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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COMMENTS

(submitted by the Government of Egypt)

(1) Scope of application of the preliminary draft Convention / Aircraft Protocol as to aircraft and aircraft equipment

Article II of the preliminary draft Aircraft Protocol entitled "Application of the Convention as regards aircraft objects" stipulates that the Convention shall apply in relation to airframes, aircraft engines and helicopters, thus excluding the aircraft as such, for no obvious reason. On the contrary, the Geneva Convention of 1948 extends the scope of its application to both aircraft and aircraft equipment. It is appropriate that the new instruments should cover both the aircraft and aircraft equipment.

Article I (2) (b), (d) and (l) of the preliminary draft Aircraft Protocol dealing with the definitions of aircraft engines, airframes and helicopters respectively state that they should be "other than those used in military, customs or police services". The Chicago Convention on International Civil Aviation, the Geneva Convention and several other civil aviation Conventions concluded under the auspices of ICAO deal differently with the same issue. All of them contain a separate Article in this respect stating that "the Convention shall not apply to aircraft used in military, customs or police services". [1] Needless to say that such prohibition contained in this Article relating to aircraft would be automatically applicable to any equipment thereof. It is advisable that the new instruments should follow the same practice.

[1] See Article 3 of the Chicago Convention on International Civil Aviation of 1944 and Article XIII of the Geneva Convention of 1948 on the International Recognition of Rights in Aircraft.

(2) Registration system

The Geneva Convention depends solely on the national registries of the Contracting Parties for the recording of rights, interests and assignments. They must be regularly recorded in a public record of the Contracting State in which the aircraft is registered. The preliminary draft UNIDROIT Convention/Aircraft Protocol has adopted the other extreme line by creating its own unique system of international registration for the recording of rights, interests and assignments.

According to this system, the national registries of the Contracting Parties are not used for the purpose of registration, a function which is assigned only to the International Registry. Nonetheless, the International Registry makes use of the national registries of the Contracting Parties as possible sources of information in the process of registration.

Under the current text of Article 17 of the preliminary draft Convention, Contracting Parties may designate operators of registration facilities in their own territories to be transmitters of the information required for registration.

The strict approach adopted by the new instrument in making the International Registry the sole means of registration and excluding the national registries of Contracting Parties lacks a good deal of flexibility.

It is useful here to mention the conclusions reached by the International Civil Aviation Organization (ICAO) in a similar situation.

The ICAO Council in 1967 adopted a resolution creating a new international registration system for registering aircraft operated by multinational airlines. [2]

The Resolution, though binding in nature, stated expressly that it "does not apply to the case of an aircraft which, although operated by an international operating agency (multinational airline), is registered on a national basis". Thus the Resolution still allows States constituting multinational airlines to resort either to international registration or the national system of registration to register the aircraft of such airlines.

It is appropriate that the above approach of the ICAO Council Resolution should be followed by the preliminary draft UNIDROIT Convention / Aircraft Protocol, by giving users the opportunity to choose between the national registries of Contracting Parties or the International Registry established by the draft in its present form. Undoubtedly, such an approach will lead to more flexibility for users, meet certain practical considerations and lower fees for users regarding the services rendered.

(3) Comments on the relevant Articles dealing with international registration

The current text of Article I of the preliminary draft Aircraft Protocol gives definitions to numerous terms used in the Protocol in respect of the registration of aircraft. Mention shall be made only of the terms which need changes or deletions.

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[2] Cf. K. EL HUSSAINY: "Registration and nationality of aircraft operated by international agencies in law and practice" in *Air Law*, Vol. X, N° 1, February 1995, pp. 15-27.

Re Article I (2) (h)

Article I (2) (h) states: " 'De-register the aircraft' means delete or remove the registration of an aircraft from a national aircraft register."

This definition covers only the de-registration of an aircraft from the national register in the case of national registration but it does not cover the de-registration of an aircraft internationally or jointly registered with a common mark registering authority as defined in Article I (2) (g). Consequently, a reference to "a non-national register" should be added at the end of Article I (2) (h).

Re Article I (2) *(o)*

Article I (2) (o): states that " 'national registry authority' means the national authority, or the common mark registering authority in a Contracting State which is the State of registry responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention."

This paragraph generates confusion with Article I (2) (g), which defines the term "common mark registering authority". According to the legal system of non-national registration, the common mark registering authority can be the international Organisation or the State maintaining the non-national register. Consequently, the reference to the common mark registering authority should be deleted from Article I (2) (o), and in Article I (2) (g) the word "State" should be added to the definition so that it reads as follows:

"(g) 'common mark registering authority' means the authority or the State maintaining the non-national register ……".[3]

Re Article I (2) (q)

Article I (2) (q) defines the term "State of registry" and for the same reason as explained above the phrase referring to a State member of a common mark registering authority should be deleted.

(4) Relationship of preliminary draft UNIDROIT Convention / Aircraft Protocol with other Conventions

Chapter V of the preliminary draft Aircraft Protocol deals with the relationships between the preliminary draft UNIDROIT Convention/Aircraft Protocol and three existing Conventions. Article XXII tackles the relationship with the 1948 Convention on International Recognition of Rights in Aircraft. Article XXIII deals with the relationship with the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft.

Finally, Article XXIV has to do with the relationship with the 1988 UNIDROIT Convention on International Financial Leasing. The last two Articles provide expressly that the future UNIDROIT Convention shall supersede the existing Conventions mentioned in those Articles. Accordingly, upon the coming into force of the future UNIDROIT Convention, the 1933 Convention and the 1988 Convention shall cease to operate among the States Parties to the future UNIDROIT Convention and shall be considered as terminated when all States Parties thereto become Parties to the new Convention.

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[3] A similar definition is contained in Annex 7 to the Convention on International Civil Aviation of 1944 dealing with aircraft nationality and registration marks, 4th edition, July 1981, 10.7.

It is to be noticed that Article XXII did not apply the same approach followed by the two other Articles. On the contrary, it implied the continued validity and application of the 1948 Geneva Convention after introducing to it certain alterations for the purpose of adapting it to the provisions of the future UNIDROIT Convention.

This Article as it now stands is confusing, complicated and raises more problems than it solves. It deviated from the appropriate legislative approach as reflected in Article 59 of the Vienna Convention on the Law of Treaties of 1969 which stipulates that a treaty shall be considered as terminated if all the Parties to it conclude a later treaty relating to the same subject-matter. [4]

Furthermore, the Geneva Convention is a rather old one going back in history more than fifty years. It is advisable that Article XXII should be changed to the effect that the Geneva Convention shall be superseded by the future UNIDROIT Convention after introducing in the latter the relevant provisions of the Geneva Convention which deserve to be maintained for future application. The suggested approach would help avoid the difficult experience encountered by ICAO and its member States for so many years with respect to the Warsaw Convention of 1929 on the liability of air carriers in the case of the death and injury of passengers and damage to baggage and cargo, as amended and supplemented by several Protocols and Conventions. This difficulty was overcome by consolidating all these Warsaw instruments in one single Convention adopted by a diplomatic Conference in Montreal in May 1999.

[4] The 1969 Vienna Convention entered into force into force on 27 January 1980.