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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:
SUB-COMMITTEE FOR THE PREPARATION OF A FIRST DRAFT

*REVISED PROPOSALS FOR A FIRST SET OF DRAFT ARTICLES OF A
FUTURE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT*

(drawn up by the drafting group on the basis of the provisional conclusions
reached by the sub-committee at its second session)

Rome, July 1995

INTRODUCTION

1. - The drafting group of the Sub-committee of the Unidroit Study Group for the preparation of uniform rules on international interests in mobile equipment held its second session at St John's College, Oxford on 29 and 30 June 1995. The session was opened at 12 noon on the 29th by Mr R. M. Goode, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, who chaired the session in his capacity as chairman of the Sub-committee.

2. - The session was also attended by the following other members of the Sub-committee:

Mr R. C. C. Cuming	Professor of Law in the University of Saskatchewan
Mr K. F. Kreuzer	Professor of Law in the University of Würzburg
Mr H. Synvet	Professor of Law in the University of Paris II (Panthéon - Assas)

3. - The drafting group was seised of the following materials:

- (1) Proposals for a first draft (drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the latter at its first session) (Study LXXII - Doc. 13);
- (2) Proposals for a first draft: comments (by Professor K. F. Kreuzer, Mr H. Uchida, the Hague Conference on Private International Law and the European Federation of Equipment Leasing Company Associations) (Study LXXII - Doc. 14);
- (3) Proposals for a first draft: comments (by Mr T. J. Whalen, Professor R. Herber and The Boeing Company) (Study LXXII - Doc. 14 Add. 1);
- (4) Proposals for a first draft: comments (by Professor C. W. Mooney, Jr. and the Legal Committee of the Finance & Leasing Association of the United Kingdom) (Study LXXII - Doc. 14 Add. 2);
- (5) Proposals for a first draft: comments (by the European Bank for Reconstruction and Development) (Study LXXII - Doc. 14 Add. 3);
- (6) Proposals for a first draft: comments (by the Banking Federation of the European Union and the Italian Banking Association) (Study LXXII - Doc. 14 Add. 4);
- (7) Study Group for the preparation of uniform rules on international interests in mobile equipment: Sub-committee for the preparation of a first draft: summary report (prepared by the Unidroit Secretariat) (Study LXXII - Doc. 15);
- (8) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 16);

- (9) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by Mr V. A. Kouvshinov and Mr T. J. Whalen) (Study LXXII - Doc. 17).

4. - The main business of the session was the completion of the broad framework of a first draft of the proposed Unidroit Convention on International Interests in Mobile Equipment in the light of the provisional conclusions reached by the Sub-committee at its second session (cf. Study LXXII - Doc. 15, § 10).

5. - In accordance with the decision taken by the Sub-committee at its second session (cf. Study LXXII - Doc. 15, § 10 (iv)), the drafting group also proceeded to a preliminary exchange of views on the Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group. Whilst unanimous in its appreciation of the invaluable work carried out in the preparation of the memorandum, the drafting group felt that the scope of some of the recommendations contained therein was such as to require prior consideration by the Sub-committee. In particular the drafting group noted that the recommendation of the aviation working group to extend the scope of the proposed Convention to ownership in general would involve a major extension of the Sub-committee's remit and would to this extent be a matter for consideration by that body. The drafting group nevertheless signalled its recognition of the importance of the future Convention making special provision for aircraft and aircraft engines by its inclusion of a chapter heading, Chapter VIII, designed specifically to deal with these matters. The fact that it is placed inside square brackets simply reflects the fact that these are matters the substance of which has still not been discussed by the Sub-committee. The kind of issues amenable to treatment under this chapter heading are listed in an appendix to the revised proposals. This list is based on the recommendations of the aviation working group and is accordingly intended to be read in conjunction with the memorandum prepared on behalf of that group.

6. - The revised proposals for a first set of draft articles set out hereunder are still not to be seen as a complete first draft. For the most part they do no more than develop the provisional conclusions reached by the Sub-committee. It should be borne in mind that other issues have yet to be addressed, including the definition of writing and signature for the purposes of the proposed Convention. Furthermore, the drafting group has not yet been able to give headings to all the articles appearing in its revised proposals but it is its intention to ensure consistency on this point at a later stage.

7. - The alternative solutions proposed in Article 1(2) to the unresolved question whether the sphere of application *ratione materiae* of the proposed Convention should be defined in terms of an exclusive or a non-exclusive list of movable tangibles reflect the alternative approaches envisaged. The basic premise common to either solution is that the future Convention should only apply to a limited class of equipment. The only question concerns the better means of achieving this objective. The presentation of alternative solutions is designed to supply guidance to the Sub-committee in reaching a decision on this matter.

8. - The revised proposals for the first time contain rules governing the creation of the international interest (cf. Article 3). The idea here is that the new international interest would be a *sui generis* creation of the Convention itself and would not accordingly be dependent on national law. The drafting group took the view that the fact that under the future Convention

such an interest could arise under either a security agreement, as defined in Article 1(4), or a title reservation agreement, as defined in Article 1(5), would provide sufficient evidence of the nature of the type of interest contemplated by the Convention. There was no need to spell out its *in rem* characteristics in any greater detail. It was felt that this would emerge sufficiently clearly from the remedies provisions of the future Convention. It was recognised that the question as to whether a given agreement was to be considered a security agreement or a title reservation agreement was not a matter that could be resolved by the proposed Convention but would have to be left to be determined by the applicable law.

9. - One member of the drafting group wished to reserve his position on the question as to whether, in the light of the remedies provisions to be provided under the future Convention, it might be necessary to require the satisfaction of an additional criterion under Article 3 before an international interest could be considered to have been validly created, namely that the parties to the particular agreement had expressly provided that their agreement should be subject to the Convention.

10. - It was agreed that it would be necessary for the proposed Convention to apply to creation of the international interest prior to its perfection. If the Convention were only to apply once the interest had been filed on the International Register, this would mean that there would be no sanction for failure to file. Moreover, the drafting group felt that the exclusion of unregistered interests from the scope of the Convention was not consistent with the provisionally agreed priority rule that a registered interest should have priority over an unregistered interest. A buyer finding no interest recorded against the asset on the International Register would be entitled under the Convention regimen to presume that he took free of any prior interest. The drafting group was agreed that, so as to cover this case, the Convention should also apply to international interests that had been created in accordance with the criteria set out in Article 3 but had not been registered under Article 8, although pending filing in the International Registry the Convention would only have effect as between the parties to either the security agreement or the title reservation agreement under which the international interest had arisen.

11. - The system of registration to be set up under the Convention is intended for the time being to be an asset registry. The Sub-committee has reserved the possibility of a parallel debtor-based registration system for assets not lending themselves to identification. While the intention is not for the time being therefore to cover either future assets or proceeds in general, it was felt important to protect insurance proceeds, which explains the words featuring in square brackets in Article 1 (6).

12. - The remedies provisions have been drafted carefully with a view to satisfying the different major legal systems. The Convention only sets out certain basic *in rem* remedies, the availability of all other remedies, including all *in personam* remedies, for such claims as surpluses and deficiencies, being left to the applicable law. It was agreed that the applicability of the remedies provisions of the Unidroit Convention on International Financial Leasing would in due course need to be safeguarded under the Final Provisions of the future Convention. In drafting Article 6(1)(a), the drafting group was conscious of the fact that, under the law of various jurisdictions, the taking of possession required a court order as a matter of procedural law. While the drafting group took the view that the future Convention was not intended to

affect national procedural law, it recognised that this was a point which, if considered necessary, could be made expressly clear in the text.

13. - As regards the contemplated International Register, it was agreed that, at such time as the Sub-committee came to consider the general question of jurisdiction, thought would need to be given to the specific question of which courts should have jurisdiction over disputes arising out of the registrar's decision in a particular case to deny an application for registration or an application for discharge of registration.

14. - Regarding priorities, it was agreed that consideration would need to be given to the question of subordination agreements, including that of whether such agreements should be registrable under the proposed Convention and the effect, if any, of such registration.

15. - Drawing its inspiration from Article 7 (1) of the Unidroit Convention on International Financial Leasing, the drafting group has, in Article 13 (2), proposed a rule designed to render the new international interest effective as against the trustee in bankruptcy and the general body of the unsecured creditors of the debtor, lessee or buyer. This rule simply seeks to ensure the effectiveness of the new interest in bankruptcy proceedings, both the Study Group and the Sub-committee always having made it clear that there could be no question of the proposed Convention interfering with the *lex specialis* of bankruptcy.

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CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

Sphere of application

1. - This Convention provides for the creation and effects of an interest defined in paragraph 3 in any equipment listed in paragraph 2 (hereinafter referred to as an "international interest").

2. - This Convention applies to equipment (hereinafter referred to as "equipment") of the following kinds:

- (a) aircraft;
- (b) aircraft engines;
- (c) [registered ships];
- (d) oil rigs;
- (e) containers;
- (f) railway rolling stock;
- (g) satellites;
- (h) [other?]

[2. - This Convention applies to equipment (hereinafter referred to as "equipment") of a kind normally used in more than one State in the course of business, including:

- (a) aircraft;
- (b) aircraft engines;
- (c) [registered ships];
- (d) oil rigs;
- (e) containers;
- (f) railway rolling stock;
- (g) satellites;
- (h) [other?]]

3. - For the purposes of this Convention an interest in equipment is an interest arising under a security agreement or an interest arising under a title reservation agreement.

4. - For the purposes of this Convention a security agreement is an agreement which creates a right ("a security interest") in or over equipment securing performance of an existing or future obligation owed by one person ("the debtor") to another ("the secured party").

5. - For the purposes of this Convention a title reservation agreement is an agreement by which:

(a) one person ("the lessor") leases equipment (with or without an option to purchase) to another person ("the lessee") or

(b) one person ("the seller") agrees to sell equipment to another person ("the buyer") on terms that ownership does not pass until performance of the buyer's obligations.

6. - This Convention does not govern interests in proceeds of equipment [but does govern sums payable under contracts of insurance covering the equipment against loss or damage].

CHAPTER II

THE INTERNATIONAL REGISTER

Article 2

1. - An international register shall be established for the purpose of registering international interests.

2. - The international register shall be located in such place and managed by such body as shall be determined from time to time by the Governing Council of the International Institute for the Unification of Private Law (Unidroit) and shall be operated in accordance with rules made by that body.

3. - [Other provisions to be inserted subsequently.]

CHAPTER III

CREATION OF AN INTERNATIONAL INTEREST

Article 3

1. - An international interest is created only where:

(a) the agreement is in writing signed by or on behalf of the parties;

(b) the equipment is described in the agreement in a manner sufficient to enable it to be identified;

(c) the debtor, lessor or seller has rights in the equipment.

2. - No conditions other than those stated in the previous paragraph are necessary for the creation of an international interest.

CHAPTER IV

EFFECTS OF AN INTERNATIONAL INTEREST AS BETWEEN THE PARTIES

Article 4

This Chapter applies only where the parties to a security agreement or a title reservation agreement have so agreed in writing.

Article 5

The parties are free to provide in their agreement as to what constitutes default giving rise to the remedies specified in Articles 6 and 7.

Article 6

Rights of the parties to a security agreement

1. - In the event of default by the debtor, the secured party may:

(a) take possession of the equipment;

(b) sell or lease the equipment on reasonable terms.

2. - At any time after default by the debtor, the parties may agree or the court may order that ownership of the equipment shall vest in the secured party in full satisfaction of all the secured party's claims under the security agreement.

3. - At any time before sale of the equipment the debtor may redeem it by paying the full amount secured by the security interest, subject to any lease made by the secured party under sub-paragraph (b) of paragraph 1 and subject to any agreement or order under paragraph 2.

4. - The parties may agree on any additional remedies for default by the debtor so far as permitted by the applicable law.

Article 7

Rights of the parties to a title reservation agreement

1. - In the event of default by the lessee or buyer under a title reservation agreement, the lessor or seller may recover possession of the equipment.
2. - The parties may agree on any additional remedies for default by the lessee or buyer so far as permitted by the applicable law.

CHAPTER V

REGISTRATION

Article 8

Conditions and modalities of registration

1. - An international interest in relation to which the requirements of Article 3(1) have been satisfied may be registered under the present Article.
2. - Any party to a security agreement or title reservation agreement wishing to register an international interest shall transmit or deliver to the International Registry a notice in writing ("registration notice") in accordance with rules laid down by the body referred to in Article 2(2).
3. - Registration of an international interest takes effect when a registration notice is received by the International Registry and the international registration system records a registration number and the date and time of such registration.
4. - The validity of a registration is not affected by an irregularity in the registration notice unless the irregularity is seriously misleading. The irregularity may be seriously misleading whether or not anyone is actually misled by it.

Article 9

Amendment and discharge of registration

1. - Registration of an international interest
 - (a) may be amended by the transmission or delivery of a registration amendment notice;
 - (b) shall be amended on the order of the court where it is satisfied that the amendment is necessary accurately to record an international interest.

2. - An amendment under the previous paragraph takes effect when recorded as stated in Article 8(3).

3. - The registration of an international interest shall be discharged;

(a) on the application of the secured party, lessor or seller;

(b) on the order of the court where it is satisfied that the equipment is not or is no longer subject to a security agreement or title reservation agreement.

Article 10

Certificate of registration

A certificate of registration which records on its face that it was issued by the International Registry shall be *prima facie* evidence of the fact, time and order of registration without the need to prove the authenticity of the certificate.

[Article 11

Liability of International Registry]

CHAPTER VI

PRIORITIES

Article 12

1. - A registered international interest is not valid against the holder of a previously registered international interest.

2. - A registered international interest arising under a security agreement is subordinate to another such interest subsequently registered as regards advances made after notice of the subsequent interest except where made pursuant to an obligation to do so.

3. - An unregistered international interest is not valid against the holder of a registered international interest.

4. - An international interest is not valid against any third party who acquired an interest in the equipment under an agreement with the debtor, lessee or buyer at a time when the international interest was not registered.

CHAPTER VII

RECOGNITION OF INTERNATIONAL INTERESTS

Article 13

1. - In any proceedings involving an international interest, any Contracting State shall recognise the validity and effects of that interest to the extent provided in this Convention.

2. - (a) A registered international interest shall be valid against the trustee in bankruptcy and creditors of the debtor, lessee or buyer, including creditors who have obtained an attachment or execution.

(b) For the purposes of this paragraph "trustee in bankruptcy" includes a liquidator, administrator or other person appointed to administer the estate of the debtor, lessee or buyer for the benefit of the general body of creditors.

[CHAPTER VIII

SPECIAL PROVISIONS FOR AIRCRAFT AND AIRCRAFT ENGINES

See Appendix to this paper]

SPECIAL PROVISIONS FOR AIRCRAFT AND AIRCRAFT ENGINES

Core provisions to be included in the Convention

In addition to the points set forth in the revised draft, the following are proposed to apply in respect of aircraft and aircraft engines (hereinafter referred to as "aircraft equipment") on a mandatory basis:

1. - Recordation of notices evidencing (not effectuating or constituting legally conclusive proof of) title/ownership transfers of aircraft equipment would be fileable (through satellite offices) with the international asset register by manufacturer's serial number.

The failure to file any such notice would render such transfer violable as against third parties who have made a subsequent Convention filing in respect of the relevant aircraft equipment, but not as between the parties, and all purchasers of aircraft equipment (and their financiers) would acquire their interest in such aircraft equipment subject to all interests previously recorded in the register with respect thereto.

(see recommendations A1.1-1.3 in the aviation group memorandum)

2. - The creation/validity of all fileable interests under the Convention shall be governed by the substantive law expressed to govern the subject contract (without the requirement of any connection between such selected law and such contract or that any other condition be satisfied in respect of such selection) and, absent such an express selection, by the private international law rules of the forum.

(see recommendations A2.1-2.4 in the aviation group memorandum)

3. - Security and absolute assignments of lease (and sub-lease) contracts shall be covered by the proposed Convention. Filings of such contracts with the asset register shall be made by manufacturer's serial number of the leased aircraft equipment, and the priority and choice of law rules shall be as set forth in recommendations A4.2 and 4.3 of the aviation group memorandum.

The Convention need not cover any other types of associated contract right, except rights in respect of insurance proceeds.

(see recommendations A4.1-4.4 in the aviation group memorandum)

4. - The Convention shall provide a mandatory timetable in which courts having jurisdiction under the Convention would be required to determine issues brought before them relating to Convention remedies. In particular, such courts (and their associated appellate systems) would be required to issue non-appealable, final decisions in respect of the availability of (a) the grounding of the aircraft (pending further litigation procedures) no later than five (5) days, and (b) the right of the financier/lessor to repossession/seizure, or a judicially supervised

sale/judicial sale, of the aircraft equipment no later than thirty (30) days, in each case of the date on which application is made to the court with *in rem* jurisdiction over the aircraft.

The right to "deregister" the aircraft for Chicago Convention of 1944 on International Civil Aviation purposes, and to export the aircraft equipment, in each case following a default shall be available immediately upon "repossession", whenever the same shall occur, without the need for further governmental or regulatory action (e.g. separate review or proceedings by aviation authorities) and/or acquiescence by the airline (e.g. consent to such deregistration and export).

(see recommendations A5.1-5.3 in the aviation group memorandum)

5. - A separate or sub-registry shall be established for aircraft engines and, similar to airframes, all conveyances, security interests, title reservations (including all engine leases without further distinction) and engine lease assignments shall be filed by reference to the manufacturer's serial number of such engines. The same mandatory Convention provisions (including its priority rules and basic enforcement rules (except those relating to de-registration (which are inappropriate in that the Chicago Convention does not independently address engine registration/nationality)) and optional provisions shall apply to engines.

(see recommendations A6.1-6.2 in the aviation group memorandum)

6. - The only qualification to the first-to-file priority principle shall be in respect of preferred national creditors, and shall be as follows. On the date of each country's enactment of the Convention, such country would record with Unidroit/the international register, in reasonable specificity, the categories of creditors, if any, which would have priority over a previously filed international interest. Although each country may add to this list from time to time (and must further record, in reasonable specificity, such amendments from time to time), any such recorded change would only have prospective application.

The Convention should permit future advances, if contemplated in the original financing or title reservation document evidenced by a Convention filing, such future advances to have the same priority under the Convention as the original advance. There is no need to state a "maximum secured amount", nor to provide by way of a priority rule for the protection of junior creditors. The ability contractually to subordinate an interest should, however, be contemplated by the Convention.

(see recommendations A7.1-7.4 in the aviation group memorandum)

7. - In addition to the courts noted in clause 10 (xix) of the summary report of the December sub-committee meeting, courts located in the debtor's principal place of business need also to have jurisdiction to resolve disputes under the Convention.

8. - Civil aviation registries (or, as the case may be, such other applicable governmental authorities) in each enacting country should constitute "satellite offices" for the purposes of the Convention, and filings made therewith shall be electronically transmitted to, and constitute filing with, the central international register. All filings with respect to an aircraft registered in an enacting country may be made with the satellite office in such country.

Further thought should be given as to whether such filings may, in addition, be made with the central registry rather than with the relevant satellite office.

The registration system shall, as a general matter, be based on the concept of notice filing. Full documents need not be filed; rather, the forms of the filed statements (e.g. "financing statements", evidencing security interests; "title reservation statements", evidencing title reservations; and "transfer statements", evidencing title/ownership transfers) should contain sufficient information to put parties searching the registry on notice of the existence of prior interests in, or transfers of, the aircraft equipment. The registration system, however, should permit (at the parties' discretion and with their joint written authorisation) the filing of transaction documents (annexed to the filed financing/title reservation statements) which, by virtue of such attachment, shall for evidentiary purposes be presumed to be the agreed form of such documents.

The registry's rules should also specifically contemplate matters relating to removing/terminating filings that no longer exist, and other practicalities relating to the efficient operation of the registry and the notice-based system contemplated thereby.

Filings with the registry (or appropriate satellite office) would replace/supersede all national security law filings (but not aircraft nationality filings) in respect of the subject aircraft equipment including those filings otherwise made with local aviation registries, mercantile registries and registries of deeds and documents.

(see recommendations set forth in A9.1-9.5 of the aviation group memorandum)

9. - The issue of the relationship between the Convention and the Geneva Convention is an important question involving a number of complex legal and political considerations. The aviation working group has reserved on this matter.

Optional provisions to be included in the Convention

Each of these two provisions, if elected by a particular enacting country, would only apply if and to extent that the debtor/lessee contractually agreed to the same in the specific financing/leasing contract.

10. - On the enactment of the proposed Convention, each country would have the option of including a provision requiring, without condition or qualification, that the substantive laws (that is, national laws without reference to conflict of law rules) selected by parties to a transaction shall govern their respective rights and duties, that is, all matters of (i) contractual interpretation and governance and (ii) contractual remedies including, without limitation, self-help remedies.

(see recommendations B1.1-1.2 in the aviation group memorandum and the recommended form of this provision attached as Annex 4-A thereto)

11. - On enactment of the proposed Convention, each country would have the option of including a provision which would ensure that, in the event of insolvency-type proceedings under its national laws or a debt moratorium or suspension of payments, the debtor/lessee

would be required either to cure all defaults within a specified time (and continue to perform its contractual obligations) or to return the aircraft equipment to the financier/lessor, and that the material rights of the financier/lessor would not otherwise be prejudiced in such insolvency proceedings.

Priority contests, in the context of insolvency proceedings, would be addressed in the same manner as priorities generally, that is, each enacting country would need to record, in reasonable detail, with Unidroit and the register the classes of statutorily preferred creditors, if any, that would prevail over/compete with a holder of a filed Convention interest under its insolvency laws.

(see recommendations B2.1-2.2 in the aviation group memorandum and the recommended draft of this provision attached as Annex 4-B thereto)