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

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COMMENTS

(submitted by the Government of the Federal Republic of Germany)

Re the insolvency provisions

The German Government welcomes the progress achieved with regard to the insolvency provisions. However, the German Government is concerned about the question whether the preliminary draft Aircraft Protocol's insolvency provisions will be acceptable to a majority of States and also whether the two alternatives really offer States an option.

Re Article XI of the preliminary draft Aircraft Protocol

Alternative A:

Since discussion of this provision by the Insolvency Working Group in Rome the basis for Article XI has changed completely in view of the new wording of Article XXX. Whereas Article XXX originally gave Contracting States an option not to apply individual paragraphs of Article XI, Article XXX, in its present wording, simply provides a choice between Alternatives A and B. Although this might be a sensible step in the interest of legal certainty, it does, however, make acceptance of these provisions considerably more difficult.

The German Government would like to draw attention to the following details:

Re Paragraph 4

Under paragraph 4 the insolvency administrator shall bear the costs of maintaining the aircraft although, for instance in the event of liquidation, he is not interested in the aircraft since he has to surrender it to the secured creditor anyway. In this case the insolvency administrator shall be given the opportunity of indicating to the debtor that he is no longer claiming the aircraft subject to a security agreement as part of the insolvency assets with the result that these assets do not comprise the costs of maintaining the aircraft, which are sometimes considerable. This is particularly the case where the insolvency administrator is not in direct possession of the aircraft.

Otherwise the situation would arise where unsecured creditors have to pay for maintenance of an object that is subject to a security agreement which is of no value to them at all.

Paragraph 4, first sentence, should therefore commence as follows: "Unless and until the creditor is given the opportunity to take possession ..."

Re Paragraph 8

It should be made clear in the wording that this can apply only to measures under the preliminary draft Convention or the preliminary draft Aircraft Protocol performed in a legitimate manner.

Re Paragraphs 6 and 9

If there is an intention to reorganise, the insolvency administrator can only retain possession of the secured object if he meets all outstanding obligations. This refers also to obligations resulting from the security agreement, which means that for example contractual penalties, increased default interest or maturity of other obligations are also included.

In conjunction with paragraph 9 the result of this will be that the secured creditor must be satisfied in full before reorganisation proceedings, for which the aircraft is needed, can take place. If the security agreement also covers obligations of companies associated with the chargee, such obligations will also have to be met first. This would virtually exclude successful rehabilitation.

So as not to leave anything out, attention should be drawn to the fact that, contrary to the insolvency law of a large number of States, under Article XI the secured creditor can claim current interest from the moment the proceedings were opened.

Hence, the provision gives the secured creditor a "super privilege", greatly to the detriment of the unsecured creditors, thus constituting a blatant violation of the principle of equal treatment of creditors.

Regarding Alternative A it must be pointed out that this kind of provision was only acceptable on the understanding that States would have the right to declare individual paragraphs as not being applicable. At the Rome meeting of the Insolvency Working Group several Governments, *inter alia* Germany too, stated that their considerable misgivings regarding a provision like paragraph 9. Since in terms of the new conception of Article XXX Alternative A can only be selected *in toto*, there will be a risk that many States will have to reject this provision because of the inequality of creditor treatment referred to above.

Alternative B:

The original conception of Alternative B was to give an opt-out to those States that cannot accept the strict Alternative A. Almost nothing is left of this conception following the rewording of Alternative B. This Alternative also requires the insolvency administrator – assuming he wishes to reorganise – to meet all outstanding obligations, irrespective of the extent to which other creditors are willing to accept a reduction in their claims.

Whilst the first three paragraphs of Alternative B create the impression that effective control is being exercised by the respective national court, paragraph 4 makes it absolutely clear that a secured creditor can demand surrender of the secured object in accordance with the orders made by the court. The absence of provisions corresponding to Article XI (9) Alternative A would hardly mean an improvement in the position of the debtor or the unsecured creditors, since there is express provision to the effect that all outstanding obligations have to be met. Hence, the German Government would suggest that the relationship between the first and second sentences of paragraph 4 should be clarified in the sense that the court orders admissible under paragraph 4, first sentence, are not completely undermined by the second sentence.

In conclusion, we have to say that it is not clear how far Alternative B is supposed to constitute relief for those States that cannot accept the rigid provisions of Alternative A on the ground of equal treatment of creditors.