

UNIDROIT 2002
DC9/DEP Doc. 3
(Original: English)

UNIDROIT

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

NOTE

CONCERNING THE ADVANTAGES THAT STATES MAY EXPECT TO DERIVE
FROM BECOMING PARTIES TO THE CAPE TOWN CONVENTION ON
INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND
THE PROTOCOL THERE TO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

(prepared by the Secretariat of UNIDROIT, as Depositary)

Rome, December 2002

NOTE

CONCERNING THE ADVANTAGES THAT STATES MAY EXPECT TO DERIVE FROM BECOMING PARTIES TO THE CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

(prepared by the Secretariat of UNIDROIT, as Depositary)

I. BACKGROUND

1. On 16 December 2002 the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) was, as Depositary, requested by Dr Ludwig Weber, Director of the Legal Bureau of the International Civil Aviation Organization (ICAO), to provide it with elements to be included in an “administrative package” to be sent out by ICAO, under cover of a State letter, pursuant to the discussions that had taken place during the Ninth Meeting of the 167th session of the ICAO Council, held in Montreal on 22 November 2002, with a view to assisting States in ratifying the Convention on International Interests in Mobile Equipment (hereinafter referred to as *the Convention*) and the Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as *the Aircraft Protocol*) opened to signature in Cape Town on 16 November 2001, at the conclusion of a diplomatic Conference organised under the joint auspices of UNIDROIT and ICAO (hereinafter referred to as *the diplomatic Conference*), and in particular informing States as to the advantages that States may expect to derive from becoming Parties to the two instruments.

II. ADVANTAGES THAT STATES MAY EXPECT TO DERIVE FROM BECOMING PARTIES TO THE CONVENTION AND THE AIRCRAFT PROTOCOL

2. The advantages that States may expect to derive from becoming Parties to the Convention and the Aircraft Protocol are both legal and economic in nature. Before considering what these advantages are it is appropriate first to examine the essential problem that the Convention and the Aircraft Protocol are designed to deal with.

(a) *The essential problem addressed in the Convention and the Aircraft Protocol*

3. The Convention and the various Protocols envisaged thereto are designed principally to overcome the problem of obtaining secure and readily enforceable rights in items of high-value mobile equipment which by their nature have no one fixed location and, in the case of space assets, such as satellites, are not on Earth at all. This problem derives essentially from the widely differing approaches taken by legal systems to security, title reservation and leasing rights, engendering uncertainty amongst intending financiers as to the efficacy of their rights. The result is to inhibit the extension of finance in respect of such categories of high-value mobile equipment, particularly to developing countries, and to increase borrowing costs.¹

(b) *Legal advantages*

4. Through the creation of a new uniform international regimen governing the taking of security in high-value mobile equipment, based on the creation of an international interest in such categories of equipment that is to be recognised in all Contracting States and on the establishment of an electronic

¹ Cf. Roy Goode, “The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing” in *Uniform Law Review* 2002, 3 at 4.

international registration system for the registration of such interests, the Convention and its Protocols will greatly improve predictability as to the enforceability of security, title reservation and leasing rights in the various categories of high-value mobile equipment covered by its terms, and in the first place aircraft objects.²

(c) *Economic advantages*

5. The creation of this new international regimen facilitating the creation, perfection and enforceability of security, title reservation and leasing rights in the categories of high-value mobile equipment covered by the Convention and its Protocols, and in the first place the Aircraft Protocol, will provide confidence to lenders and institutional investors, making it possible to convert illiquid loans into liquid securities and to attract domestic and foreign capital in respect of such equipment.³ It will improve opportunities for asset-based financing of high-value mobile equipment.⁴ By virtue of the improved legal predictability that it will permit, it should reduce risks for creditors and consequently borrowing costs for debtors and facilitate the extension of credit for the acquisition of high-value mobile equipment, particularly in developing countries the existing legal regimes of which may not currently be sufficiently responsive to the need of creditors to feel secure.⁵ In respect of aviation credit it is to be noted that, in so far as financing is typically a condition to the acquisition and use of aircraft and aircraft engines, the Convention and the Aircraft Protocol will contribute to improved safety by assisting airlines in many jurisdictions in their efforts to modernise and upgrade their fleets.

² *Idem.*

³ Cf. Roy Goode, "The preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment: the next stage" in *Uniform Law Review* 1999, 265 at 266.

⁴ Cf. Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment, A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center by Anthony Saunders and Ingo Walter (September 1998), where, at pp. 5/6, it is noted that "The key principles underlying the ability to extend asset-based financing are that a financier or lessor (a) should be able to determine and assure itself that its proprietary interest in a financed or leased asset is *superior* to all potential competing claims against that asset, (b) upon default, will be able to *promptly realize the value* of the asset and/or redeploy that asset for purposes of generating procedures/revenues to be applied against amounts owed, and (c) will not have their rights described in (a) and (b) above qualified or modified in the *context of bankruptcy or insolvency*."

⁵ Cf. Roy Goode, "The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing", *op. cit.*, at 14/15.