



**JOINT SESSION OF THE UNIDROIT GENERAL
ASSEMBLY AND THE UNIDROIT COMMITTEE
OF GOVERNMENTAL EXPERTS
FOR THE FINALISATION AND ADOPTION OF
A DRAFT MODEL LAW ON LEASING
Rome, 10/13 November 2008**

UNIDROIT 2008
J.S. Leasing/W.P. 6
Original: English
October 2008

**JOINT PROPOSAL
REGARDING THE APPLICATION OF THE DRAFT MODEL LAW ON LEASING
TO AIRCRAFT TRANSACTIONS**

(submitted by the UNIDROIT Secretariat and the Aviation Working Group (A.W.G.))

I. BACKGROUND TO PROPOSAL

At the second session of the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing (hereinafter referred to as *the Committee*), held in Muscat from 7 to 9 April 2008, a proposal was tabled for a paragraph to be added to Article 3 of the draft model law designed to exclude from the sphere of application of the latter leases of mobile equipment covered by other laws uniquely tailored to such category of asset. That proposal, as stated by its proponent, was based on extensive consultations with the aircraft sector, which showed that the proposed model law was inappropriate for transactions in that sector. The suggested drafting amendment prepared by the Drafting Committee at that session by way of implementation of this proposal proved not to be acceptable to all States represented, with some arguing that such mobile equipment should either be excluded in general or that aircraft, aircraft engines, helicopters, railway rolling stock, ships and space assets should be specifically excluded and others expressing their concern that to exclude the leases of potentially such a broad category of mobile assets would be to defeat one of the fundamental objectives of the proposed model law, namely the facilitation of investment in such critical infrastructure for developing countries and economies in transition. It was, given the lateness of the hour, agreed that a paragraph should be added, inside square brackets, to Article 3, providing that the future model law should not apply to aircraft, aircraft engines, helicopters, railway rolling stock, ships and space assets, the idea being, thereby, to signal to the Joint Session for the finalisation and adoption of the draft model law that this was a matter requiring further consideration (cf. Study LIXA - Doc. 13, p. 9).

Following the second session, Mr Jeffrey Wool, Secretary to the Aviation Working Group (A.W.G.),* wrote to the President and Secretary-General of UNIDROIT, expressing the A.W.G.'s concern regarding the suitability of the draft model law on leasing to cover the leasing of aircraft, helicopters or engines or other components installed on an aircraft or a helicopter. The future model law, it was suggested, would be inconsistent with the Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001, as applied to aircraft objects (through the Protocol to the Convention on Matters specific to Aircraft Equipment, also opened to signature in Cape

* The A.W.G. comprises the world's major aviation manufacturers, lessors and financiers. Chaired jointly by Airbus and Boeing, its members are based or owned by entities in Asia, Europe, Latin America, the Middle East and North America.

Town on 16 November 2001) in a number of ways. It would also be inconsistent with highly developed practices in the aviation sector, as well as specialised aviation rules and practices in many countries. The A.W.G. called for the UNIDROIT Governing Council, meeting at its 87th session, held in Rome from 21 to 23 April 2008, to take the necessary action to ensure either that the future model law did not apply to a leasing agreement or a supply agreement involving an aircraft, helicopters or engines or other components installed on an aircraft or a helicopter or that the draft model law be amended in such a way as to give effect to the suggestions made by Mr Wool in the comments that he submitted to the second session of the Committee (cf. C.G.E. Leasing/2/W.P.3 Add. 3, footnote 1), with a view to strengthening the role of freedom of contract in this context.

The Governing Council at its 87th session, after considering the concerns of the A.W.G., invited the Secretariat to deploy the necessary efforts to find an amicable solution to such concerns, involving the parties concerned.

II. DEVELOPMENT OF PROPOSAL

Immediately following the Council session, the Secretariat contacted Mr Wool with a view to arranging a meeting for the purpose of seeking the amicable solution requested by the Council. At the kind invitation of Mr Ronald DeKoven, Reporter to the Committee, the meeting was held in his chambers in London on 8 September 2008. In addition to Mr DeKoven, the meeting was attended by Mr Wool, on behalf of the A.W.G., Mr M.J. Stanford, Deputy Secretary-General, on behalf of UNIDROIT, and Professor Sir Roy Goode, as *amicus curiae*, given the central role he had played in the development of not only the UNIDROIT Convention on International Financial Leasing, opened to signature in Ottawa on 28 May 1988, but also the Cape Town Convention and the two Protocols thereto adopted to date, as well as the further Protocol currently under preparation.

At this meeting, Mr Wool indicated that the A.W.G. was amenable to a number of solutions with a view to seeing its concerns dealt with. It, nevertheless, saw a blanket exclusion of leasing agreements and supply agreements relating to large aircraft equipment of the type covered by the Cape Town Convention as applied to aircraft objects from the sphere of application of the future model law as the most effective solution. The A.W.G.'s concern was, essentially, that the terms of the draft model law were inconsistent with current and developing legal practice in respect of aircraft leasing and sales - in particular as it had developed under the Cape Town Convention as applied to aircraft objects - which already embodied accepted risk allocation within the aviation industry.

Following detailed discussion of the issues involved, the view emerged that the problem raised by the A.W.G. was peculiar to the aviation industry and resulted from the fact that this industry was traditionally governed by specialist legislation, like the Cape Town Aircraft Protocol, and had developed its own legal practice over the years. This was borne out, in particular, by the considerable level of acceptance achieved already by the Cape Town Aircraft Protocol.

It was, accordingly, the considered view of those attending the meeting that it would be legitimate and appropriate to make a special exception in the context of the future model law for leasing and supply agreements for large aircraft equipment - always provided, that is, that the parties did not specifically express the desire to make the future model law applicable to their agreements - without, however, defeating the application of the future model law to those smaller aircraft in respect of which its application might be particularly beneficial to developing and transition economies, such as aircraft employed for the purpose of crop dusting. It would not, however, in the opinion of the UNIDROIT Secretariat, be either legitimate or appropriate to extend such an exclusion to those other categories of mobile equipment, namely railway rolling stock, ships and space assets, at present also encompassed by Article 3(3) of the draft model law, given that legal practice in respect of such other categories of mobile equipment had not to date developed to the same extent as in the aviation field and that the proposed

model law was, therefore, still likely to have an important contribution to make in facilitating the acquisition of such equipment through lease finance in the developing world and in transition economies.

It was, therefore, agreed that the UNIDROIT Secretariat and the A.W.G. would prepare a joint proposal for submission to the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts (hereinafter referred to as *the Joint Session*) the effect of which would be to replace the existing language of Article 3(3) of the draft model law by an exclusion of the application of the draft model law limited to leasing and supply agreements for large aircraft equipment, in cases, moreover, other than cases in which the lessor, the lessee and the supplier had agreed in writing that it should apply to such agreements. It was further agreed that the term "large" aircraft equipment should be defined in such a manner as to ensure its perfect concordance with the language employed in the Cape Town Aircraft Protocol to delimit its sphere of application, although the definition is not conditioned on application of that Protocol: the proposed definition would, of course, apply regardless of whether the State in question was at the time a Party to the Aircraft Protocol. The approach of a cross-reference is employed.

III. NATURE AND PRESENTATION OF PROPOSAL

Mr Wool agreed to prepare the first draft of the new provisions to be put forward under this joint proposal, with a view to the language of these new provisions, once considered by Mr DeKoven, being embodied in a document to be tabled at the Joint Session jointly by the UNIDROIT Secretariat and the A.W.G., with the former preparing the paper designed to incorporate the proposed new provision.

Following completion of this process, the UNIDROIT Secretariat and the A.W.G. have the honour to submit the following joint proposal, designed to replace Article 3(3) of the draft model law on leasing (J.S. Leasing/W.P. 3), to Governments and Organisations for consideration by the Joint Session:

* * *

Joint proposal for a new paragraph of Article 2 and a new Article 3(3) of the draft model law

submitted by the UNIDROIT Secretariat and the Aviation Working Group

Proposed new paragraph of Article 2

Article 2 – Definitions

Large aircraft equipment means all "aircraft objects" as defined in the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed in Cape Town on 16 November 2001.

Proposed new Article 3(3)

Article 3 – Other laws

1. [as at present drafted in J.S. Leasing/W.P. 3]
2. [as at present drafted in J.S. Leasing/W.P. 3]
3. This Law shall not apply to a leasing agreement or supply agreement for large aircraft equipment unless the lessor, the lessee and the supplier have otherwise agreed in writing.