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Unidroit

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):

COMMENTS

(by Airbus Industrie / The Boeing Company
on behalf of an aviation working group)

Rome, October 1995

Re: Revised proposals for a first set of draft articles of a future Unidroit Convention
on International Interests in Mobile Equipment

Reference is made to (i) the above-referenced revised draft articles ("revised draft") and (ii) our joint memorandum dated 15 May 1995 ("aviation group memorandum"), prepared on behalf of an aviation working group¹ ("aviation working group") making certain recommendations ("aviation group recommendations") on Unidroit's proposed security and leasing Convention ("proposed Convention") as the same relates to aircraft equipment.

On behalf of the aviation working group, we would respond to the revised draft, and supplement the aviation group recommendations, as follows:

1. - We are encouraged by the inclusion (if in square brackets) of Chapter VIII entitled "Special Provisions for Aircraft and Aircraft Engines" and the accompanying appendix listing the aviation group recommendations. We look forward to the Sub-committee's deliberations on the procedure for drafting, the content of, and the time-table for, the supplementary aircraft rules.

2. - We have received considerable commentary on the aviation group memorandum (and the specific aviation group recommendations) since the submission of the memorandum to Unidroit. Based upon this commentary, and towards the end of enhancing the political acceptability and practicability of the proposed Convention, we would hereby amend two of our recommendations as follows:

(a) In paragraph 5.1 of the aviation working group memorandum we recommend that, as a core (and thus mandatory) provision, "the proposed Convention provide a mandatory time-table in which courts having jurisdiction under the proposed Convention would be required to determine issues brought before them relating to [the proposed Convention's] basic remedies." We then recommended such a time-table.

We have been persuaded that the time-table element of this provision is more appropriate as an "optional provision" (as defined in the aviation group memorandum), that is, the applicability of a mandatory time-table for the proposed Convention's remedies would be conditioned on the relevant country enacting the proposed Convention having specifically opted into this provision.

This provision would constitute a third and final optional provision applicable to aircraft equipment.

¹ The members of the aviation working group, listed alphabetically (with their nationalities noted parenthetically), are: Airbus Industrie (French, German, Spanish and U.K. consortium), Banque Indosuez (French), Douglas Aircraft Corporation (U.S.), General Electric Aircraft Engines (U.S.), International Lease Finance Corporation (U.S.), Kreditanstalt für Wiederaufbau (German), Rolls Royce (U.K.), Snecma (French), The Boeing Company (U.S.), The Chase Manhattan Bank, N.A. (U.S.), The Long-Term Credit Bank of Japan Ltd. (Japan) and United Technologies Pratt & Whitney (U.S.).

(b) In paragraph 9.3 of the aviation working group memorandum, while supporting the concept and centrality of a "notice filing" system, we suggested that "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."

Both the text of and framework underlying the revised draft, as well as a more detailed study of technical considerations, have led us to conclude that a system which contemplates (optional) filing of transaction documents may not be feasible given the centralised, international character of the proposed Convention. We are thus prepared to support a pure notice filing system.

3. - At the very centre of our approach to the proposed Convention is the concept of optional provisions as such. The overwhelming majority view of those commenting on the aviation group recommendations fully supports this concept as an appropriate way of addressing certain differences among legal and political systems rather than doing so by diluting the substance of the proposed Convention.

We would take this opportunity to draw the Sub-committee's attention to the firmly established legal basis for such provisions.² Indeed it may be said that such optional provisions are playing an increasingly important role as international commercial Conventions and treaties attempt to address ever more complex commercial law subject-matter.³

² The starting point of analysis of this subject is the Vienna Convention on the Law of Treaties 1969 ("Vienna Convention"). The definition of "reservation" laid down in Article 2(1)(d) is "any unilateral statement, however phrased or expressed, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the [subject treaty] in their application to that State." Reservations which are not of a type prohibited by the subject treaty and which are not incompatible with the object and purpose of the subject treaty, may be made by any Contracting State. *See* Vienna Convention Article 19. Moreover, a reservation expressly authorised by a subject does not (unless so provided in the subject treaty) require acceptance by the other Contracting States. *See* Vienna Convention Article 20(1).

The three (3) recommended optional provisions technically would constitute provisions in respect of which reservations are expressly authorised.

³ *See e.g.* Rome Convention on the Law Applicable to Contractual Obligations of 1980, Article 22 (expressly authorising reservations in respect of Article 7(1) thereof (applicability of "mandatory rules" of a country whose laws would otherwise not be applicable) and Article 10(1)(e) (applicability of law otherwise applicable under the Convention to the consequences of nullity of the contract); and United Nations Convention on Contracts for the International Sale of Goods, Article 95 (expressly authorising reservations in respect of Article (1)(1)(b) thereof) (applicability of the Convention to sales between parties from different States which are not Contracting States when the rules of private international law lead to the applicability of the law of a Contracting State).

Even the provisions (the third stage of) Economic and Monetary Union in the Treaty on European Union (7 February 1992) ("Maastricht Treaty") contain reservations of a kind which, in effect, render their applicability optional in respect of the reserving signatory country. *See* Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (annexed to and constituting part of the Maastricht Treaty); *see also* Protocol on certain provisions relating to Denmark (annexed to and constituting part of the Maastricht Treaty).

4. - Finally, for the reasons set forth in paragraph 1.2 of the aviation group memorandum, we would reiterate our support for (a) limiting the proposed Convention to enumerated types of specifically identifiable, high value mobile equipment (*i.e.* we support the non-bracketed version of Article 1(2) of the revised draft) and (b) making use, exclusively, of an asset registry. In addition to embodying a clearer and more efficient system, an asset registry is more consistent with filings in respect of transfers/conveyances which, as we have noted, is an important element of any system intending to set forth comprehensive priority rules⁴ in a manner consistent with current aviation finance law and practice⁵.

We appreciate the Sub-committee's attention to these matters which the aviation working group's representative, Jeffrey Wool, can elaborate upon at the meeting of 11-13 October 1995.

Sincerely yours,

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Airbus Industrie

Scott Scherer
Assistant Treasurer
The Boeing Company

⁴ See United Nations Commission on International Trade Law, Twenty-eighth session, Vienna, 2-26 May 1995, *Possible Future Work, Registration* (Note by Secretariat) at paragraph 30 (in comparing a name-index registry with an asset-index registry, noting that "the asset-index ... is more likely to inform a prospective purchaser whether the property in question is subject to encumbrances").

⁵ See the rationale for inclusion of title/ownership transfers at pp. 8-9 of the aviation group memorandum.