were also invited to attend, and in addition Mr J. Wool (Aviation Working Group) was invited to attend the meetings as an adviser. It was further decided that the Drafting Committee would be convened in Plenary by its Chairman, Mr K.F. Kreuzer (Germany), as appropriate.

PRESENTATION OF THE PROGRESS MADE IN RELATION TO THE PRELIMINARY DRAFT PROTOCOL ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK

8. A presentation of the progress made with respect to the preliminary draft Rail Protocol was made by Mr H. Rosen, Co-ordinator of the Rail Working Group. He stressed the differences that existed between the rail and the aircraft sectors by reason of the traditionally heavy involvement of States in national railways and of the difficulties that privatisation had given rise to. He announced that a study assessing the economic impact of the preliminary draft Protocol would be prepared shortly. Mr Rosen indicated that the Rail Protocol would soon be ready for consideration by a Committee of Governmental Experts.

9. The observer from the Intergovernmental Organisation for International Carriage by Rail (OTIF) stressed the changes that the privatisation process had brought with it in the railway sector. He expressed the strong support of his organisation for the presently envisaged structure of a "parent" Convention with equipment-specific Protocols.

PRESENTATION OF THE PROGRESS MADE IN RELATION TO THE PRELIMINARY DRAFT PROTOCOL ON MATTERS SPECIFIC TO SPACE OBJECTS

10. Mr D. Panahy, representing the Space Working Group, illustrated the progress made with respect to the preliminary draft Space Protocol and the importance that the protocol would also have in economic terms.

11. Mr G. Lafferranderie (European Space Agency) also stressed the economic importance of the preliminary draft Space Protocol and the need to consider the interests of all parties in the process. He observed that both the Convention and the Space Protocol would be well received by States as well as by the private sector. He indicated that it would however be necessary to ensure appropriate co-ordination between the future Convention in its application to space property and the existing body of international space law.

12. Mr M. Stanford (UNIDROIT) mentioned the different initiatives in which the UNIDROIT Secretariat had participated with a view to publicising awareness of the issues involved in the preliminary draft Space Protocol.

GENERAL DISCUSSION

13. In relation to the presently envisaged Convention/Protocol structure, a number of delegations expressed their support, one delegation indicating that the reservations it had previously had no



longer had reason to exist, although a draft informal integrated text would be make it easier to understand the regime. One delegation however suggested that a single structure might be preferable, and another that it would prefer to keep options open.

14. Several delegations and observers expressed their concern in relation to the opening statement made by Mr Espínola (ICAO), which appeared to reopen discussion on the philosophy underlying the instruments. It was stressed that the purpose of the instruments under preparation was to make aircraft or equipment financing more available and at much lower cost, primarily in the markets that were in need of such financing and that the means to achieve this purpose was the introduction of modern asset-based financing laws. A number of delegations however stated that they were not in a position to take a stand on the ICAO comments as they had not yet examined the papers that ICAO was submitting.

15. One delegation expressed the view that the draft instruments had so far been creditor-oriented and that they should be looked at in more depth.

16. Mr Espínola (ICAO) indicated that the intention of the ICAO papers was to assist the discussion of the Joint Session, in particular by flagging the concerns his Organisation had with respect to the lack of an adequate balance between the protection given to the creditor and the defences permitted to the debtor. The ICAO considered that a better balance could facilitate acceptance of the draft instruments.

17. The observer of the International Air Transport Association (IATA) stressed IATA's commitment to the rapid progress of the Aircraft Protocol and expressed strong support for the work underway in relation to the Rail and Space Protocols. He stated that the reports on the progress made with respect to these Protocols clearly showed that the only international Organisation capable of pulling together all the different strands was UNIDROIT. The central role of UNIDROIT must, he stated, be maintained also in relation to the Rail and Space Protocols.

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

18. It was decided that Items 3 and 4 on the UNIDROIT Agenda would be dealt with in parallel.

#### PREAMBLE OF THE PRELIMINARY DRAFT CONVENTION

19. It was decided to delete the clause of the Preamble in square brackets in the preliminary draft Convention, and to defer consideration of its possible inclusion in the Space Protocol to the discussions on that Protocol.

#### PREAMBLE OF THE PRELIMINARY DRAFT PROTOCOL

20. The Preamble of the preliminary draft Protocol was adopted without modification.

#### ARTICLE 1 OF THE PRELIMINARY DRAFT CONVENTION

21. Modifications or suggestions were made *inter alia* in relation to the following definitions and referred to the Drafting Committee:

(b) “assignment” – it was suggested that the Drafting Committee examine whether the definition was broad enough to cover pledges of receivables;

(n) “insolvency administrator” – it was suggested that the Drafting Committee consider replacing “appointed” by “authorised”, or combining the two terms: “appointed or authorised”;

(p) “interested persons” – it was suggested that the Drafting Committee consider whether the reference to “insolvency administrator in (n) should be included in (p), or whether it should be inferred that the reference to the debtor in Article 28 included a reference to the insolvency administrator;

(x) “proceeds” – it was suggested that it should be made clear that partial as well as total loss was covered;

(bb) “protocol” – it was decided that the question of whether the definition of category of object dealt with in the Protocols could have geographic scope should be dealt with in the context of the Protocols;

(ff) “Registrar” – it was suggested that the words “or body” should be added after “person” so as to cover both legal and physical persons;

(mm) “title reservation agreement” – it was suggested that the Drafting Committee re-examine this definition in the light of the inter-relationship of the definitions of the different terms used in the definition;

(oo) “writing” – it was suggested adding the words “where required” after “which indicates” and that the following words should be amended to read “by reasonable means the approval of the record and the initiator of it”.

#### ARTICLE I OF THE PRELIMINARY DRAFT PROTOCOL

#### 22. Modifications or suggestions were made in relation to the following definitions:

(a) “aircraft” – it was suggested that the definition of “aircraft” in the Annexes to the Chicago Convention should be followed, although it was also suggested that in following the Chicago Convention definition the technical definitions of “aircraft engines” and “airframes” should not be extended;

(c) “aircraft objects” – it was suggested that this definition should be reconsidered, as in accordance with this definition and the definition of “aircraft” helicopters constituted both aircraft and aircraft objects;

(f) “Chicago Convention” – it was suggested to add the words “and its Annexes” after “Chicago Convention”;

(h) “de-register the aircraft” – it was suggested to add “or from a common mark registering authority”;

(m) “insolvency-related event” – it was suggested that the reference to Chapter III of the Convention in sub-paragraph (ii) should be deleted. In relation to the commencement of the insolvency proceedings in sub-paragraph (i), it was suggested that the provision should be brought into line with Article XI, Alternative A, paragraph 2;

(o) “national registry authority” – it was suggested that the definition should specify that this reference was to the national authority and the common mark registering authority “as defined in Annex VII to the Chicago Convention”;

(p) “primary jurisdiction” – it was felt that the footnote to this provision was misleading and needed to be re-examined by the Drafting Committee;

(q) “State of registry” – it was suggested that reference should be made to the State of registry or the State where the common mark registering authority was located.

## 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.

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

29. 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.

30. 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 II OF THE PRELIMINARY DRAFT PROTOCOL

31. 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.

32. 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.

33. 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

34. 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.

35. 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.

36. 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).

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

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

42. The Chairman of the Special Working Group on Article 3 of the preliminary draft Convention (Mexico) indicated that a compromise had been reached and was put forward in the Report of the Group (UNIDROIT CGE/Int.Int./3-WP/27; ICAO Ref. LSC/ME/3-WP/27). Paragraph 3 of the Report listed three principles upon which the Group had agreed.

43. It was agreed that the Drafting Committee insert into the Article or the preliminary draft Aircraft Protocol a reference to the connecting factor to aircraft registration in the Contracting States, as it had inadvertently been omitted.

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

45. 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.

46. 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”.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

#### ARTICLE III OF THE PRELIMINARY DRAFT PROTOCOL

53. 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.

54. 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.

#### ARTICLE 4 OF THE PRELIMINARY DRAFT CONVENTION

55. It was observed that as this provision was inspired by Article 3 of the preliminary draft Convention on Jurisdiction and Foreign Judgements 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.

56. 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.

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

#### ARTICLE 6 OF THE PRELIMINARY DRAFT CONVENTION

58. 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.

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

60. 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.

61. 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

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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

68. It was suggested to add “or material” after “substantial” in line 2 of paragraph (2).

69. The ICAO Secretariat introduced a document 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.

70. 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.

71. 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.

72. 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

73. 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

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

75. 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

76. 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.

77. 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.



78. 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.

79. 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.

*PRESENTATION OF THE REPORT OF THE SPECIAL WORKING GROUP ON ARTICLE 14 OF THE PRELIMINARY DRAFT CONVENTION AND SELECTED ASPECTS OF ARTICLE X OF THE PRELIMINARY DRAFT AIRCRAFT PROTOCOL*

80. The Chairman of the Special Working Group on Article 14 of the preliminary draft Convention and selected aspects of Article X of the preliminary draft Aircraft Protocol (Japan) introduced the Report of the Working Group (UNIDROIT CGE/Int.Int./3-WP/24; ICAO Ref. LSC/ME/3-WP/24), which submitted proposed revised texts of the two articles.

81. One delegation expressed its serious concern in relation to the results of the deliberations of the Working Group. It suggested that Article X(4) would be essential if Article 14(2) were to be included, and that without Article X(4) the benefits of the future Convention/Protocol would be lost. Its understanding was that originally the Articles had been intended to refer to final remedies, and as proposed they did not fulfil that task.

82. There was general agreement with the deletion of the words *prima facie* in Article 14(1). A number of delegations indicated that the word “clear” which had been put in their place was acceptable, but that they could also consider not including it at all.

83. There was general agreement that Article 14 of the future Convention should be an “opt-out” provision, whereas Article X of the future Protocol should be an “opt-in” provision. It was suggested that the Drafting Committee might reword Article X to ensure that this was clear.

84. One delegation expressed support for a suggestion made by an observer to move the sale-related elements of Article 14(1) to the Protocol.

85. With reference to Article 14(2), under which the court “may impose such terms, including the giving of prior notices, as it considers necessary to protect the interested persons”, one delegation indicated that it should be clear that the notices were to be given to the interested persons. Furthermore, with respect to Article X(4) of the preliminary draft Protocol, it stated that it had thought that there was agreement that a waiver in an agreement between a debtor and creditor could not be binding upon third parties.

86. Three delegations supported the removal of the brackets around Article 14(2).

87. A lengthy discussion took place with regard to a proposal submitted by a delegation (UNIDROIT CGE/Int.Int./3-WP/25; ICAO Ref. LSC/ME/3-WP/25) for an opt-in Annex to, or Article in, the future Aircraft Protocol. While the paragraphs (2) and (3) of the proposal raised no objections, paragraph (1), according to which “[a] Contracting State shall ensure that judicial proceedings relating to the remedies under the Convention will be completed within the period set forth in a declaration to this Protocol”, was found to be highly controversial.

88. Several delegations indicated that their countries would have constitutional problems with such a provision. Furthermore, even if some delegations would have been prepared to accept the addition of such a provision in the context of Article X of the Protocol and on the understanding that the provision

would be an opt-in provision, a clarification from the delegation proposing the provision that what it was intended to cover was not only speedy or interim relief but all judicial proceedings raised considerable doubt among delegates as to the appropriateness of such a solution.

89. Another issue raised concerned whether it was in the discretion of the court to choose the remedy granted, irrespective of which remedy had been requested by the creditor, or whether the court's discretion only extended to choosing an option within the category of remedies requested.

90. In view of the issues raised in the course of the discussions, an observer suggested that Article 14 should be retained in the Convention with a few drafting changes, and that no attempt should be made at this stage to push the discretion of the courts in either direction. He also suggested that Article X of the future Protocol should be retained without brackets and that paragraph (4) thereof should be modified to take account of the observation raised in relation to waivers. He suggested that a footnote should be added to the effect that one delegation had proposed a rather more comprehensive approach, but that the proposal had raised concern. This suggestion was accepted.

#### ARTICLE 15 OF THE PRELIMINARY DRAFT CONVENTION

91. 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.

92. 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.

93. 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.

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

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

96. 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.

97. 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

98. One delegation suggested adding “or replace” in paragraph (2)(b).

99. 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.

100. 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.

101. 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

102. 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

103. One delegation suggested that the word “or” should be deleted in Article 17(1)(a).

104. 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.

105. 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.

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

107. 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.

108. 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.

109. 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).

110. 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.

111. 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

112. 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).

113. 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.

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

#### ARTICLE 21 OF THE PRELIMINARY DRAFT CONVENTION

115. With reference to the bracketed language in Article 21, several delegations and one observer expressed a preference for the second alternative.

116. One delegation suggested that the Article also state that the registration of an international interest ceased in the event of total destruction of the object.

117. The *Rapporteur* indicated that Article 27(5) extended priority to proceeds. If the object were destroyed, the security would extend to those proceeds, so that it was necessary to maintain registration until the proceeds had been paid, after which the registration would effectively cease.

118. It was suggested that Article 27(5) should be applied first, after which Article 21 should be applied.

119. It was decided to approve Article 21 provisionally, and that Article 21 should be re-examined if Article 27(5) were not retained.

#### ARTICLE 22 OF THE PRELIMINARY DRAFT CONVENTION

120. One delegation referred to the proposal it had put forward in Working Paper 16 (UNIDROIT CGE/Int.Int./3-WP/16; ICAO Ref. LSC/ME/3-WP/16) and indicated that the wording it proposed was intended to clarify that, in order to be able to conduct a search, it was not necessary for the person who intended to conduct the search to prove a special interest.

121. Whilst the sense of the proposal was approved, it was agreed that the Drafting Committee should improve the wording.

ARTICLE 26 OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

122. 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.

123. 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).

124. 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.

125. 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.

126. 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.

127. 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.

128. 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

129. 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.

130. 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* OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

131. 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.

132. 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.

133. 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.

134. 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.

135. 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 27 OF THE PRELIMINARY DRAFT CONVENTION

136. In relation to Article 27(3), one delegation asked for clarifications as regards the manner in which the preliminary draft Convention resolved conflicts between competing interests, namely, whether in the case of an international interest arising under a conditional sale or leasing agreement, but which was not registered, the third party, based on Article 27(3), was the buyer and would be able to take the object free of the interest of the conditional seller.

137. The *Rapporteur* gave an affirmative reply to both hypothetical cases.

138. With reference to Article 27(3)(b), one delegation indicated that the fact that a buyer of an object could acquire its interest in an object free from an unregistered interest even if it had actual knowledge of such an interest was a source of major concern, and proposed that a requirement of good faith be introduced.

139. 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.

140. 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.

141. 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.

142. 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.

143. 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.

144. 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).

145. 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.

146. 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

147. In relation to Article 28(3), one delegation suggested that the language in square brackets be deleted.

148. 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.

149. 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.

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

#### ARTICLE VI OF THE PRELIMINARY DRAFT PROTOCOL

151. 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.

152. 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

153. 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.

154. 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.

155. 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).

156. 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.

157. 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.

158. 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.

159. 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.

160. 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

161. 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.

162. 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.

163. 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.

164. 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.

165. 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.

166. 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.

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

168. 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.

169. 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.

170. 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.

171. 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

172. 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.

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

174. 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

175. 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.

176. 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.

177. 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.

178. 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.

179. 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.

180. 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.

181. 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.

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

183. 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.

#### ARTICLE 29 OF THE PRELIMINARY DRAFT CONVENTION.

184. 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.

185. 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.

186. 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.

187. 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.

188. 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).

189. 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.

190. 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.

191. 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.

192. 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.

*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]*

193. 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.

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

195. 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.

196. 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.

197. 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.

198. 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”.

199. 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.

*PROPOSAL FOR REVISED TEXT OF CHAPTER IX OF THE PRELIMINARY DRAFT CONVENTION*

200. The three delegations that had been appointed assistants to the Chair with respect to Chapter IX of the preliminary draft Convention (Canada, France and the United States of America) submitted two alternative drafts of the relevant provisions to Plenary for consideration (UNIDROIT CGE/Int.Int./3-WP/31; ICAO Ref. LSC/ME/3-WP/31).

201. One of the three delegations introduced the proposal and suggested that, considering the preliminary character of the drafts, the Working Paper should be appended to the Report on the Plenary of the Joint Session.

202. One observer supported by five delegations suggested that Alternative A of the proposed Articles be inserted into the text of the preliminary draft Convention with an explanatory note referring to Alternative B.

203. One delegation supported by ten other delegations opposed the insertion of Alternative A into the text, as the Joint Session had not had the opportunity to discuss it in depth and it would not be possible to take a final view at this Joint Session. It suggested appending Working Paper 31 to the Report on the Joint Session and inserting a footnote in the draft. Two of the proponent delegations also stated their acquiescence to this proposal.

204. The observer from UNCITRAL expressed his appreciation for the improvements made to the text in the proposal. He suggested, however, that the key issue was in Article 34, as the risk was that, if more than one regime existed, the cost of transactions would increase dramatically if parties had to examine a number of different registries to discover which of the regimes applied to their interests.

205. It was decided that the text of Chapter IX should be retained as presently in the text, and that a footnote should be added making reference to the solutions contained in Working Paper 31. The final text should be considered by the diplomatic Conference. It was also decided that any drafting changes should be made in accordance with what in the course of the discussion had appeared to be necessary.

ARTICLES 37 AND 38 OF THE PRELIMINARY DRAFT CONVENTION.

206. 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.

207. 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.

208. 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.

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

210. 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.

211. 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.

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

#### ARTICLE 40 OF THE PRELIMINARY DRAFT CONVENTION.

213. 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.

214. 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.

215. 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.

216. 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.

217. 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.

218. 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).

219. 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.

220. 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.

221. 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 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.

222. 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).

223. 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.

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

224. 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 OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

225. 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.

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

227. 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.

228. 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 OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

229. One delegation observed that in paragraph (4) the word “shall” should be used instead of “will”.

230. 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.

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

#### ARTICLE Z bis OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

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

#### ARTICLE Z ter OF THE PRELIMINARY DRAFT CONVENTION

*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 (UNIDROIT CGE/Int.Int./3-WP/28 Rev.; ICAO Ref. LSC/ME/3-WP/28 Rev.)*

233. 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.

234. 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.

#### ARTICLE XX OF THE PRELIMINARY DRAFT PROTOCOL

235. One delegation pointed out that Articles 40 and 41 of the preliminary draft Convention had been modified, and that Article XX of the preliminary draft Protocol should take those changes into account. It also pointed out that, in cases of common mark registries, for the purpose of determining the competent jurisdiction, reference should be made to the State where the register was located.



ARTICLE XXV OF THE PRELIMINARY DRAFT PROTOCOL

236. One delegation observed that neither the preliminary draft Convention nor the preliminary draft Protocol provided details as to the procedure to be followed for the adoption of amendments to the instruments, and expressed the hope that it would be possible to consider such a procedure at the diplomatic Conference.

ARTICLE XXX OF THE PRELIMINARY DRAFT PROTOCOL

237. One delegation recalled that it had been decided to re-examine in the context of Article XXX the possibility of States selecting either Alternative A or Alternative B, or neither Alternative under Article XI of the future Protocol. The delegation expressed a strong preference for allowing such a possibility. Three other delegations supported this view.

238. One delegation, while supporting the view expressed by the other delegations, referred to the 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 had sought confirmation that a single Contracting State would be able to select Alternative A for certain types of insolvency proceedings and Alternative B for other types.

239. It was observed that it should not be possible for the Alternatives to be split and re-assembled as thought best by Contracting States, and that they should apply in their entirety or not apply at all.

ARTICLE XXXI OF THE PRELIMINARY DRAFT PROTOCOL

240. One delegation referred to a recommendation it had made earlier in the discussions to either have a parallel Article to Article XXXI in the preliminary draft Convention, or to move Article XXXI to the Convention. The reason for this was that at present the impression was that a Contracting State had to make all declarations at the time it acceded to the instruments, whereas this was not the case.

ARTICLE XXXIII OF THE PRELIMINARY DRAFT PROTOCOL

241. With reference to paragraph (2), one delegation observed that it had been the general feeling in the Public International Law Working Group that a denunciation should take effect after a short period of time after its deposit, for example six months. With reference to paragraph (3), it had been agreed by the Public International Law Working Group that a prospective international interest should be converted into a full international interest on the date the denunciation took effect.

ARTICLE XXXIV OF THE PRELIMINARY DRAFT PROTOCOL

242. With reference to paragraph (1), one delegation suggested that the words in square brackets should be deleted, as consultations between the Organisations would be conducted as a matter of course. It was decided that the Drafting Committee should consider this proposal.

PRESENTATION OF THE REPORT OF THE PUBLIC INTERNATIONAL LAW WORKING GROUP

243. The Chairman of the Public International Law Working Group presented the Report of the meetings of the Working Group that had taken place on 20 and 21 March 2000 (UNIDROIT CGE/Int.Int./3-WP/18; ICAO Ref. LSC/ME/3-WP/18).

244. A number of delegations proposed amendments to the Report. The Chairman of the Joint Session pointed out that it was not for Plenary to modify the Report of the Working Group, which had to remain unchanged in so far as it represented the conclusions reached by that Group. Delegates' comments on the Report would be reflected in the Report on the Joint Session.

245. In relation to paragraph 5 of the Report, the *Rapporteur* indicated that the last sentence should be deleted, as it was inconsistent with the remaining text of the paragraph.

246. It was suggested that the question of the inclusion of spare parts under the Convention/Protocol system, having regard to the provisions of the 1948 Geneva Convention on the International Recognition of Rights in Aircraft should be considered.

247. With reference to the single or dual system of registration, whilst one delegation stressed the importance of a single registration system, another delegation supported a dual registration system for the registration of national and international interests, considering also the system presently in force under the Geneva Convention. In support of this view, the delegate indicated that for developing countries the fees under the new system would be very high and, depending on where the Registry was located, access might also be difficult. He furthermore considered the word “impracticable” in paragraph 7 of the Report to be too strong.

248. One delegation insisted on the role of national registries as correspondents for the International Registry, indicating that these bodies would themselves be required to distinguish between their national and international roles.

249. One delegation reiterated its preference for the inclusion of aircraft as such in the list of equipment in Article 2.

250. It was decided that the Drafting Committee should consider the inclusion of a new opt-out provision relating specifically to the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft.

251. In relation to the Convention/Protocol structure envisaged for the preliminary draft Convention and Protocol, it was agreed that one delegation and Mr Kronke would provide the Joint Session with a list of the precedents indicated in paragraph 9 of the Report.

252. With reference to the procedure to be adopted for additional Protocols, the options envisaged in addition to the traditional diplomatic Conference procedure were a fast-track opting-in procedure and an expedited form of the traditional diplomatic Conference procedure. One possibility considered was that the General Assembly of UNIDROIT might be empowered to adopt the instruments under such an expedited form of the diplomatic Conference procedure.

253. The question was raised whether the fast-track approach was only intended for the future Rail and Space Protocols, or whether it had also been considered to be appropriate for other possible future Protocols. There was general agreement that a differentiation had to be made between the future Rail and Space Protocols, on the one hand, and other possible future Protocols on the other. Some delegations however felt that it was too early to decide upon the procedure to be employed in respect of additional future Protocols.

254. Whilst one delegation favoured the fast-track approach at least as regards the future Rail and Space Protocols, others questioned the possibility of opting for such an approach considering the fact that Governments had not participated in their preparation and stated a clear preference for a traditional diplomatic Conference procedure.

255. As regards the possibility that UNIDROIT might be called upon to act as depositary for the future Convention and Protocols, some delegations indicated that other solutions should also be kept open.

256. One delegation suggested that the sentence in paragraph 10 of the report “[h]owever, this was balanced by concerns about the political acceptability of a process that would substantially reduce the

scope for governmental control” should be reformulated so as to read “[h]owever, it was recognised that a balance needed to be established with the appropriate governmental processes”.

257. As regards the number of ratifications that should be necessary for the entry into force of the future Convention/Aircraft Protocol, there was general agreement that it should be kept low.

258. As regards the entry into force of amendments, one delegation indicated that there had not been a consensus within the Public International Law Working Group regarding the words inside brackets in paragraph 16 (“and in any case less than 50%”). Other delegations agreed on this point and stated that more traditional percentages (75% of Contracting States) should be adopted instead.

259. In relation to the chapeau of Article U(1), one delegation indicated that the word “accession” caused problems and suggested that it be deleted.

260. As regards the question of whether States could be a party only to the Convention, without being a party to one of the Protocols, opinions were divided. Whilst one delegation stated that as States had to be Parties to a Protocol for the Convention to become operative, the future Convention would not in itself constitute a treaty as understood by the 1969 Vienna Convention on the Law of Treaties, another delegation indicated that it was not apparent why a State should not be able to ratify the Convention itself. The only importance this question had was, in that delegation’s opinion, the fact that the Convention would not produce legal effects unless, and only to the extent that, a State had ratified a Protocol.

261. As regards the three months that the Report (paragraph 18) proposed should be required for the entry into force of the instruments following the deposit of a State’s instrument of ratification, one delegation expressed a preference for the customary six months, as the three months proposed would cause constitutional problems. It was decided that this question should be left for the diplomatic Conference to decide.

262. In relation to the international liability, immunity and privileges of the Supervisory Authority and Registrar, one delegation suggested that the Convention should be modified to make it clear that the power given to the Supervisory Authority to give directions to the Registrar did not include the power to make the Registrar change what was on the Registry.

263. One delegation suggested that Article 26(4)(a) might be deleted.

264. In relation to whether the immunity and privileges should be specified in the future Convention or in the future Headquarters Agreement of the Supervisory Authority or Registrar, one delegation stated that minimal requirements needed to be spelled out in the future Convention or in the future Protocol, but that a Headquarters Agreement would in any case be necessary. The same delegation felt that the possible circumscription of the control to be exercised by the Supervisory Authority over the Registrar to administrative matters as indicated in paragraph 20 of the Report, was too restrictive, as the Supervisory Authority would be expected to have certain regulatory functions.

265. As regards the relationship between the future Convention/Aircraft Protocol and the 1944 Chicago Convention on International Civil Aviation, one delegation suggested that it be made clear that this relationship, as well as that between the future Convention/Aircraft Protocol and the Geneva Convention system, would not change. This was particularly relevant for registration, as it was likely that filing in both registries would be required for some time to come for parties to ensure maximum protection for their rights.

266. As regards the relationship between the future Convention/Aircraft Protocol and the 1988 UNIDROIT Convention on International Financial Leasing, one delegation indicated that it was not in a position to take a final stand and that this question needed further study. He suggested that this applied also to the relationship between the future Convention/Aircraft Protocol and the 1988 UNIDROIT Convention on International Factoring.

267. As regards the question of the priority of pre-existing interests and the two options that the Working Group had submitted to Plenary (paragraph 28 of the Report, Options A and B), a number of delegations indicated that further consideration would be necessary.

268. Whilst a couple of delegations indicated a preference for Option B, one delegation observed that airlines would not be in favour of that Option.

269. With reference to the Federal State clause, one delegation suggested that States with an interest in this regard should meet to identify the terms in the future Convention and Protocol that required definition.

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

270. 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).

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