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)

UNIDROIT CGE/Int.Int./3-WP/4
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THIRD JOINT SESSION

(Rome, 20 – 31 March 2000)

PRELIMINARY COMMENTS

(submitted by the Government of France)

The Third Joint Session of the UNIDROIT Committee of governmental experts and the Sub-committee of the Legal Committee of the International Civil Aviation Organization (ICAO) responsible for the preparation of a draft Convention on international interests in high-value mobile equipment (aircraft equipment, space property, railway rolling stock, registered ships, etc.) and a draft Protocol thereto on Matters specific to Aircraft Equipment will be held in Rome from 20 to 31 March 2000.

The preliminary drafts that will be before the Joint Session are based on concepts which were at the outset relatively unfamiliar to our legal system and continue, notwithstanding the amendments made over two previous sessions, to raise significant legal problems for France.

1. *Sphere of application of the Convention*

It is worth recalling that the preliminary draft Convention has a very broad sphere of application, in that it is designed to apply to all types of category of equipment: aircraft, railway rolling stock (trains, trams, wagons, etc.), registered ships and the like, tugs, lighters, oil exploration and drilling rigs, inland waterway barges, passenger boats, containers, space property, etc.

In view of this general and potentially extensive sphere of application, the French delegation is of the view that the base Convention should only contain very general and versatile rules, with which all legal systems could live and capable of being filled out by Protocols according to the type of equipment in question and the needs of the sectors involved so as not to interfere unduly with rules of domestic law.

The list of the categories of equipment intended to be covered has been deleted from the text of the preliminary draft Convention. All that remains of this list is a reference in the preamble, for that reason without any real legal value, to mobile equipment of “high value”. Clarification needs to

be restored to the text of the preliminary draft Convention regarding the categories of equipment intended to be caught by its sphere of application, which the French delegation would not wish to see extended to mobile equipment of lesser importance.

In a more general way, it seems to us that the focus of the sphere of application of the preliminary draft Convention as regards the types of interests covered needs to be sharpened.

Moreover, if one looks at the intentions of UNIDROIT at the time when it embarked on this project, it would appear that they were "to limit the scope of its efforts in this field to the preparation of uniform international rules governing the taking of security in those categories of high-value mobile equipment by their nature likely to be moving either across or beyond national frontiers on a regular basis and which were capable of unique identification" so as "to avoid any semblance of interference with rules of national law, except for the purpose of conferring priority upon holders of registered international interests". [1] The registration of an international interest in the international registration system is not by itself sufficient to bring about the application of the rules of the preliminary draft Convention, in that registration is only required in order to ensure the interest's priority ranking vis-à-vis third parties. The preliminary draft Convention, and in particular Chapter III regarding default remedies, will apply once the equipment concerned is of a category subject to a Protocol. It thus replaces the rules of national law for those categories of equipment covered by national law interests, which raises the question of the relationship between the regimen established for the "international" interest and the subsidiary rules of national law.

Furthermore, the preliminary draft Convention contains no definition of internationality. Internationality is solely to be determined by the inherent mobility of the categories of equipment covered. Even if that may appear self-evident for certain types of aircraft or for satellites, the same is not true for all aircraft (flying school aircraft, aircraft used for recreation purposes, private jets, etc.) nor for helicopters nor above all for other less mobile equipment such as trains. The majority of international instruments dealing with private law matters are international in their application and include a definition of internationality.

As at present drafted, the preliminary draft Convention encompasses "purely internal" transactions (cf. Article V). France and other delegations have argued that only transnational transactions or transactions intended to be international in character should be covered by the preliminary draft Convention. The application of the preliminary draft Convention to purely internal transactions would raise an intolerable question mark over the application of domestic law. Thus, in addition to the equipment belonging to a category defined in a Protocol, registration by the creditor of his interest in the International Registry will suffice to set in motion the priority rules of the preliminary draft Convention. A possibility should accordingly be given to reserve certain transactions.

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[1] *Note by the UNIDROIT Secretariat*: cf. M.J. Stanford: "A broader or a narrower band of beneficiaries for the proposed new international regimen?: Some reflections on the merits of the Convention/Protocol structure in facilitating the former" in *Uniform Law Review* 1999-2, 242.

2. *Default remedies*

The French delegation has already had occasion to note that Article 8 of the preliminary draft Convention, as at present drafted, represents a derogation from the rules of municipal law in so far as, among the self-help remedies it confers on the creditor, it authorises him to sell or grant a lease of the equipment. It is true that Article Y gives Contracting States the possibility to declare that this rule may only apply on their territory with leave of the court. However, this safeguard will not work if the remedy is given in a State other than the State which has made the declaration and is not likely to protect debtors if the equipment is seized in a State which has not made such a declaration. The question of the recognition of such a remedy by the State where the debtor is situated is then likely to raise serious problems.

3. *Interim relief*

There would be some merit in limiting the effects of Article 14, which, albeit only where the creditor adduces "*prima facie* evidence" of default by the debtor, enables a judge, pending determination of the creditor's claim, to order *interim* relief which, however, in the case of the sale of the equipment, is also in the nature of *final* relief. It would not appear appropriate at this stage to envisage relief as radical as sale. The French delegation has already had occasion to note that Article 14(1)(d) and (e) did not constitute "interim relief" but substantive rules. Such relief could not be obtained from our *juge des référés (*judges responsible for giving interim relief) in that it would involve prejudging the substance of the case. It exceeds what may be granted by way of interim relief. As a rule, it should be referred to the court having jurisdiction over the substance under Article 8. In any case, an order under Article 14(1)(e) could only be for an "interim" application of the proceeds of, or income from the equipment for a "period of time to be determined by the court". Furthermore, *prima facie* evidence will suffice to trigger the right to obtain such relief. The French delegation would propose that Article 14(1) be amended in such a way as to ensure that such relief only be permitted in cases where the debtor is "manifestly" in default, that is, where his default could not be seriously disputed.

4. *Assignment of international interests*

The preliminary draft Convention, in Articles 29 to 36, completely overturns our ideas regarding the assignment of debts. It makes important derogations from the rules governing the transfer of security interests and the assignment of debts, to the extent that the Chapter concerned (Chapter IX) carries the implication that an assignment of the international interest carries with it the assignment of the obligation to which it is accessory. According to the preliminary draft Convention, if a charge is assigned, the obligation is assigned, whereas as a rule it is the opposite which occurs. These rules derogate considerably from our Civil Code (Articles 1690 and 1692). If, by virtue of these rules, a transfer of the obligation carries with it the accessory transfer of the security interest securing the performance of that obligation, inversely an assignment of the security interest may not carry with it the assignment of the principal obligation unless there is an agreement providing therefor. The preliminary draft Convention moreover derogates from our rules governing the enforceability of an assignment against the debtor whose debt has been assigned.

The text of the preliminary draft Convention thus completely overturns our concept of the security interest in that it reverses the principle on which the law of security interests is based and makes the obligation accessory to the international interest. The international interest created by the preliminary draft Convention relates to the equipment which is the subject of that interest but also to

"associated rights", whereas under French law it would appear that a charge does not relate to the obligation regarding the price payable for the equipment.

The French delegation accordingly reiterates its strong reservations regarding the Chapter on assignments of international interests, which is not only incompatible with our domestic law (Article 1692 *et seq.* of the Civil Code) but may also bring it into conflict with the same and the draft UNCITRAL Convention on Assignment in Receivables Financing.

This leads us to question the need for the inclusion in the base Convention, applicable to all types of category of equipment, of provisions dealing with assignments of interests which might only be justified for certain very specific categories of equipment, provided that is demonstrated. At the very least, if this Chapter is not deleted from the preliminary draft Convention or amended, Contracting States should be given the possibility not to apply it. We would recommend one or more solutions going in one or the other of these directions.

5. *Insolvency-related provisions*

Is the absence from Article 27 of the preliminary draft Convention of any mention of a declaration by States regarding general public notice priority rights intentional? We ask ourselves whether there is not a case for introducing such a declaration here too, as has been done for insolvency.

As regards the insolvency-related provisions of the preliminary draft Aircraft Protocol, the French delegation wishes to make the following remarks:

Re Article XI, Alternative A

Paragraph 4: "the debtor ... shall preserve the aircraft object and maintain it and its value": the duty of preservation should also be imposed on the insolvency administrator.

Paragraph 8: "a returned aircraft object may not be sold before the date on which the creditor would be entitled to possession thereof": sold by whom, the creditor or the debtor? Theoretically, the object could be resold by both: the debtor, who has duly acquired it, and the creditor, even if he has not yet recovered possession.

Paragraph 11: " ... ne priment en cas d'insolvabilité *des* garanties inscrites" in the French text should read: "... ne priment en cas d'insolvabilité *sur les* garanties inscrites".[2]

Re Article IX

Sub-paragraph 1(b) uses the term "export": is this suitable for the case where, as a rule, the equipment cannot be sold? "Physically transfer" would suffice. This point needs to be dealt with in so far as Article XI(7) refers back to it.

[2] *Note by the UNIDROIT Secretariat:* It seemed desirable to replace the language appearing at this point in the French original of these comments (" ... ne primeront en cas d'insolvabilité *des* garanties inscrites" in the French text should read: "... ne primeront en cas d'insolvabilité *sur les* garanties inscrites") by the language appearing elsewhere in the French original (under the point appearing immediately after that relating to Article XI(6)), given the fact that this latter language corresponded better to the relevant provision of the preliminary draft Aircraft Protocol.

Re Article XI: Alternative A

The rule enunciated in sub-paragraph 1[3](b) ("the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply") is not very easy to understand.

The rule enunciated in sub-paragraph 4[4](b) ("the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law") may be difficult to apply: the legislation regarding collective insolvency proceedings as a rule reserves the right to apply for interim relief to the insolvency administrator and not to creditors. Would it not be preferable to provide: "... any other forms of interim relief available under the law of the State"?

Re Article XI(6)

It would be useful to add the possibility for the administrator or the debtor to be able to provide guarantees judged to be sufficient.[5]

Re Article XI, Alternative B:

Paragraph 4: the term "a reasonable time period" is not very appropriate in an instrument designed to have the force of a Convention: would it not be possible to regulate the length of the time period?

Paragraph 5: the words "pending ... by a court" could usefully be made more precise, for example, by being replaced by the words "pending ... by a court having jurisdiction under the law of the State". Otherwise, a question could be asked as to the court before which such a claim might be brought.

6. *Jurisdiction*

Article 40 of the preliminary draft Convention confers jurisdiction on either the courts of the place where the object is situated, the courts of the place where the debtor is situated or the court or courts chosen by the parties to grant any of the orders provided for under Article 14 ("relief pending final determination"). The French delegation has already had occasion to warn that the preliminary draft Convention cannot, 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 (cf. Comments submitted by the Permanent Bureau of the Hague Conference on Private International Law, UNIDROIT CGE/Int.Int./2-WP/8; ICAO Ref. LSC/ME/2-WP/8), all the more so since the preliminary draft Convention carries no rule on the recognition of judgments by such courts.

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3 *Note by the UNIDROIT Secretariat:* It seemed desirable to add the number "1", missing from the French original of these comments.

4 *Note by the UNIDROIT Secretariat:* It seemed desirable to substitute the number "4" for the number "11" appearing in the French original of these comments.

5 *Note by the UNIDROIT Secretariat:* For the reason indicated in footnote 2, *supra,* it seemed desirable to move the comment appearing at this point in the French original to the comment made regarding Article XI, Alternative A, *sub* paragraph 11, *supra.*

Article 40 needs to take a more subtle approach consisting in distinguishing the jurisdiction of courts according to the kinds of order requested.

It might be redrafted as follows:

> "The courts of a Contracting State on the territory of which the object is situated [or from which it is physically controlled] may exercise jurisdiction to grant judicial relief under Article 14(1) (a), (b) and (c).
>
> The courts of a Contracting State on the territory of which the debtor is situated or which is chosen by the parties may exercise jurisdiction to grant judicial relief under Article 14(1) (d) and (e)."

Finally, in practice, a creditor will have no interest in requesting from a court of the place where the debtor is situated an *in personam* order in respect of an object situated elsewhere where such an order will probably not be enforced in the State where the object is situated. Likewise, the courts of the place where the object is situated are naturally the most suitable to grant interim judicial relief of the type provided for under Article 14(1) (a) and (c).

As regards Article 41, it would appear that, as has already been noted by the French delegation on the Jurisdiction Working Group, this Article introduces into the system of the preliminary draft Convention the *forum arresti,* a jurisdiction abandoned by our legal system and excluded by the Brussels and Lugano Conventions, which currently bind approximately 19 States (the European Union, Iceland, Norway, Poland and Switzerland), and by the draft universal Convention of the Hague Conference on Private International Law. Jurisdiction over questions of substance should accordingly be restricted to those courts having jurisdiction to order only those types of interim judicial relief provided for in Article 14[6](1) (b) and (c). The courts of the place where the object is immobilised are probably not the most suitable to decide on the substance of a case between the debtor and the creditor. The implementation of such a rule would furthermore have the effect of circumventing the derogations provided by the Convention in Article Y(1) or in Article V, which might not be calculated to inspire confidence in the system established by the Convention among those States desirous of availing themselves of such declarations. Finally, a decision given in the place where the object is situated in these circumstances will probably not be enforced against the assets of the debtor in his forum and would accordingly yield only a pyrrhic victory for the creditor. In fact, there is a clear link between the recognition and enforcement of judgments and the choice to be made regarding jurisdiction. Consequently, where there is not a close relationship between the forum and the case, currency will not be given to the judgment in that in general the judge seised will verify whether the original court had jurisdiction to order interim judicial relief and whether its judgment is not contrary to its own public policy rules.

Finally, the French delegation takes the view that it is highly desirable that the choice of forum clauses provided for in Articles 40 and 41 be exclusive, as in the Brussels and Lugano Conventions and in the draft universal Convention of the Hague Conference.

[6] *Note by the UNIDROIT Secretariat:* It seemed desirable to substitute the number "14" for the number "40" appearing in the French original.