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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

(Second session: Rome, 12 - 16 April 1996)

REPORT

(prepared by the Unidroit Secretariat)

Rome, July 1996
1. The Study Group for the preparation of uniform rules on international interests in mobile equipment held its second session in Rome at the seat of Unidroit from 12 to 16 April 1996. The session was opened at 10 a.m. on 12 April by Mr M. Evans, Secretary-General of Unidroit. Mr R.M. Goode, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, was in the chair.

2. The session was also attended by the following experts and representatives of intergovernmental and international non-governmental Organisations:

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<th>Members of the Study Group</th>
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<td>Mr R.C.C. Cuming</td>
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<td>Mr G. Ferrarini</td>
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<td>Mr V.A. Kouvshinov</td>
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<td>Mr K.F. Kreuzer</td>
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<td>Mr S.J. McGairl</td>
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<td>Ms S. Martin Le Corre</td>
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<td>Mr S. Masuda</td>
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<td>Mr C.W. Mooney, Jr.</td>
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<td>Mr G.K. Olufon</td>
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<td>Mr K.M. Smyth</td>
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<td>Mr H. Synvet</td>
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Mr T.J. Whalen  
Partner, Condon & Forsyth, Washington, D.C., representing the Department of State of the United States of America

Observers

INTERGOVERNMENTAL ORGANISATIONS

Hague Conference on  
Private International Law  
Mr M. Pelichet, Deputy Secretary-General

United Nations Commission on International Trade Law  
Mr R. Sorieul, Administrator

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

European Federation of Equipment Leasing Company  
Associations (Leaseurope)  
Mr R. Clarizia, Professor of Law, University of Rome III; Consultant to the Italian Leasing Association and Leaseurope

European Federation of Finance House Associations (Eurofinas)  
Mr R. Clarizia, Professor of Law, University of Rome III; Consultant to the Italian Leasing Association and Eurofinas

International Association of Young Lawyers  
Ms M. Sardo, representing Mr P. Cavasola, Vice-President

International Bar Association  
Ms L. Curran, Vice-Chairperson, Subcommittee of the Banking Law Committee of the Section on Business Law on the Taking of Security in International Transactions

International Law Association  
Mr G. Guerrieri, Secretary, Italian Branch

International Maritime Committee  
Mr T.M. Remé, Attorney, Röhreke, Boye, Remé, van Werder, Hamburg.

In addition Mr J. Wool, Partner, Perkins Coie, London and Affiliate Professor of Law in the University of Washington, and Mr H. Rosen, Attorney, Zug, attended as expert consultants to the Study Group on international aviation finance matters and international rail finance matters respectively.

3. - The Study Group was seised of the following materials:
(1) Study Group for the preparation of uniform rules on international interests in mobile equipment: Sub-committee for the preparation of a first draft (third session: Rome 11 - 13 October 1995): summary report (prepared by the Unidroit Secretariat) (Study LXXII - Doc. 21);

(2) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 pursuant to the decisions taken by the Sub-committee of the Study Group at its third session) (Study LXXII - Doc. 22);

(3) Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 23);

(4) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996) (Study LXXII - Doc. 24);

(5) Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf on an aviation working group: summary of principal concepts (prepared by Mr J. Wool) (Study LXXII - Doc. 25);

(6) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): comments (by the Cosmic Space Agency of the Russian Federation and the Banking Federation of the European Union) (Study LXXII - Doc. 26);

(7) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): comments (by Professor C.W. Mooney, Jr. and Mr T.J. Whalen) (Study LXXII - Doc. 26 Add 1);

(8) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996): comments (by Ms N. de la Peña, Professor L. Girton & Mr H. Fleisig) (Study LXXII - Doc. 26 Add 2).

4. The Study Group approved the agenda which is set out in Appendix I to this report.

5. Appendix II sets out the comments of the Legal Affairs Committee of the European Federation of Equipment Leasing Company Associations (Leaseurope) on the first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996 (Study LXXII - Doc. 24) which came to hand after the Study Group's meeting.
INTRODUCTION

6. In opening the meeting, the Secretary-General of Unidroit recalled that a good deal had happened since the previous session of the Study Group, held in March 1993. Three sessions of a Sub-committee responsible for the preparation of a first draft had been held, in February 1994, November / December 1994 and October 1995. Those members of the Study Group and those Organisations represented thereon who had not been part of its Sub-committee had however been kept fully informed of its progress and had indeed made invaluable contributions to its work.

He extended a particular welcome to those attending a Study Group session for the first time: Mr S. Masuda, attending in place of Mr H. Uchida; Mr R. Sorteul, representing the United Nations Commission on International Trade Law; Dr T.M. Remé, representing the International Maritime Committee, previously represented by Professor R. Herber; Ms M. Sardo, representing Mr P. Cavasola, Vice-President of the International Association of Young Lawyers, an Organisation which was taking part in this work for the first time; Mr H. Rosen, who had been appointed expert consultant to the Study Group on international rail finance matters.

The three sessions of the Sub-committee, together with four sessions of the Drafting Committee, had permitted the establishment of a first set of draft articles (Study LXXII - Doc. 24) (hereinafter referred as the first draft). Considerable progress had been made and for this he expressed the Institute's particular gratitude to Professor R.M. Goode, who had chaired both the Sub-committee and the Drafting Group. Unidroit was also very much indebted to Mr J. Wool, who, in his capacity as expert consultant on international aviation finance matters, had co-ordinated the enormous efforts of the Aviation Working Group, organised jointly by Airbus Industrie and The Boeing Company. Professor R.C.C. Cuming too had performed an invaluable service to the advancement of this project with the exploratory report (Study LXXIIc - Doc. 1) he had prepared with a view to the first session of the Working Group that had been called to consider the legal and technical issues raised by the establishment of the international register posited under the future Convention, that was to be held from 16 to 18 April 1996. In addition he expressed his gratitude to Mr M.J. Stanford for doing everything in his power, at Secretariat level, often with resources that did not correspond to those that he would like to be able to allocate to the project, to ensure the smooth and efficient running of all the committees responsible for its work.

Since the last session of the Sub-committee Mr Stanford had attended a number of meetings with a view not only to giving exposure to the Institute's work on this project but in particular to stimulating a more active participation therein by representatives of the different interest groups other than the aviation industry likely to be affected by the proposed Convention, for example satellite interests, in such a way as to balance the huge input by the aviation industry. The Secretariat's aim through these efforts was to achieve a Convention that would be to the benefit of all the different interest groups involved.

It was moreover clearly essential as this work progressed that it should be made as widely known as possible and he had therefore been particularly pleased to hear about the one-day seminar, addressed essentially to business circles, organised in London the month before by
the Department of Trade and Industry of the United Kingdom, largely at the instigation of Professor Goode, who had chaired the morning session devoted to the Institute's project. He was equally grateful for the work being done by other members of the Study Group in this connection and expressed his particular appreciation to Mr V.A. Kouvshinov for the interest he had kindled in Russian space circles, expressed in the comments submitted by the Cosmic Space Agency of the Russian Federation.

While not desiring to impinge on the substantive issues raised by the first draft, he nevertheless noted that the problems these entailed at the level of differences between national systems of law continued to be extremely complex and difficult, in particular from a conceptual point of view. It was accordingly absolutely vital that the substantive rules to be drafted took full account of these major conceptual differences between the different systems of law and sought to accommodate these differences as far as possible. Presentation would, however, also be of capital importance. Unidroit instruments were, he recalled, drawn up in the Institute's two working languages, English and French, and it was indispensable that the future instrument be intelligible in both language versions, not only for those whose mother tongue was English or French but also for those whose mother tongue was not English or French and who would accordingly have to translate it into their own languages in due course.

7. - In introducing the business of the session, the Chairman paid his own special tributes, first to Mr Wool and, through him, to the Aviation Working Group, for the prodigious amount of work that they had put in on this project, which would be extremely helpful in the Study Group's further prosecution of this work, and, secondly, to Professor Cuming for the sizeable exploratory report he had prepared for the Working Group set up to look at registration questions.

He noted that the project had attracted enormous interest in a number of different sectors. The interest in mobile equipment generally had been matched in special measure by the aviation industry. Other interest groups were becoming more actively involved, as indicated by the presence for the first time of Mr Rosen as expert consultant on international rail finance matters and by the submission of the Russian Cosmic Space Agency's comments. He accordingly saw the planned Convention as having the potential to become one of the most important international Conventions for a very long time, involving as it did protection of rights over high-unit equipment entailing large financial commitments.

In the three years since the Study Group had last met much had been achieved, the planned Convention having begun to take shape, although a great deal of work still remained to be done. He proposed that the Study Group take as its primary working document the first draft but that it should also have to hand the very full Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 23) (hereinafter referred to as the memorandum). He suggested that the draft aviation text annexed to the memorandum should be seen as a vehicle for illustrating the ideas of the Aviation Working Group on a whole range of issues, such as relations between the proposed Convention and other international Conventions, the idea of including a number of optional provisions and possible reservations and declarations. Extremely useful as this text would be in this sense, it was clear that the Aviation Working Group did not necessarily expect all the words contained in the draft aviation text to appear in the final text of the Convention.
By way of outline of the achievement of the Sub-committee and of the thought processes that had determined this, he indicated that the key objective had initially been to establish a uniform regimen for security interests in mobile equipment. The original idea was to adopt a functional approach to the concept of security, with all forms of transaction intended to fulfil the function of security, even if framed, for example, as a sale under reservation of title or a lease, being, along the lines of the approach embodied in Article 9 of the Uniform Commercial Code of the United States, brought within the purview of the planned Convention. It however quickly became clear that the leaps of imagination required by this approach would be too much not only for Civil law jurisdictions but also indeed for some Common law jurisdictions which had historically drawn a sharp distinction between security in the strict sense and title reservation. The decision was therefore taken to have two categories, security interests and reservations of title, under sale and leasing agreements. The European Federation of Equipment Leasing Company Associations however then made it known that it did not regard leasing as a form of reservation of title because there was no dispositive intent on the part of the lessor, the leased asset was the lessor’s property and leasing did not involve the reservation of title. In deference to this view the Sub-committee consequently decided that it would be necessary to have three categories of interest, security interests, title reservation and leasing, on the basis that an effort would be made to devise rules that were, as far as possible, the same for all three categories but which, in some respects, would be bound to differ as between one category and another.

The way in which a given transaction would be classified, that is as a security interest, title reservation or leasing, was a matter that would not be dealt with by the planned Convention itself but was left to be dealt with by the applicable law. This would preserve the prerogative of local systems of law to continue to observe their own legal characterisation.

Finding a suitable definition for "mobile equipment" had caused more than a few difficulties. A solution was found in the nature of the equipment to be covered, that is high-value equipment lending itself to unique identification. The decision was therefore taken to concentrate on an exhaustive list of specific assets that would not be mobile equipment generally. It was agreed that this list might perhaps be added to from time to time, should the need arise. The assets that had to date been singled out for treatment were aircraft, aircraft engines, registered ships (with the proviso that a decision as to their ultimate inclusion was a matter subject to continuing consideration by the competent organs of the International Maritime Committee), oil rigs, containers of a certain minimum capacity, railway rolling stock and satellites and other cosmic space objects. A residual category had been left open for other assets that had not hitherto been contemplated but might need to be added and he noted in this context that there was already a proposal that helicopters should be added to the list. Such a listing of specific high-unit assets had the merit of avoiding the problems that would arise in any attempt to define the term "mobile equipment". It would further avoid the problems of potentially large numbers of small transactions being filed in the international register.

The basic intention was to create an international interest, whether it was a security interest or the equivalent interest under a title reservation or leasing agreement, which would be registrable in an international register, would receive recognition throughout Contracting States and would confer various priorities on its holder and various rights against the debtor and third parties, including a trustee in bankruptcy.
The first draft had introduced the concept of a *prospective international interest* (cf. Article 4(b)) to deal with the situation in which the chargor, seller and lessor were not at the time able to create an *international interest* because they did not have rights in the asset (cf. Article 6(b)). For example, the chargor might have contracted to buy the asset and to give it in security but had not at the time acquired ownership of the same.

On the test of internationality to be employed in the planned Convention, the view was reached that it should be sufficient that the equipment was mobile as defined in Article 2 of the Convention, because essentially this meant equipment that by its nature moved regularly from one country to another. It was this very fact that had provided the starting point for the efforts to draft a new Convention, namely the fact that the ordinary conflict of laws rules applied to the determination of the law applicable to dealings in tangible movables, the *lex rei sitae*, did not work very well in the case of equipment lacking a fixed *situs*.

The Sub-committee had not devoted much attention to the question of which should be the appropriate link to a Contracting State, although some work had been done on this point by the Aviation Working Group. The Sub-committee had decided that this was a matter that was best deferred until such time as adequate attention had been given to the substantive provisions.

Underlying the series of provisions in the first draft which addressed the question of the international registration system to be set up under the planned Convention was the idea that a central register would work in conjunction with satellite registries in individual countries which might be able to serve both as the national registry under other existing Conventions and as a satellite of the international register for the purposes of filing under the planned Convention.

A set of rules (cf. Article 6) laid down the formal requirements to be complied with for the creation of an effective international interest. These were quite straightforward, including for example the requirement that the agreement providing for the interest was in writing.

Another set of provisions dealt with the effects of an agreement for the creation of an international interest as between the parties (cf. Chapter IV). These were based on the principle of consent, expressed in two alternative formulations. Under one of these the parties had to agree that the future Convention applied to their agreement (cf. Article 7(1), Alternative I); under the other the parties were given the right to opt out of the Convention (cf. Article 7(1), Alternative II). Either way the intention was that the parties should not be bound by the planned Convention in their relations *inter se* if they did not want to be so bound. Various default remedies were provided.

In drawing up the provisions to govern the registration of an international interest, the Sub-committee had first to decide which type of registration system to go for. This involved it in deciding whether registration should be against the name of the debtor or rather against the asset. Either solution carried both advantages and disadvantages. Registration against the name of the debtor had the advantage that it was not necessary for the asset to be uniquely identifiable, which meant that it was possible to cover both present and future property,
proceeds and products. The disadvantage of debtor-registration was that the register would only show dealings by the debtor and not prior dealings that might affect rights in the asset. The Sub-committee concluded in favour of an asset registration system covering identified assets, typically identified by manufacturer's serial number, rather than seeking also to deal with claims to after acquired property, proceeds and the like, which was considered to have the potential to expose the planned Convention to endless complications.

The planned Convention rules regarding priorities were set out in a chapter (Chapter VI) dealing with the effects of an international interest as against third parties. These included an important rule preserving the rights of the chargee, seller and lessee in the event of the bankruptcy of the chargor, buyer or lessee.

The Drafting Committee had thought it would be useful for the planned Convention to have some rules dealing with assignments and charges of international interests and a new chapter heading (Chapter VII) had accordingly been provisionally included as an idea for the Study Group's consideration. Inspiration for the drafting of rules on this subject might, he suggested, be sought from the draft aviation text, which included a set of rules governing assignments, whether by way of security or absolute, of the interests of the chargee, the seller or the lessor.

Chapter VIII of the first draft, likewise placed inside square brackets, was designed to include special rules for aircraft and aircraft engines. Analogous special provisions might in due course be found necessary for other types of equipment to be covered by the proposed Convention, for example cosmic space objects and railway rolling stock, although on this point it would be necessary to await specific representations from the relevant interest groups.

A new chapter would, in his view, be desirable on the relationship between the planned Convention and other relevant Conventions, including the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter referred to as the Rome Convention), the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as the Brussels and Lugano Conventions), the Geneva Convention on the International Recognition of Rights in Aircraft, the Unidroit Conventions on International Financial Leasing and International Factoring and the United Nations Convention on Registration of Objects launched into Outer Space.

8. – With a view to seeing how the first draft might look after incorporation of key elements of the draft aviation text and other comments submitted on the final draft (cf. Study LXXII - Doc. 26 Add. 1, p. 3), the Chairman had drawn up a revised draft structure of the planned Convention. This document is reproduced in Appendix III to this report. This showed that the draft aviation text did not have a significant impact on the basic structure of the first draft, apart from a proposed new Chapter V on "[c]ertain additional provisions relating to international interests". The main changes reflected in this revised structure were the addition of a new Article 5 on interpretation, the addition of a series of articles on assignments and charges of international interests, the addition of a new Chapter IX on jurisdiction and of the new Chapter X on the relationship of the planned Convention with other Conventions and the moving of the definitions into a separate annexure so as not to overburden the body of the text of the planned Convention. It was agreed by the Study Group that it would not be necessary
for it to take a view on this revised draft structure for the time being, it simply having been put forward in order to show how the future Convention would look if the more important proposals included in the draft aviation text were taken on board.

9. - The Study Group noted that the draft aviation text contained an amount of detail that was uncommon and would probably be undesirable in an international Convention. On the other hand, it was recognised that this detail essentially reflected and corresponded to the calculation of risk that aviation financiers would have to make before advancing very large sums of money in reliance on the proposed Convention. It was important that there should be a sufficient measure of predictability that their rights would be safeguarded. As a means of balancing these twin considerations the Study Group agreed that the possibility should be explored of addressing some of the points of detail raised in the draft aviation text in an official explanatory report or commentary that might be worked on at the same time as the future Convention. The idea would be to treat these points of detail as matters essentially of interpretation and the purpose of such a report or commentary would be to give guidance to the courts that would be called upon to apply the future Convention as to the intent behind its provisions. Reference was made to the official reports prepared on the Brussels and Lugano Conventions and the Rome Convention and the use these had been to national courts, although it was important to remember that these Conventions had been worked out between a relatively limited number of States linked together by institutional ties. It would also be vital to have a clear idea, at the latest by the beginning of the committee of governmental experts stage, as to the degree of authority which States would be prepared to accord to such a report. Realism moreover dictated that, if this approach were to be followed, a first detailed draft commentary would have to be ready by the time of the convening of such governmental experts, as the alternative could be to multiply by as much as six times the amount of time that would be needed to secure agreement at sessions of governmental experts and at a diplomatic Conference. The Study Group was also advised not to ignore the very considerably increased burden that such a decision would place on the Secretariat and it was suggested that, if such a decision were to be taken, then help might be offered by members of the Study Group. It was agreed that a specimen commentary should be prepared on an article raising the type of concerns addressed in the draft aviation text in such a way as to illustrate how some of the detail at present contained in that text might be dealt with in a future explanatory report or commentary. An explanatory report would in any event be an especially important guide for courts in the interpretation of the planned Convention, should it be decided not to include a rule attributing exclusive jurisdiction to a particular court on matters regarding its interpretation.

CONSIDERATION OF THE FIRST DRAFT

Re Title

10. - Some concern was expressed regarding the suitability of the term "garantie", with its contract law connotations, to convey in the French text the idea of a proprietary right rendered in English by the term "interest". It was suggested that use of the term "garantie" in the planned Convention was not only terminologically incorrect to cover a proprietary right but could also lead to substantive difficulties in a text that was replete with references to the
applicable law. It was suggested that a reference to the applicable law in respect of an interest that was labelled a "garantie" but which was intended to refer to a proprietary right could prove to be a considerable source of legal uncertainty in private international law terms.

The problem arose out of the fact that the term "garantie" was being employed in an effort to encompass three legal concepts that were technically distinct under French law and those legal systems, like Italian law, that followed French law on this point. A suggestion was made that the word "droit" or "droit réel" would be a more suitable term, particularly to encapsulate the notion of title involved in reservation of title and leasing agreements. Attention was drawn to the comments of the Banking Federation of the European Union (Study LXXII - Doc. 26), in particular the general comment made by one of the members of the Federation that "[i]n his method used, which treats in the same way a subordinate right in rem over movable property (mortgage on aircraft, collateral security) and a right of ownership, will most likely result in extricable difficulties, in particular with regard to bankruptcy law" (ibidem, p. 3) and the special comment regarding Article 19 in which it was suggested, "[s]uch concerning Articles 19(1), 19(2) and 19(3), [that] it would be preferable to establish separate provisions for title reservation and for leasing" (ibidem, p.5).

The Study Group concluded that it was nevertheless proper for it to employ the term "garantie" in a property law context, since it did not have any precise meaning in property law. It was suggested that the problem might be resolved by qualifying the term "garantie" by the adjective "réelle" to indicate that it was being employed to convey the idea of a proprietary interest, a right in rem.

Re Article 1 (1)

11. Attention was paid to the Aviation Working Group's recommendations for this clause. It was agreed that, while these in some respects raised matters of style, in other respects they might be considered unnecessary, even if they did deal with substantive questions (such as the relationship between international interests and national interests for priority purposes) so far as they referred to matters that were, or were capable of being, dealt with elsewhere in the draft (thus the reference to the establishment of relative priorities might be considered to be unnecessary in view of the substantive provisions on priorities contained in the chapter on the effects of the international interest as against third parties) and that it was essential to keep the text as light as possible. It was agreed that these were points of detail that might, in line with the general decision taken on this matter (cf. §9 supra), be addressed in the explanatory report.

12. The fear had been expressed (cf. Study LXXII-Doc. 26 Add. 1, p. 2) that the term "throughout the territories of Contracting States" would unduly restrict the reach of the planned Convention in so far as it might be interpreted as meaning that the Convention was only to be applied by courts sitting in Contracting States, whereas a forum court not located in a Contracting State should not be prevented, on the model inter alia of the Unidroit Convention on International Financial Leasing, from applying the Convention on the basis of the operation of private international law rules to, say, a priorities dispute between two parties both located in Contracting States and in respect of equipment also located in a Contracting State. It was agreed that the words "throughout the territories of Contracting States" might indeed give the impression that a connecting factor was being laid down, whereas the only
intention was to indicate that the future Convention would have effect once it was applicable. It was intended that the conditions for the application of the future Convention would be set out in Article 3 and that it was to be expected that these would include the operation of rules of private international law. It was accordingly agreed that the words "and shall have effect throughout the territories of Contracting States" should be deleted.

13. – Concern was expressed as to the appropriateness of the term "creation" in respect of the interest of a seller under a title reservation agreement and that of a lessor under a leasing agreement, in that both interests existed prior to, and were not strictly speaking created by, the relevant agreement. The employment of the term "creation" in the context of the interest of a seller under a title reservation agreement and that of a lessor under a leasing agreement was nevertheless felt to be justified on the basis of an analogy with the way in which an owner of property was able, by sub-dividing its full ownership interest, to create simultaneously both a security interest and an international interest. Likewise, when an owner of property sub-divided its full ownership interest by creating a possessory legal interest in a potential buyer under a title reservation agreement or in a lessee under a leasing agreement, the intention under the proposed Convention was that immediately following upon the creation of that possessory legal interest another new interest, an international interest, also arose. The effect intended by Article 1(1) was that where a seller entered into a title reservation agreement or a lessor entered into a leasing agreement the resulting interest created under the Convention was an international interest. It was suggested that such a conceptual analysis of the international interest might usefully find some place in the explanatory report.

14. – Exception was taken to the term "autonomous". It was pointed out that, whilst it was usual for more than one security interest to be created over an asset, a lessor's title under a leasing agreement was one and only one, which raised the question as to which interest of a lessor could be considered to be autonomous of his title. It was explained that the purpose behind the proclamation of the "autonomous" character of the international interest was to indicate that it was to be treated as a sui generis right in rem with its own distinctive characteristics that derived from the future Convention and not from national systems of law. The intention thereby was to avoid the new interest being mixed up with analogous interests created under individual systems of national law by the operation of the rules of private international law. It was however recognised that the term "autonomous" did not convey sufficiently clearly the idea that was intended, that is that the interest "created" under the Convention was quite distinct from the different types of security interest, a seller's interest under a title reservation agreement or a lessor's interest under a leasing agreement that existed under national law. It was agreed that this idea should be spelled out more clearly and more accurately in a revised version of Article 1(1).

Re Article 1(2)

15. – In addition to the three classes of interest included in the first draft – that granted by a chargor under a security agreement, that retained by a seller under a title reservation agreement and that retained by a lessor under a leasing agreement – the draft aviation text proposed that three further classes of interest be included (cf. Study LXXII - Doc. 23, Annex I, Article 1(3)(d)-(f)). It was agreed that two of these, security assignments, providing for the transfer of the rights of a secured creditor (Article 1(3)(d)) and outright assignments
(Article 1(3)(f)), involved the transfer of interests created under the proposed Convention and that it was appropriate that these should be dealt with in the new chapter on transfers and assignments of international interests rather than in Article 1(2). It was however suggested that once the Study Group had provided rules for transfers by a chargee, seller or lessor of an international interest, it might then be necessary for it to revisit Article 1(2) to see whether, in addition to interests in specific categories of asset, the scope of the proposed Convention should not also refer to interests in rights to payment secured by such assets.

16. – On the other hand, the Aviation Working Group's other proposed addition to Article 1(2) related to outright sales, as opposed to sales under reservation of title, and therefore to the creation of an international interest rather than to the transfer or assignment of an international interest. In support of this proposed addition it was pointed out that in most jurisdictions aircraft registers already covered such transfers so that the effect of the proposal would be consistent with general practice. It was argued that an extension of the scope of the Convention to encompass all sales would also avoid difficult characterisation issues that might arise as to whether a given transaction was an outright sale or a conditional sale and thus enhance legal certainty regarding the Convention's priority rules, under which purchasers might in certain circumstances prevail over registered international interest holders. Whilst one initial problem raised by the proposed extension concerned the method by which first interests would be distinguished from new interests, the main problem would be to ascertain whether the proposed addition would correspond to the needs of other interest groups, apart that is from the consensus that it obviously already commanded among the manufacturers, users and financiers of aircraft equipment. Certain members of the Study Group moreover indicated that they wished to reserve their position on the desirability of the extension proposed by the Aviation Working Group until they had had time to appreciate the full implications of this proposal. In the circumstances it was agreed that a new sub-paragraph (d) should be added to Article 1(2) stating "sold under a contract of sale", placed however in square brackets to indicate the need for the full implications as to how such an extension would work to be considered further, in particular for reactions to be sought from other interest groups with a view to determining whether it should be made of general application to all the categories of mobile equipment covered by the proposed Convention or rather confined to aircraft equipment only.

Re Article 2 (1)(a) and (b)

17. – Following the suggestion of the Aviation Working Group, it was agreed to refer separately in Article 2(1) to airframes and aircraft engines, as the term "aircraft" might be interpreted to mean the complete aircraft, that is including the engines. It was further agreed to follow the Aviation Working Group's suggestions in the annexure for the indication of a limiting factor regarding airframes and aircraft engines. In response to a request for clarification as to whether propellers, as valuable parts of an aircraft engine that could easily be removed from one and installed on another and had an individual identification number, were to be understood as being covered by the term "aircraft engine", it was explained that the Aviation Working Group had not considered it practicable to have separate identification for propellers any more than for other valuable component parts of an airframe or aircraft engine. It had taken this line on the basis that, the purpose of the proposed Convention being to protect third parties dealing with high-value highly mobile assets, the only way in which third parties could
be afforded such protection was where the system of identification employed in respect of the assets covered was universal. The intention was that propellers and other component parts would therefore only be covered by the proposed Convention so long as they were attached to the engine or the airframe, as the case might be, and would not be so covered as long as they were detached therefrom. In response to the question whether one and the same international interest might be filed in respect of an airframe and aircraft engine where an omnibus security interest had been taken over the two in the same agreement, it was explained that the intention was that separate filings would be required in respect of each in so far as each represented a separate registration category under the proposed Convention.

Re Article 2(1)(c)

18. – As regards registered ships, discussions were continuing within the International Maritime Committee as to the case for or against their ultimate inclusion in the planned Convention. The International Maritime Committee was invited, through the person of its representative, to organise a working group, comparable to that organised by Airbus Industrie and The Boeing Company for the aviation industry, to submit a representative shipping industry view on the desirable content of the proposed Convention as the same related to shipping.

Re Article 2(1)(d)

19. – Efforts were continuing within the Secretariat to identify bodies representative of oil drilling interests. The information obtained to date regarding mobile oil rigs tended to indicate that vessels were increasingly taking over the erstwhile functions of such mobile oil rigs.

Re Article 2(1)(e)

20. – The Institute of International Container Lessors was represented on the Study Group, even if it had not been able to attend on this occasion. It was invited by the Study Group to organise the preparation of a memorandum setting forth a representative container industry view on the desirable content of the proposed Convention as the same related to containers. It was in particular invited to assist the Study Group in drafting a suitable definition for the class of containers to be encompassed by the Convention, to indicate \textit{inter alia} a cubic capacity limiting factor for such inclusion.

Re Article 2(1)(f)

21. – Two of the international Organisations representing railway rolling stock interests, the Central Office for International Carriage by Rail and the European Company for the Financing of Railroad Rolling Stock (Eurofima), were represented on the Study Group, even if they had not been able to attend on this occasion. The Secretariat had in addition been in touch with the International Union of Railways (I.U.R.) and the International Union of Private Wagon Owners Associations, both of which had expressed great interest in the Institute's project. The I.U.R. in particular was in the process of consulting its national networks on both the first draft and the memorandum. Mr H. Rosen, a renowned expert on
international rail finance matters, had moreover joined the Study Group at this session as expert consultant on these matters. The Study Group invited him to consult with railway rolling stock circles, in particular the four aforementioned Organisations, with a view to reporting back to it at its following session on the desirable content of the proposed Convention as the same related to railway rolling stock.

Re Article 2 (1)(g)

22. – The Secretariat had continued its efforts to galvanise the interest of satellite finance circles in the proposed Convention, inviting the European Space Agency, the International Maritime Satellite Organization (Inmarsat), the International Telecommunication Union, the International Telecommunications Satellite Organization (Intelsat) and the United Nations Committee for the Peaceful Uses of Outer Space both to formulate comments on the first draft and the memorandum and to designate representatives to attend this session. While they had all in the event declined to send a representative, the Secretariat's participation in an international satellite finance conference in January 1996 had shown the great interest of satellite finance lawyers in the Institute's project. On that occasion it had however been pointed out to the Secretariat that the most valuable part of a satellite for financing purposes was the series of transponders incorporated therein, the satellite itself being little more than a shell, and that it would therefore be necessary to refine the term "satellite" in Article 2(1)(g) somewhat.

23. – This need had been confirmed in the comments of the Cosmic Space Agency of the Russian Federation (Study LXXII - Doc. 26), which had indeed proposed two additional categories of satellite equipment for inclusion (*ibidem*, p. 1). It was explained that the proposed Convention had excited great interest in Russian space circles both for commercial and for legal reasons. Commercially, international commercial activity in satellites was growing all the time and was to be expected to do so even more in the future. The Cosmic Space Agency of the Russian Federation in particular was looking actively at exploiting all possibilities of commercial financing. Legally, an agreement had been concluded between the Governments of the Russian Federation and the United States of America on co-operation in outer space and a high-value commercial agreement involving France, Japan, the Russian Federation and the United States of America had been concluded on outer cosmic stations. In line with the separate categories created for airframes and aircraft engines, the Cosmic Space Agency had proposed separate categories for cosmic objects, for the scientific apparatus and other equipment installed on cosmic objects and for the working time of such scientific apparatus and other equipment installed on cosmic objects. In addition it was suggested that it might be wise to explore the need for special provisions for cosmic objects, on the model of those foreseen for aircraft equipment. In determining whether a separate category should be created for scientific apparatus and other equipment installed on cosmic objects, it was agreed that it would first be necessary to ensure that these lent themselves to unique identification, in the same way as aircraft engines. To the extent that the working time of scientific apparatus and other equipment installed on cosmic objects referred to intangible contract rights, granted by the operator of a satellite to third parties desiring to make use of it, it was suggested that the inclusion of such rights would involve a dramatic expansion of the scope of the planned Convention. It was agreed that, to the extent that this was what was meant by the working time of such scientific apparatus and other equipment, it would not be appropriate for such rights to fall within the scope of the planned Convention, which was designed essentially to
cover rights in rem and some contractual aspects of the relationship between the parties one of whom had created such a right in rem. It was agreed to invite the small group of Russian satellite experts that was to be created in Moscow to monitor the Institute's work on this project to look further into these questions. It was suggested that Western satellite finance experts might co-operate in the work of this group.

_Regarding Article 2(1)(b)_

24. – The Banking Federation of the European Union in its comments on the first draft (Study LXXII - Doc. 26, p. 3) had suggested it would be appropriate to broaden the scope of the future Convention to embrace lorries, omnibuses, construction machinery and non-registered ships. In Germany support had also been voiced for the inclusion of omnibuses, construction machinery and large lorries. In the United States of America there had been support in the relevant industries for the inclusion of construction machinery, lorries, pleasure yachts and some agricultural equipment, especially big-ticket items like harvesters. The enthusiasm for the inclusion of pleasure yachts, albeit consumer goods, that had been registered in the U.S.A. derived from the very weak level of protection lenders currently enjoyed under the documentation relating to the secured financing of such craft. The Secretariat moreover suggested that consideration might usefully be given to the inclusion of air-cushion vehicles, which were normally excluded from the application of maritime law Conventions but which had been shown by Unidroit's past work on the subject to be treated differently from country to country for registration and liability purposes. It was however pointed out by the representative of the International Maritime Committee that very few air-cushion vehicles were still operating commercially, since, on account of the huge amounts of energy they consumed, they had not proven economical. In response to a suggestion that computer equipment might also be considered for inclusion, it was pointed out that such equipment would not normally move frequently across international frontiers except where it was installed on assets, such as ships, aircraft and satellites, which would be moving regularly across such frontiers. It would therefore only be legitimate to consider it for inclusion as a separate category to the extent that it was installed on other assets already covered by the proposed Convention.

25. – Caution was urged before any final decision was taken regarding the inclusion of additional items of equipment. It would be necessary to examine the case for their inclusion in the light of the overall structure of the Convention, in particular the interplay between the international interest and national interests. It would be necessary to bear in mind the interest parties would have to place themselves under the Convention regimen given the fact that the international interest was intended to prevail over most national interests. It would in this context be necessary to bear in mind the heterogeneous character of many of the additional assets proposed for inclusion. Most construction equipment, for example cranes, it was pointed out, whilst of high value, would only move across international frontiers infrequently, whereas the Convention was clearly of potential interest for tunnel-digging equipment of the kind used in constructing the Channel Tunnel and that might be used in such other projects as the one under study for a tunnel between Spain and Morocco. To include equipment that would only move across international frontiers infrequently would create legal uncertainty as to whether an international interest would prevail over a national interest.
26. - It was agreed that it should not be possible for individuals to opt into the Convention regimen in respect of additional high-value mobile equipment, like Rolls-Royce motor cars, not featuring in the categories to be listed in Article 2(1). It was clear that the Convention must contain a definite list of the equipment covered so that third parties could know which objects might be subject to an international interest and for which it would accordingly be necessary to consult the international register. The alternative would be to sacrifice an essential element of legal certainty. The proper solution, it was pointed out, would be for a relevant interest group, that is the manufacturers, financiers and buyers of a particular type of asset, desirous of securing the Convention's coverage extended to that asset, to seek, by an amendment to the Convention of the kind provided for under Article 2(2), to have its coverage so extended.

27. - Given the interest which had been expressed for the inclusion of agricultural equipment, air-cushion vehicles, construction machinery, lorries, non-registered ships, omnibuses and pleasure craft, it was agreed that these items should be provisionally added to the list of items of equipment to be encompassed by the proposed Convention, on the understanding, first, that their definitive inclusion would depend on their being shown to be of high-value, to lend themselves to unique identification and to be normally, that is frequently, used on a cross-border basis, and, secondly, that following the establishment of the next draft members of the Study Group should approach interested circles in their countries with a view to ascertaining the desirability, in the light of the aforementioned considerations, of the inclusion of such assets, in particular taking care to seek out views on the sort of limiting factor (for example, size or capacity) which might usefully be employed to distinguish those examples of such assets which merited inclusion from those which were better left outside the ambit of the Convention.

Re Article 2(2)

28. - With a view to permitting the extension of the Convention's coverage to categories of asset not included therein, it was agreed that provision might be included for the kind of rapid revision procedure common in recent Conventions setting limits of liability. In so far as such an amendment procedure would need to be carried out by Governments, interest groups desirous of seeing the Convention's coverage extended to a particular asset would first need to persuade Governments of the desirability of such an amendment, thus guaranteeing the required degree of legal certainty.

Re Article 3

29. - Although the Study Group had been seised of a specific proposal for a connecting factor provision (cf. Study LXXII - Doc. 26 Add. 1), it was agreed that, whilst it would clearly be essential for a forum court to be able to tell from the face of the Convention when it should apply it, the question of the appropriate connecting factor was a matter that was best left to be dealt with after the development of the substantive provisions.
Re Article 4

30. — With one or two exceptions (cf. § 31 - 37 infra.) it was agreed to defer until a later session of the Study Group consideration of the definitions set out in Article 4. As a general point, in the light of the proposal by the Aviation Working Group considerably to expand this list of definitions, it was agreed, for presentation purposes, to relocate the definitions set out in Article 4 in a separate annexure to the Convention, with reference being specifically made thereto in the body of the text. The case for having these definitions off into a separate annexure, rather than overburdening the body of the future Convention, would be reinforced were it to prove necessary, as suggested in the revised structure proposed by the Chairman (cf. Appendix III), to have some definitions common to all the categories of equipment to be covered by the Convention and others specific to one or more individual category of asset.

Re Article 4(b)

31. — Exception was taken to the fact that under the definition of "prospective international interest" proposed in Article 4(b) a registration notice filed by a chargee, seller or lessor during pre-agreement negotiations at a time when no funds had been advanced would be invalid even where such filing had been authorised by the chargor, buyer or lessee. In practice it was quite normal for a filing to be made prior to the interest to which it related actually coming into existence. Three events could happen after such a filing which would cause the interest to come into existence, namely the conclusion of the relevant agreement, the advancing of funds and the acquisition by the chargor, seller or lessor of rights in the equipment. From a policy point of view it was argued that, for the purpose of the validity of a registration notice filed under the proposed Convention, it should not matter in which order these events occurred provided that the filing was made with the authorisation of the chargor, buyer or lessee. Such a solution would reflect the pattern of Article 9 of the Uniform Commercial Code under which the various requirements for the perfecting of a security interest (the need for an agreement, for the debtor to have an interest in the collateral, for there to be an obligation to be secured, for value to be given and for a filing to be made) could be satisfied in any order, with priority normally being determined by the date of filing. While the proposed change would simplify the draft by eliminating the need for any reference to a prospective international interest, it would nevertheless have to be remembered that the system to be established under the proposed Convention was asset-based, whereas that of Article 9 was debtor-based, and careful consideration would need to be given to any impact that such a change might have on the priority rules set out in Article 19. With these qualifications, it was accordingly agreed that the Drafting Committee should be invited to find an appropriate formulation for the concept that the Convention should enunciate certain ingredients necessary for the creation and perfection of an international interest but that these ingredients should be capable of being satisfied in any order and that once all the ingredients were so satisfied then priority should be determined by the date of filing.

32. — Once it had been decided to permit pre-agreement filings under the proposed Convention, the question arose as to the most appropriate means of protecting the owner and any other person having an interest in the asset against which such a filing might have been made in respect of filings made without the knowledge or consent of such persons. It was agreed that one solution would be to require such a prospective chargor or chargee to obtain
the consent of such persons before being able to make a pre-agreement filing. For aircraft such a solution would not raise any problems as public registers of ownership already existed for such assets. Failing the adoption of the Aviation Working Group's recommendation to expand the Convention's coverage to encompass the registration of ownership and transfers of title, such a solution, could however cause problems for assets other than aircraft as public registers of ownership did not generally exist in respect of such assets. Another possible solution, perhaps more apt for the case where the owner was either not himself involved in the transaction at the time when a prospective chargor or chargee was anxious to make a pre-agreement filing or was not minded to be co-operative toward such parties, might be found along the lines of the priority notice which could be filed in the United Kingdom in respect of aircraft without the need to seek anyone's consent. Such a priority notice was effective for only 14 days after which, if a definitive financing statement had not been filed in the meantime, it simply fell away so that any prejudice to the owner was short-lived. Indicating that the Aviation Working Group could support either of the solutions advocated, Mr Wool indicated that the concept of the priority notice was also employed in the draft aviation text, where provision was likewise made for it to fall away after a set time, failing the filing of a definitive registration notice.

Re Article 4(f)

33. It was felt that the words "until performance of the buyer's obligations" did not make it clear whether the intention was only to cover performance of the buyer's obligations under the particular sale contract or whether performance of his obligations under another sale contract concluded, say, as part of a series of successive contracts, with the same seller was also meant to be covered. It was explained that the intention was to leave it to the parties to determine in the terms of their contract whether they wished to provide for such a link. It was accordingly agreed that the drafting of this clause should be amended to reflect the idea that ownership would not pass until the satisfaction of the buyer's obligations as well as any other conditions stated in the sale contract to be conditions for the passing of ownership.

Re Article 4(g)

34. It was noted that certain interest groups, in particular aviation interests, had indicated that they were against the idea of the definition of a leasing agreement for the purposes of the future Convention including the qualification that the lease term should be for a period of at least three years. It was suggested that the introduction of such a minimum lease term was not necessary in a text designed to cover only high-value mobile equipment that was uniquely identifiable and normally used in cross-border transactions. It was agreed that, while the basic definition of a leasing agreement should remain unchanged, an exception to the idea of a minimum lease term might be made for those special assets for which it was felt to be necessary, such as aircraft.

35. Leasing circles in one country had voiced concern that the inclusion of true leases and not just finance leases in the definition of a leasing agreement could have undesirable repercussions on that country's legislative treatment of leasing for bankruptcy purposes and in the context of forced sale. In view of the different meanings attributed to leasing from one jurisdiction to another, these leasing circles had therefore suggested that consideration be given to the idea of restricting the Convention's coverage to financial leases. The Study Group was
however strongly the view that a general definition of leasing was to be preferred to a more restrictive definition. It was considered that it would be unwise either to try to exclude any particular type of leasing agreement or to try to introduce a classification of leasing agreements for the purposes of the future Convention. The fact was that in the drafting of lease documentation the only limits were the imagination of the drafters involved, so that many transactions would be arguably one type of lease and arguably another, sometimes being drafted specifically to exploit the confusion between the two main types of leasing. It was important to bear in mind that the proposed Convention was designed *inter alia* to promote asset-based financing in whatever form — and leasing was a very important form of such financing — and that it was therefore important to leave the parties to such transactions maximum flexibility to shape the way in which they wished to finance the acquisition and use of a particular asset. This flexibility should include freedom to make use of the most up-to-date market developments. The Aviation Working Group was strongly of the view that all leases should be covered for a number of reasons. First, it considered that the *inter partes* remedies to be provided under the Convention were equally appropriate for both finance leases and true leases. Secondly, it was important to avoid complex characterisation issues that could only end up creating more uncertainty regarding the Convention's applicability. Thirdly, it felt that the application of the Convention's priority rules as between third parties would not be clear unless all leases were included. Fourthly, since the decision had been taken to opt for an asset registry, it took the view that the filing of both finance leases and true leases was a practical way of resolving all these difficulties. A distinction based on whether or not the lessee was an authorised financial institution would not work in those countries where leasing activity did not require such authorisation and would not even always work in those countries where such authorisation was required, in so far as the majority of high-value transactions affecting aircraft were not handled by such authorised leasing companies but rather by special-purpose companies, which were sometimes off-shore but also sometimes *groupements d'intérêt économique*. It was suggested that the only distinguishing line between leases intended to be covered and those that were not which could properly be included in the definition was the concept of the minimum lease term. The basic requirement of a minimum term could in this way be seen as an indication of those leases the terms of which were not sufficiently long in general to merit coverage.

*Re Article 4(o)*

36. — Regarding the question of whether the "auteur" of the particular writing, in the case of a physical person acting on behalf of a legal person, had authority to grant an international interest, it was agreed this was a matter to be left to be settled in accordance with the applicable law.

37. — Comparing the Sub-committee's definition of "writing" with that proposed by the Secretariat of the United Nations Commission on International Trade Law in Article 4(6) of the revised articles of draft uniform rules on assignment in receivables financing (A/CN.9/WGII/WP 86) (*fn1*), it was noted that this last suggested one way in which the drafting of Article 4(o) might be improved upon. Whereas the latter used the term "in tangible form" to

(*fn1*) *"Writing" means any form of electronic, optical or analogous means of communication, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy, if the information contained therein is accessible so as to be usable for subsequent reference*.
indicate information which was retrievable and which did not simply flash up on a screen, for example, on the Internet, and, not being stored, then disappear, the Uncitril definition employed the concept of information that was "accessible so as to be usable for subsequent reference", conveying the idea of information that was retrievable in one form or another. On the other hand, the Uncitril definition of "writing", understandably perhaps in a text concerned with assignment in receivables financing where authentication might not be felt to be necessary in respect of written notice to a debtor, lacked that element of authentication, built into Article 4(c), where it was designed to indicate that the record of information contained a method of verifying that the message was indeed sent by the person by whom it had purportedly been sent, considered to be of great importance in an agreement providing for an international interest. It was accordingly agreed that the drafting of Article 4 (o) should be revised so as to move more towards the aforementioned Uncitril definition of "writing" whilst at the same time preserving the reference to authentication.

Re proposed new Article

38. — In line with the specific proposal submitted to the Study Group in the comments of Professor C.W. Mooney, Jr. and Mr T.J. Whalen (cf. Study LXXII - Doc. 26 Add. 1, p. 3) and with the corresponding provision (Article 30) of the draft aviation text, the Study Group agreed to incorporate a new article designed to deal with the interpretation of the future instrument based on Article 7 of the United Nations Convention on Contracts for the International Sale of Goods.

Re Article 5

39. — It was agreed that this and the other provisions of the first draft dealing with registration should be left to be considered by the Working Group that had been set up to consider the legal and technical issues raised by the establishment of an international register. However, with a view to giving some policy guidance to the Working Group, the Study Group briefly considered the tentative decision taken by the Sub-committee, reflected in Article 5(3)(b), to envisage the possibility of registration against the name of the debtor for the limited purpose of preserving the validity of the international interest against the trustee in bankruptcy and judgment creditors of the chargor, buyer and lessee. It was pointed out that it would raise a whole level of additional complications to establish a debtor-based registry alongside the basic asset-based system that had already been decided upon. Pessimism was expressed as to the value of such an additional system in the light of the problems highlighted in Professor Cuming's exploratory report, in particular the fact that it would probably not be possible for all names to be written in the same alphabet. It was agreed that it was not necessary to take a final decision at this stage as to whether a debtor-based registration system should also be provided for under the proposed Convention for the limited purpose that Article 5(3)(b) was designed to serve and that the Working Group should for the time being concentrate on solving the main legal and technical problems raised by the establishment of an asset-based registration system and only turn its attention to those that would be raised by the establishment of a parallel debtor-based registration system at such time as it had reported back to the Study Group with its conclusions on the asset-based registration system. It was however pointed out that it should not be impossible to devise an electronic asset-based registration system that would permit identification of the name and whereabouts of the debtor for the limited purpose of contacting
him as opposed to a fully-fledged debtor-based registration system under which the validity and retrievability of the registration would be dependent on the name of the debtor.

40. - Given that it was the intention that the international registration system should be truly electronic, it was agreed that it was important to make it clear that it was the intention that the written documents to be filed together with the registration notice (for instance, the copy of the chargor's written consent to the registration referred to in Article 14(2)(b)) could also, in line with the decision that had been taken regarding the definition of "writing" for the purposes of the future Convention (cf. § 37 supra), be filed electronically. The filing of certain pieces of paper would not therefore be a prerequisite to a valid registration under the Convention.

41. - By way of explanation of the Aviation Working Group's proposal for the expansion of the concept of the international register into an international registration system consisting of a central registry and satellite registries (cf. Article 4(1) of the draft aviation text), it was pointed out that the introduction of the idea of satellite registries, which in the case of aircraft would probably be the existing registers maintained by national civil aviation authorities, was designed not only to maintain a meaningful link between the central register and such national registers as might exist in respect of the items of equipment to be covered under the proposed Convention but also to provide the possibility of filing in a place that would in most cases be closer to the base of the transaction than the international register. A key factor to be borne in mind regarding these different satellite registries was the fact that the rules that would be applicable to them would be internationally uniform and consistent with the rules to govern the central international register. The Aviation Working Group further proposed that the international registration system should be established not only for the filing of international interests but also for the filing of what it referred to as "registrable national interests". It was agreed that this, however, raised a matter of substance which, in so far as it concerned the priorities regimen to be established under the proposed Convention, might therefore best be reverted to at such time as the Study Group came to consider the issues of priorities.

Re Article 6

42. - Article 5 of the draft aviation text was found to improve on Article 6 of the first draft in a number of respects. First, it was agreed that Article 6 should take over the reference in Article 5(1) of the draft aviation text to the creation of an international interest. Secondly, it was also agreed that the more positive formulation employed in the chapeau of Article 5(2) of the draft aviation text, indicating that providing that the agreement complied with the requirements laid down in paragraphs (a) to (d) of Article 6 of the first draft a valid international interest was created, was preferable to the somewhat more negative formulation ("apply ... only where ...") employed in the chapeau of Article 6 of the first draft. However, it was agreed that it would not be prudent to include in the text the four potentially invalidating factors listed in Article 5(2)(a) - (d) as, with all such lists, there was always the danger that some other such potentially invalidating factors might have been overlooked and a court called upon to interpret such a provision might reason that, such other potentially invalidating factors not having been specifically referred to, they were not intended to be covered. It was agreed that, while the need to minimise the degree of uncertainty that would inevitably flow from the
creation of the new autonomous interest to be provided for under the future Convention militated in favour of some specific mention of the principal grounds on which such an interest might be invalidated, this could be done in the explanatory report or commentary.

43. - On the other hand, the Study Group took the view that the draft aviation text’s addition in Article 5(1(a) of the words “signed by or on behalf of the parties” after the word “writing” was not necessary, the idea of signature being implicit in the definition of “writing” provided in Article 4(o) (cf. § 37 supra), with its requirement of some form of authentication rather than a manual signature. It was further agreed that the references in Article 5(l)(b) to outright assignments and security assignments should rather be dealt with when the Study Group came to draft rules on assignments and charges of international interests.

44. - It was noted that the word “states” referring to the obligations secured in Article 6(d) could be construed narrowly to require a detailed description of the obligations secured. It was agreed that the word “states” should be replaced by an expression like “reasonably identifies”.

45. - The concept of the chargor, seller or lessor having to have “rights” in the object under Article 6(b) gave rise to considerable discussion. First, in response to a query regarding the fact that at the time of pre-agreement filing the chargor might not have rights in the equipment, it was explained that this clause was dealing with the creation of an actual, rather than a prospective international interest. It was moreover pointed out that there could not be any enforceable security agreement as between parties regarding equipment in which the chargor had not yet acquired rights. Secondly, discussion arose as to the precise meaning of the term “rights” in Article 6(b). In reply to a question whether this term should be understood as referring to the right or power to create an international interest, it was explained that this was not the intention, the idea being rather to encompass rights in rem, ownership rights or more limited rights, in a given asset, as opposed to contractual rights. However, it was also pointed out that there were some rights in rem which would not confer the right to create an international interest, for example a right of user, and it was suggested that it be made clear that the term “rights” did not encompass these. It was further suggested that the problem essentially arose in those cases where the intention seemed to be to allow the chargor to give more rights than it actually had. It was agreed that this was a matter that the Study Group needed to consider further with a view to making it clear what was actually intended by the word “rights” in this provision. It could then be decided whether this clarification should be reflected in the text or whether some explanation in the explanatory report would suffice. It was pointed out that in any case the question whether a particular chargor, seller or lessor had rights in equipment situated in a particular country prior to the creation of the international interest, that is at a time when the equipment was subject to a particular national ownership regimen, was one that could only be answered by reference to the applicable law. Except to the extent that would be permitted under the Aviation Working Group’s proposal for the Convention’s coverage to be extended to ownership transfers and therefore for the international register also to record ownership, it was felt that the only alternative would be to essay a full-scale unification of the law governing proprietary rights in goods, a task that was however recognised to be beyond the scope of the current exercise. It was pointed out that this was one of those issues, like the characterisation of the different types of interest to be covered by the
proposed Convention, which would fall to be determined under the new interpretation provision which the Study Group had agreed to include at this session (cf. § 38 supra.)

Re Article 7(1)

46. – Article 7(1) as established by the Sub-committee had been framed in the form of alternatives, both designed to ensure that parties to agreements for an international interest were not forced to accept the application of the proposed Convention’s rules governing their rights and remedies. The only difference was that Alternative I gave the parties the right to opt into the application of these rules, whereas under Alternative II they were given the right to opt out of them. Alternative II had earned the support of both the Banking Federation of the European Union (cf. Study LXXII - Doc. 26, p. 4) and the Aviation Working Group (cf. Article 6(1) of the draft aviation text). The Study Group too decided in favour of Alternative II, in particular on the ground that Alternative I created the risk of a legal vacuum and the consequential need to refer to rules of private international law.

Re Article 7(2)

47. – The purpose of Article 7(2) was to ensure that, where the Unidroit Convention on International Financial Leasing (hereinafter referred to as the Unidroit Convention) was applicable and to the extent that there was an inconsistency between the terms of that Convention and those of the proposed Convention, the Unidroit Convention should prevail. It was suggested that it would be helpful for the judges who would be called upon to apply the proposed Convention to have a precise idea as to which provisions of the Unidroit Convention were envisaged in this provision. Such clarification might be provided either in the text of the Convention or in the explanatory report. It was agreed that an effort should be made to identify the relevant provisions of the Unidroit Convention but that one drawback of such a method was that great care would need to be taken not to overlook any such provision. Whereas it was clear that the main provisions of the Unidroit Convention envisaged in this provision were those dealing with the lessor’s default remedies (cf. Article 13 of the Unidroit Convention), it would also be important to consider the extent to which the formulation of the applicable law for the purpose of the determination of the public notice requirements to be complied with by a lessor under the Unidroit Convention (cf. Article 7(2) and (3) of that Convention) might have some impact on the formulation of the applicable law for the purposes of the future Convention. It was noted that the Aviation Working Group had specifically reserved its position on the relationship between the two Conventions (cf. Article 23(5)(c) of the draft aviation text), a matter which it intended to look at in due course.

Re Article 8

48. – Before looking at Article 8 of the first draft, which was designed to indicate that the parties were to be able to provide in their agreement as to what constituted default, the Study Group first considered the Aviation Working Group’s proposal for an additional limb to this article, providing that the parties should be able to choose the law governing all matters pertaining to their contractual rights and duties (cf. Article 7(a) of the draft aviation text). The principal objective of the Aviation Working Group’s proposal was to enhance legal certainty
and thus to minimise the overall degree of risk. The Aviation Working Group took the view that it was fair that the right to choose the law to govern such matters should be given to sophisticated business parties regularly dealing with such high-value equipment. It felt that it was fair in this way to give them the opportunity to exclude the operation of mandatory rules of law that might otherwise apply, while safeguarding the right of individual States to enter a reservation in this regard, should they not be willing as a matter of public policy to accept such a broad measure of party autonomy. There was general support within the Study Group for the Aviation Working Group's proposal. It was pointed out that the proposed Convention was essentially concerned with proprietary rights and did not therefore need to deal with the contract law aspects of the relations between the creditor and the debtor, which could be left to the parties' freedom of contract. It was however agreed that the drafting of the Aviation Working Group's proposal would need to be improved upon; it was submitted that, as drafted, it gave the impression that, for the parties to be able to choose the law to govern all matters pertaining to their contractual rights and duties, there had first to be a rule under the law of the forum which allowed the parties to choose such law. It was agreed that the provision should read:

"[t]he parties may provide in their agreement as to which law shall govern all matters relating to their contractual rights and obligations".

49. - Regarding the text of Article 8 as it appeared in the first draft, issue was taken with employment of the term "default", it being pointed out that the right to exercise of contractual remedies would typically be the result of factors which were external to the conduct of the chargor, buyer or lessee, but which were nevertheless matters on which that party was assuming a risk; for example, where a licence necessary for the operation of the equipment was withdrawn, the supplier of finance would normally expect the transaction to be unwound, even though the withdrawing of the licence was not necessarily the fault of the chargor, buyer or lessee. As a solution it was agreed that the provisions of Article 8 appearing in the first draft should be relocated after the articles intended to deal with default, i.e. Articles 9 - 11, and that the Drafting Committee should be invited to reformulate it along the following lines:

"The parties may provide in their agreement as to the events other than default giving rise to the rights and remedies specified in Articles 9 to 11".

Re Article 9(1)

50. - It was agreed that Article 9 was restricted to the rights in rem which a chargee could exercise upon default by the chargor, with all the rights in personam exercisable by the chargee on the basis of the security agreement falling to be determined in accordance with the applicable law under Article 11. A problem, however, arose as to the meaning of the words "or otherwise obtain the proceeds and other benefits of realisation of the object" featuring in the second part of Article 9(1)(a). It was explained that these words had originally been intended as a sort of residual category of remedies at a time when the text of Article 9(1)(a) appeared under Article 9(1)(g), that is when the remedies provided for under Article 9(1) were set out in reverse order. While there was general agreement that the word "realisation" was unhelpful in this context, it was felt that the words "or otherwise obtain the proceeds and other benefits of the
object" would serve to cover cases such as income arising from the management or use of an asset. It was explained that this could be a particularly important remedy in the project financing, say, of an oil field where upon the chargor's default, it might well prove difficult to find a buyer for the oil field, with the result that the only effective remedy open to the financiers would be themselves to take over the management of the project, together with the equipment forming part thereof, and to attempt to recover their investment out of any income arising therefrom. Exception was, however, taken to the word "otherwise" on the ground that it might permit the parties in their agreement to defeat the objective that all the rights in rem exercisable by the chargee upon the chargor's default should be set forth in the text of the proposed Convention. It was agreed that the right to collect or receive any income arising from the management or use of any charged object could fairly be considered a proprietary right, in so far as it was a right that derived from the asset, and should accordingly also be specifically set out in Article 9(1), whereas all other aspects of the process of management or use of such as asset, such as the ability to give instructions and to enter into contracts, were rather to be considered as associated contractual rights which fell properly under the scope of Article 11. It was agreed that it would as a result be necessary to reformulate Article 9(1) in such a way as to indicate that the remedies exercisable by the chargee upon the chargor's default were the taking of possession of any charged object, the selling of such an object or the granting of a lease in respect thereof and the collection or receipt of any income arising from the management or use of such an object.

51. — However, it was recognised that, since this would entail the chargee being entitled to collect or receive income arising from the management or use of the asset independently of a judicial sale, it would be necessary to make the same provision for such a remedy only being exercisable on the basis of a court order as had already been made in respect of the chargee's right to sell the charged object. In the light of this proposal it was agreed to broaden the application of the provision relating to the obtaining of a court order in relation to certain of the remedies contemplated under Article 9(1) to all three categories of remedy. It was felt that there was no good reason why the right to apply for a court order should be more limited than the other basic remedies to be provided under Article 9(1). A chargee might want to obtain a court order even where the granting of such an order was not strictly necessary for its exercise of a remedy. It was accordingly agreed that the remedies exercisable under Article 9(1) should be four: first, taking possession of any charged object; secondly, selling such an object or granting a lease in respect thereof; thirdly, collecting or receiving income arising from the management or use thereof; fourthly, applying for a court order authorising or directing any of the three aforementioned remedies.

52. — So as to avoid any inference that this was a matter left to be determined in accordance with the applicable law under Article 11, it was agreed that it was important for it to be clearly stated in the Convention that the chargee should be guaranteed any sum collected or received by that party as a result of his exercise of any of the remedies provided under Article 9(1) only up to the extent of the secured obligation. To leave the matter to the vagaries of the applicable law would mean that the chargee would run the risk that the applicable national law might not recognise this proposition. The advisability of stating such a rule in the Convention reflected the need to ensure that the remedies exercisable by the chargee under the Convention were consistent with the terms of the security agreement, as suggested by the Aviation Working Group.
53. - Related to this concern was the Aviation Working Group's proposal to delete the words "on reasonable terms" in Article 9(1)(c), the idea being that these were unclear and could lead to litigation and that it was better that this duty should be subsumed under a general reference to the terms of the security agreement. It was suggested that the desirability of the inclusion of an appropriate reference to the need for Convention remedies to be exercised in a reasonable manner should be viewed against the different approaches taken by the Civil law and Common law jurisdictions to the whole issue of the manner of exercise of remedies by a chargee and should be seen as an important factor in rendering the self-help remedies provided under the Convention acceptable to as many jurisdictions as possible. It was explained that the main reason why certain jurisdictions might be reluctant to accept self-help remedies was that the requirement in such jurisdictions that a chargee first go to court to obtain an order before being able to enforce his security interest was the method chosen to protect the interests of subordinate secured parties and unsecured creditors. In Common law jurisdictions, where self-help remedies were more common, they were backed up by extensive duties imposed on the chargee to obtain the best price and to act in accordance with a recognition of the interests other parties might have in the asset. It was suggested that a failure to impose analogous duties on a chargee seeking to exercise self-help remedies under the Convention might well constitute an impediment to the willingness of States to agree that self-help remedies should replace remedies exercised through judicial proceedings. It was agreed that the Convention should accordingly incorporate a general rule providing that the remedies exercisable by the chargee under its terms were to be exercised in a commercially reasonable manner. A suggestion that the chargee should also be required to act in good faith was rejected on the ground that the different views taken from one jurisdiction to another on the concept of good faith would mean that the introduction of such a requirement in the Convention would lead to uncertainty. In determining an appropriate standard of commercial reasonableness for the purposes of Article 9(1), it was agreed that reference should be had to the terms of the security agreement.

54. - Regarding the Aviation Working Group's proposal that the chargee's exercise of the remedies provided under Article 9(1) be made subject to the terms of the security agreement, in particular as regards the notion of "default", a term which, it was agreed, should under the Convention extend to cover events which were not, strictly speaking, events of default (cf. § 49 supra), it was agreed that this was superfluous in view of the Study Group's decision to opt for Alternative II of Article 7(1) (cf. § 46 supra). The terms of the security agreement therefore already controlled the exercise of the chargee's remedies under Article 9(1).

55. - It was agreed that the chapeau of Article 9(1) would have to be amended to reflect the fact that default for the purposes of Article 9(1) was not limited to default by the charger under a security agreement but was also intended to cover situations where it related to security granted by a third party. It was pointed out that this was a general point and that default, understood in the broad sense of an event triggering default, could be on the part of either party: it might be that the person owing the money did not pay just as it might also be that the owner of the property failed to keep up the insurance payments. It was accordingly suggested that, in so far as it had been agreed not to attempt to compile a list of the events constituting default but rather to leave these events to be defined in the parties' agreement, it should be possible in reformulating the drafting of this provision to avoid any mention of a particular party.
56. — It was pointed out that the default provisions contained in the first draft could, absent agreement by the parties to the contrary, be seen as rather draconian in their effect, in so far as they could be triggered by any event of default, however small. Even if it was true that these were matters which would almost always be the subject of detailed negotiation between the parties, it was suggested that the need to ensure the credibility of the future Convention, in particular the fair and balanced character of its provisions, in the eyes of States and national courts called upon to apply its terms militated in favour of the introduction of an element of materiality into the Convention's definition of default and the incorporation of the concept that a reasonable opportunity should be given to remedy the default in so far as the same was remediable. It was pointed out that, even if the main goal of the proposed Convention was to enhance legal certainty in such a way as to facilitate asset financing, it would also be important for the Convention to be perceived as fair and balanced from the point of view of those States Parties anxious to receive the benefit of such financing. Courts in most jurisdictions would in any case automatically imply requirements of materiality and the giving of a reasonable opportunity to remedy the default before, say, ordering the sale of an object for default. It was accordingly agreed that it would be better to follow the concepts of "fundamental breach" and "failure to remedy a breach within a reasonable period of time" employed in the United Nations Convention on Contracts for the International Sale of Goods\(^4\). It was stressed that such an amendment should not be seen in any way as depriving the parties of the right to write their agreement on these matters: it was only intended to operate in the absence of agreement to the contrary by the parties. The proposed Convention would continue to leave the parties free to vary such a rule, as it was acknowledged, they almost always would, inter alia by specifying any events other than default as attracting the remedies laid down in the Convention (cf. § 49 supra). Concern was nevertheless expressed regarding the manner in which the new standards introduced into the default provisions of the Convention might be interpreted by national courts, in particular in relation to the parties' ability to agree on events other than default as attracting Convention remedies. It was agreed that, in order to avoid the possibility of any such interpretation, the explanatory report should make it clear that this provision was intended to be capable of being varied or displaced by the parties in their agreement and was not intended to interfere with the parties' right, moreover proclaimed under the Convention, to specify any events other than default as attracting the remedies of the Convention.

*Re Article 9 (2)*

57. — Article 9(2) had been conceived to enable a Contracting State, at the time of signature, ratification, acceptance, approval or accession, to enter reservations with regard to the remedies provided under Article 9(1)(b) and (c). The effect of these reservations would be to enable a State availing itself of such reservations to deny the exercise of the aforementioned remedies in cases where the charged asset was situated on its territory. It was suggested that a State should also be able to enter such a reservation in respect of the additional remedy to be incorporated in the reformulation of Article 9(1), to wit the right to collect or receive any income arising from the management or use of such an asset. It was however pointed out that the application of such a reservation could cause serious problems in so far as the asset might be situated in one State and the income deriving from its management or use received in a

\(^4\) Reference was also made in this connection to the concepts of "substantial default" and "the giving of a reasonable opportunity of remedying the default so far as the same may be remedied" employed in the Unidroit Convention.
different State. There were two scenarios in which the application of such a reservation would
be fraught with problems. In the first of these, the State where the charged object was situated
was a Contracting State which had not availed itself of the reservation whereas the State where
the income was received was a Contracting State which had availed itself of the reservation. In
the converse situation, the State in which the charged object was situated was a Contracting
State which had availed itself of the reservation whereas the State where the income was
received was a Contracting State which had not availed itself of the reservation. It was
suggested that there was no perfect solution to this problem so long as the intention was to
permit non-uniformity, although, to the extent that the income being referred to would be a
material portion of a financing package, the place where the income was to be received would
be a matter that would frequently be within the control of the parties, who would thus have
some initial control over structuring the management of the asset in such a way that it would
not be subject to the jurisdiction of a Contracting State requiring the granting of a court order.
As a possible solution it was agreed that consideration should be given to the Aviation
Working Group’s proposal for using the concept of the "relevant Contracting State" (cf. Article
12(2) of, and § 38 of the Annexure to the draft aviation text) as a defined term for the purposes
of the Convention in general and for the purposes of reservations in particular. It was pointed
out that for aircraft it had been suggested by the Aviation Working Group that the relevant
Contracting State both for these purposes and also in the context of the assignment of contract
rights should be the country of registration of the aircraft.

58. – Taking its cue from the Aviation Working Group’s proposed Article 12(2), the
Study Group agreed to combine Article 9(2) with Article 12, on the ground that “the
procedural law of the place where exercise of the remedy is sought” might well form the basis
of a requirement for judicial intervention and assistance. It was agreed that under this solution
the drafting of Article 12 should be reformulated in such a way that that provision, introduced
by a clause stating “[s]ubject to paragraph 2”, should form paragraph 1 of the new Article,
paragraph 2 of which would have the effect that the need to require judicial intervention in
connection with the exercise of the chargee’s remedies under Article 9(1) would only arise if
the relevant Contracting State had made a reservation in respect of the Convention’s self-help
remedies. This solution was seen as having the merit of ensuring consistency between the
application of the rule laid down in Article 9(2) and that of the rule laid down in Article 12.
Otherwise it was possible that a Contracting State might not have made a reservation under
Article 9(2) but the exercise of self-help remedies might turn out to require judicial intervention
under the procedural law of that State in accordance with Article 12. It was suggested that such
a rule could be of great importance in facilitating adoption of the future Convention by those
developing countries which, while not wishing to undertake the overhaul of their procedural
law that the entering of such a reservation might entail, might nevertheless see the Convention
as an invaluable tool to attract foreign financing.

59. – The Aviation Working Group further suggested that there was no good reason
why the Convention should operate a distinction, for the purposes of the applicability of the
reservation facility contemplated under Article 9(2), between those remedies available to a
chargee upon default in the performance of a secured obligation and those available either to a
seller upon default by the buyer under a title reservation agreement or to a lessor upon default
by the lessee under a leasing agreement. It was agreed to extend the power of a Contracting
State, by means of a reservation, to require judicial intervention in such a way that it would
apply equally to security agreements and to title reservation and leasing agreements. It was understood that Contracting States should be free to enter such a reservation in respect of all or whichever of the three types of agreement they wished. It was suggested that this could be clarified both by an appropriate reference in the explanatory report and by the addition of the words "and to the extent" after the word "unless" in the penultimate line of Article 12(2) of the draft aviation text. It was noted, for instance, that the entering of such a reservation should only be necessary in Civil law jurisdictions for the exercise of self-help remedies in the context of a security agreement. Whereas it would not be possible in Italy for the holder of a hypothec upon default by the debtor to sell the asset without going to court, an Italian lessor would, upon the lessee's default, be able to terminate the leasing agreement and recover possession of the asset without going to court, that is, unless the lessee objected.

60. – In combining Article 9(2) and Article 12, it was agreed that sight should not however be lost of Article 9(2)(b), the idea of which had been inadvertently omitted from Article 12(2) of the draft aviation text. Whereas the purpose of Article 9(2)(a) was to permit Contracting States to enter a reservation simply requiring the intervention of the court before the chargee could take possession under Article 9(1)(b), the purpose of Article 9(2)(b) was to permit Contracting States to make a reservation regarding the very possibility of the chargee being able to sell or grant a lease of a charged asset under Article 9(1)(c). It was agreed that the intention in combining Article 9(2) and Article 12 should be to preserve the effect of the whole of Article 9(2) while dealing with it in a different manner.

Re Article 9(3)

61. – It was agreed that the same amendment would be necessary to the opening words ("at any time after default by the chargor") as had been made in the chapeau of Article 9(1) to take account of the fact that the chargor might be either the debtor or a third party (cf. § 55 supra).

62. – Since the effect of the chargee's exercise of the remedy provided for under Article 9(3), which corresponded to the Common law remedy of foreclosure and to the Civil law remedy of "attribution judiciale de la propriété du bien" (cf. Article 1278 of the French Civil Code), was to extinguish the interests of both the chargor and any junior chargee in the asset, it was recognised that it would be necessary to provide some mechanism in the Convention to ensure that the interests of such junior creditors were not adversely affected by the chargee's exercise of his remedy. The chargor's interests were considered to be already adequately protected in so far as it was provided that the parties could only agree to ownership vesting in the chargee after default, which gave the chargor sufficient opportunity to signal his disagreement. It was agreed that the best means of ensuring the protection of junior chargees in relation to the forfeiture of their interests that would follow from the chargee's exercise of the remedy provided for under Article 9(3) was to require their consent. As a means of enabling the senior chargee to determine with a sufficient degree of definiteness the category of junior chargees whose consent should be required, it was agreed that inspiration should be taken from American and Canadian models in requiring only the consent of those parties with registered interests, filed in the international register, in the asset at the time and those having given the senior chargee written notice of their interest in the asset. The onus would thus be on a junior chargee who had neither registered his interest nor given the senior chargee written notice
thereof to make his interest known, whether by going to court or by filing. It was agreed that, where the senior chargee considered that a junior chargee was withholding his consent unreasonably or it had proven impossible to locate a junior chargee, the senior chargee's remedy, assuming that there appeared to be no surplus value in the asset after satisfaction of the secured obligation, should be to apply to the court for an order overruling the junior chargee. Where, on the other hand, there appeared to be some surplus value in the asset and/or the senior chargee wished to avoid having to obtain the consent of those junior chargees on the record, the senior chargee's remedy would be to sell the asset and, in accordance with Article 9(7), to hand over any surplus to registered junior chargees, to the extent of their interest.

63. – It was agreed that, in order to take account of the different parties whose consent would be required to the chargee's exercise of his remedy under Article 9(3), the term "the parties" should be replaced by the term "the interested persons" and that these persons should in a separate provision be defined for the purposes of the application of Article 9(3) et seq.

64. – It was further agreed that the drafting of Article 9(3) would need to be amended by aligning it on that of Article 9(7) as regards the effect of the vesting of ownership in the chargee. The purpose of such an amendment would be to make it clear that the vesting of ownership in the chargee under the former should be effective to pass title to that party free from any other interest over which the chargee's security interest had priority under the provisions of Article 19.

Re Article 9(4)

65. – It was pointed out that the way in which the provision was drafted meant that it was open to two interpretations by a court seised of a case. On one reading, it could be interpreted as directing the court simply to satisfy itself that the value of the asset was reasonably commensurate with the amount of the obligation to be satisfied by the vesting of ownership, and, if so satisfied, to go ahead and grant an order vesting ownership in the chargee, but nothing more. On an alternative reading, a court might however view itself as being directed, in a case where the value of the asset, as ascertained before that court, was higher than the outstanding debt, also to order that the difference be handed over to the chargor or to junior chargees. In response, it was recognised that the drafting of this provision could be improved upon in a number of respects. First, it was suggested that the words "in exercising its powers" should be reformulated so as better to reflect the intention that lay behind them, that is, they should be understood in the sense of "in deciding whether to exercise its powers" to make an order for forfeiture of the asset in favour of the chargee. Thus, if the court found that the outstanding indebtedness amounted to £100,000 but that the asset was worth £1,000,000, it would be justified in declining to grant such an order. The idea was that, in deciding whether to grant an order, the court should satisfy itself that the value of the asset was reasonably commensurate with the amount of the outstanding indebtedness. It was however also agreed that, where the value of the property exceeded the amount of outstanding indebtedness, the court should be free to make it a condition for its granting of an order that the senior chargee should pay the difference to the chargor or, if there were any junior interests on the international register or of which he had been given written notice, to the holders of such junior interests. It was further agreed that the duty imposed on the court by Article 9(4) should
be couched in the form of a more explicit statement, making it clear that the court should grant an order only if it was satisfied that the amount of outstanding indebtedness was reasonably commensurate with the value of the property after account had been taken of any payment to be made by the senior chargee to any of the interested persons referred to in the context of Article 9(3) (cf. § 63 supra).

66. — It was pointed out that it was entirely up to the chargee to decide whether he was willing to accept an asset worth substantially less than that part of the debt which was being extinguished. Whilst it was true that the debtor would in such a case need to be informed of the balance of his debt, it was however felt that the question of whether the debtor should in such a case be notified was a question of detail with which the future Convention should not be concerned.

Re Article 9(5)

67. — This provision had its origin in the desire to ensure that the term "court" as employed in Article 9(3) be understood as encompassing those arbitral tribunals having lawful authority under national law to bind parties in the same way as courts did under other jurisdictions, in particular the arbitration courts which in the Russian Federation occupied an intermediate stage between State courts, which mostly handled criminal cases, and arbitral tribunals; to all intents and purposes these arbitration courts were like State courts, handling commercial cases of the kind envisaged in this context. It was not to be seen as prejudicing the broader question of jurisdiction under the proposed Convention which was to be dealt with in a separate Chapter IX. It was simply designed to permit a Contracting State, where and to the extent that its courts were called upon to make an order under Article 9(3), to designate the courts or tribunals on its territory that were to be empowered to make such an order, although it was suggested that this was something a Contracting State could do without such a declaration. There was some support for following the Aviation Working Group's approach to this kind of issue, consisting in treating it as a question of definition (cf. § 10 of the Annexure to the draft aviation text), although it was at the same recognised that it would be somewhat unusual to provide a definition of a court in an international commercial law instrument. In the circumstances, it was agreed to maintain the provision in square brackets so as to indicate that it raised a matter to be resolved at a later stage.

Re Article 9(6)

68. — The Banking Federation of the European Union in its comments on the first draft (cf. Study LXXII - Doc. 26, p. 4) had proposed that the chargor should only be able to redeem the charged asset prior to its sale or the making of a court order vesting ownership in the chargee after paying all legal costs incurred by the chargee. It was agreed that the question as to what was and was not secured was a matter for the security agreement: if what was secured included legal costs, these would have to be paid by the chargor, whereas if the security agreement did not so provide then it would follow from the terms of the security instrument that, even though such a payment might be due, it could not be a condition for the redemption of the security.
69. – Taking inspiration from Article 8(5) of the draft aviation text, it was agreed that there would be some advantage in replacing the word "buyer", which was the term otherwise employed in the Convention to refer to a buyer under a title reservation agreement, by the term "purchaser" to refer to the person who was acquiring the charged asset under this provision.

70. – It was agreed that it would be more accurate for the expression "above what is due to the chargee" referring to a surplus to state "above the sum secured by the security interest", since if the obligation was not secured the rule would not apply.

71. – The Aviation Working Group had proposed incorporating in the Convention regimen the concept of a registrable national interest which was not a consensual security interest. It was agreed that the repercussions of this proposal on this provision should be looked at subsequently in the light of the Study Group's consideration of that proposal in the context of the Convention's rules on priorities.

72. – In their comments on the first draft (cf. Study LXXII - Doc. 26 Add. 1, p. 4), Professor Mooney and Mr Whalen asked first that it be made clear that nothing in this provision precluded the chargee from having recourse to the available judicial procedures to determine the priority as between holders of other registered international interests in the charged object for the purposes of this provision if he wished to pay the surplus into court. It was agreed that this clarification did not require any specific amendment to the text but could be dealt with in the explanatory report. Secondly, Professor Mooney and Mr Whalen proposed that the enforcing chargee should, for the purpose of determining the order in which any surplus should be distributed among such other registered international interest holders, be entitled to rely on the order in time in which their interests were filed in the international register as opposed to the actual ranking of these interests which might turn on any number of factors, including knowledge and subordination agreements. As a preliminary point, it having been pointed out that the "procédure d'ordre" regimen as applied in enforcement proceedings brought in Civil law jurisdictions might well be the most appropriate means of resolving such conflicts between different registered creditors in the case of judicial sales pursuant to Article 9(1)(a), the Study Group was agreed that the rule in Article 9(7) only envisaged non-judicial private dispositions of a charged object. It was agreed that it would be desirable in this context for the Convention to provide a mechanism on which the senior chargee would be entitled to rely for the purpose of determining the order in which any surplus should be distributed as between other competing registered international interest holders. The solution adopted by the Study Group was to require the senior chargee to give notice of a sale to the chargor, to registered international interest holders and any other junior interest holders who had given him notice of their interests and to any sureties who had given guarantees direct to him. To the extent that the Convention's priority rules were not intended to deal with priorities as between consensual and non-consensual interests, the latter would remain governed by the applicable law so that, if a preferred lien creditor for taxes were given priority under the applicable national law, any sale under the Convention would however only take effect subject to that party's priority which would continue to attach to the equipment. It was pointed out that the parties to whom the senior chargee would have to give notice under the amendment agreed to
this paragraph would be the same as those whose consent the senior chargee would be required to obtain under the amendment agreed to Article 9(3) (cf. § 62 supra), which would simplify the drafting amendments to be made by allowing the same formulation to be employed in respect of the definition of the parties contemplated under both paragraphs.

*Re Article 10*

73. – No comments were proffered on this provision (although cf. § 59 supra).

*Re Article 11*

74. – Concern was voiced among Civil law representatives as to the manner in which the right to agree upon additional proprietary remedies conferred upon the parties under Article 11 might be seen as being at variance with the autonomous character of the international interest as proclaimed in Article 1(1). It was feared lest in this way the physiognomy of the international interest might be so altered as to undermine the very uniformity which the proposed Convention was designed to create. It was pointed out that the rigidly compartmentalised structure of Civil law systems would make it impossible for them to graft remedies drawn from analogous interests (for instance, the *nantisement du matériel et de l’outillage* of French law) onto the international interest, all the more so since the concept that it embodied had hitherto been totally unfamiliar to them. It was explained that the purpose of Article 11 was to indicate that the list of basic in *rem* remedies granted under Articles 9 and 10 was not intended to exclude the availability of those other remedies, whether contractual or proprietary (such as the right for the chargee to have a receiver appointed to manage the property or to collect the income deriving therefrom), that were consistent with the foregoing provisions of Chapter IV, in particular with the significant safeguards built into these provisions for the protection of the interests of other parties, and would be permitted by the applicable law. Article 11 was therefore to be seen as an answer to those who might otherwise argue that the Convention had intended to exclude the exercise of contractual remedies or proprietary remedies other than those laid down in Articles 9 and 10. It was clear that some of these additional remedies would be known to some legal systems and unknown to others and accordingly would be enforced in some and not in others. It would accordingly be for the applicable law as determined by the rules of private international law of the forum to determine whether in a given case such additional remedies were or were not enforceable.

75. – It was pointed out that the words "[t]he parties may agree upon any additional remedies ... to the extent that they are ... permitted by the applicable law" were misleading in that they gave the impression that the parties could, from the very outset of their transaction, know which law would govern the determination of their real rights in the event of a dispute arising, whereas, concerned as they were with highly mobile equipment regularly crossing national frontiers, the law applicable to the determination of such rights was likely to change just as regularly. It was suggested that one solution would be to reformulate the provision in such a way that the reference to the parties' agreement disappeared. There was moreover no reason why this provision should exclude the exercise of remedies that might be available independently of any agreement between the parties. It was suggested that there might, however, be some advantage in maintaining a reference to the parties' agreement to cover the case where the parties might wish to limit the remedies to be exercised. It was pointed out that
this problem could be dealt with under Article 7(1). In the light of the Study Group's consideration of this article, it was agreed that it should be reformulated along the following lines:

"Any additional remedies permitted by the applicable law may be exercised to the extent that they are not inconsistent with the provisions of this Chapter".

It was agreed that it would be advisable to use the words "not inconsistent" rather than the word "consistent" so as not to eliminate a remedy like the appointment of a receiver.

Re Article 12

(cf. §§ 57 - 60 supra)

Re Article 13

76. – This provision was considered to be redundant in view of the decisions taken by the Study Group in respect of a new Article and of Article 11 (cf. §§ 38 and 74 - 75 supra).

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CONSIDERATION BY THE DRAFTING GROUP OF THE AMENDMENTS TO THE FIRST DRAFT PROPOSED BY THE STUDY GROUP

77. – The Drafting Group met twice, on 13 and 15 April 1996, to revise Articles 1 - 4 and 6 - 12 of the first draft in the light of the Study Group's first reading of that text. These articles as revised by the Drafting Group are reproduced in Appendix IV to this report. It was agreed that Article 5 and Articles 14 - 18 would be left to be dealt with by the Working Group set up to consider the legal and technical issues raised by the establishment of an international register (cf. § 39 supra).

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CONSIDERATION OF OTHER ISSUES

78. – The Study Group further engaged in a general discussion of the following additional issues:

(1) proposals made by the Aviation Working Group concerning the relationship between the international interest and non-consensual national interests, in particular those held by preferred lien creditors (cf. §§ 79 - 83 infra).
(2) the priority rules proposed in Article 19 of the first draft, which would need to be substantially revised in the light of other decisions taken by the Study Group (cf. §§ 84 - 92 infra);

(3) Chapter V of the draft aviation text (cf. §§ 93 - 99 infra);

(4) proposed new Chapter VII of the first draft (cf. §§ 100 - 105 infra);

(5) Chapter VIII of the draft aviation text (special provisions for aircraft property) (cf. §§ 106 - 112 infra);

(6) jurisdiction (cf. §§ 113 - 117 infra);

(7) the relationship of the future Convention to other existing Conventions (cf. § 118 infra);

(8) additional issues suggested for inclusion in the future Convention (cf. §§ 119 - 123 infra).

Re the relationship between the international interest and non-consensual national interests

79. — Mr Wool explained that the thinking behind the Aviation Working Group's proposals on this matter (cf. Article 22(1)(b) of, and § 26 of the Annexure to the draft aviation text) was that the future Convention should provide a clear rule for the settlement of priority disputes between the holders of international interests and the holders of non-consensual national interests of whatever kind, but in particular those held by preferred lien creditors, for example, the revenue authorities. The Aviation Working Group proposed that non-consensual national interests held in specifically identified mobile equipment of the kind encompassed by the Convention should be registrable interests for the purposes of the latter and that, once filed in the international register, should enjoy priority as from the date of filing. It further proposed that the Convention should institute a procedure permitting States at the time of ratification or accession to disclose that class of creditors which under their national law would prevail over registered interests, whether international interests or non-consensual national interests. The effect of the Aviation Working Group's proposals was that an interest duly filed in the international register, whether it be an international interest or a non-consensual national interest, would enjoy priority over all interests that were not so filed or were filed subsequently, with the exception of those preferred national liens notified by States at the time of ratification or accession. Such a procedure would, it was agreed, both enable States to safeguard their preferred national creditors and enhance legal certainty for financiers as to the classes of national creditors that would prevail over their interests in disputes that might arise in such States.

80. — It was explained that non-filing of a non-consensual national interest in the international register under the Aviation Working Group's proposal was not, however, intended to have the effect of invalidating that interest; it would simply subordinate that interest in the event of a priority dispute to that of a party having duly filed its interest in the international register, regardless of whether the interest of this last-mentioned party was later
in time. Such an unregistered interest would nevertheless remain valid against the debtor and the debtor's trustee in bankruptcy wherever under national law it would be valid as against those parties without filing.

81. - It was provisionally agreed that the question of whether a particular non-consensual national interest would be registrable in the international register was a matter that would have to be determined by the applicable law. It was further provisionally agreed that the question of whether such non-consensual national interests should be registrable equally whether they were interests that were triggered only by judicial attachment (for instance, where a judgment creditor instituted execution against an identified piece of mobile equipment) or interests that arose automatically under some national laws (for instance, liens for the payment of airport dues) was likewise a matter that would fall to be determined by the applicable law. It was in this connection pointed out that, under the Aviation Working Group's proposal, it would be possible for Contracting States, by including such automatic attachments on its list of preferred national liens, to ensure that these liens did not have to be registered in the international register. It was suggested that the idea should be explored of making preferred liens attaching automatically outside insolvency registrable in the international register. There was some support for this idea, acknowledged however to be very ambitious in so far as one of the principal reasons why certain States had not become Parties to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft (hereinafter referred to as the Geneva Convention) was the way in which that Convention had the effect of overreaching the claims of local tax authorities. It was moreover pointed out that such a distinction might prove hard to operate in the type of case with which the future Convention would prevalently be concerned, that is one in which the equipment would typically be attached in a different State from that where the debtor was declared bankrupt.

82. - The question was raised as to whether the international interest was intended to prevail over a class of preferred national lien that a particular State had overlooked when making its declaration at the time of ratification or accession as well as those preferred national lien creditors that a State might wish to add subsequently. It was explained that the intention was that the holders of international interests should as a rule prevail over such undeclared preferred national lien creditors for as long as that particular class of creditor remained undeclared by the State in question and the holder of the international interest had filed his interest in the international register. It was nevertheless agreed that in the special case of bankruptcy, where a State had forgotten to declare a particular class of preferred national lien creditor under the Convention, it would be for the applicable law to determine whether that preferred interest should in fact prevail over the international interest. It was in any case the intention under the Aviation Working Group's proposal that States should be free to amend the list of their preferred national lien creditors at any time.

83. - The Study Group concluded by expressing itself to be broadly in favour of the Aviation Working Group's proposals designed to enable the filing on the international register of non-consensual national interests that gave rise to a local attachment and to create a procedure permitting States to declare which classes of preferred national lien creditor should prevail over holders of registered international interests. It was pointed out that these proposals had the merit of extending the protection afforded by the international register to non-consensual national interests and of permitting the establishment of a priorities rule providing
that an interest filed on the international register should enjoy priority over any interest, whether consensual or non-consensual, not so filed or filed subsequently and not featuring on the list of preferred national lien creditors declared at the time of States’ ratification or accession. It was however suggested that States be exhorted to keep their list of preferred national lien creditors as short as possible, it being pointed out that, in respect of tax liens for example, there would be little chance of potential tax-payers being able to pay taxes if they were not able to lay their hands on the equipment in the first place. Reservations were however expressed, on the one hand, as to the freedom States would be given under the Aviation Working Group’s proposal to choose which of its preferred national lien creditors should prevail over the international interest and, on the other hand, as to the extent to which it was realistic to expect States in effect to give public notice in respect of those lien creditors granted preferential status under their domestic law when the national law providing for those preferences was by definition statutory in origin and especially when their enforceability under national law was itself not conditional upon the giving of public notice and would normally be regarded as a matter of public policy. It was suggested that consideration might usefully be given to the idea, already canvassed in the context of Article 9(7) (cf. § 72 supra), of providing for a procédure d’ordre to determine priorities as between competing creditors, including preferred national lien creditors.

Re the priorities regimen to be established under the Convention

84. – The Study Group conducted a general discussion of the issues raised by Article 19 of the first draft without however considering in any detail the specific provisions of that article which would have to be substantially revised in the light of, first, the Study Group’s provisional decision to adopt the Aviation Working Group’s recommendations regarding the relationship between the international interest and non-consensual national interests and preferred national lien creditors (cf. §§ 79 - 83 supra) and, secondly, its approval of the concept that an international interest could be perfected in any order but that, once all the steps necessary for perfection had been completed, priority would date from the time of filing (cf. § 31 supra), necessitating some modification of the definition of the term “registered international interest” for the purposes of the Convention so as to make it clear that what was meant by that term was an interest as regards which there had been a filing, whether or not at the time of filing the interest was a full interest.

85. – It was agreed that it would be desirable to try to find a less oblique definition of bankruptcy than that contained in the first draft (cf. Article 19 (4)(b)).

86. – It was confirmed that, in line with Article 19(6) of the first draft, nothing in the priorities rules of the future Convention was intended to interfere with any special rules of local insolvency law regarding the avoidance of transactions.

87. – It was made clear that the filing of an international interest in conformity with the proposed Convention could not by itself create an international interest enforceable as against third parties. In order for a registrable international interest to be created, all the requirements of Article 6 of the first draft would first have to be satisfied. For example, in order to grant an international interest over a specific piece of mobile equipment the charger would have to have a power of disposal over the asset in question, which might in some jurisdictions include an
interest derived from possession. The question whether the filing of an international interest could cure possible defects in the chargor's title was left open, although, in the specific case where, after the chargor had purchased a piece of mobile equipment and an international interest had been filed, the contract of sale had been declared void and the initial seller claimed the return of the equipment, it was tentatively suggested the international interest might be considered to have disappeared once the chargor's interest in the equipment was no longer valid.

88. - It was agreed that it might be sensible in drawing up the future Convention's priorities rules, to distinguish between security agreements, on the one hand, and title reservation and leasing agreements, on the other. The need for the drawing of such a distinction emerged in the course of the Study Group's consideration of the relationship between the holders of international interests and preferred national lien creditors (cf. §§ 79 - 83 supra). It was pointed out that, whereas in the case of a security agreement a chargee, notwithstanding the giving of public notice, would still be in competition with preferred national lien creditors of the debtor, in the case of a financial leasing agreement in certain jurisdictions the lessor, as owner of the equipment, once he had given public notice of his ownerships rights, would have an interest enforceable against all third parties, including preferred national lien creditors of the lessee. The characterisation of leases for the purposes of such a distinction would have to be left to be determined by the applicable law. It was suggested that this problem might usefully be considered in the context of the Aviation Working Group's proposal to permit the filing in the international registry of outright transfers under contracts of sale (cf. § 16 supra). Were the Study Group to accede to this proposal, a lessor would be able to file his rights as owner/ transferee in the international register and it was suggested that there might not then be any point in requiring him also to file his lease interest in the international register.

89. - Clarification was sought as to whether, in a case where a chargor successively granted over the same mobile equipment, first, a national security interest to one chargee and, secondly, an international interest to another chargee and the international interest was filed in the international register, the international interest would prevail over the national interest, even though the latter had been created first. It was suggested that Article 19(3) seemed to indicate that it would not. It was explained that, although it was theoretically conceivable to have a national interest in the type of equipment encompassed by the future Convention that would not also be an international interest, in nearly all cases, because of the way in which the definition of an international interest was framed, namely in terms of mobile equipment, a national interest would also be an international interest so that the problem of their relative priority would in fact fall to be resolved according to the basic priority rule of the Convention, that is on the basis of which was registered first.

90. - It was agreed that Article 19(4) should be revised to make it clear that a national interest valid under the applicable law would remain valid against the trustee in bankruptcy and unsecured creditors of the chargor, buyer or lessee regardless of whether or not a filing had been made in the international registry (cf. Study LXXII - Doc. 26 Add. 1, pp. 6-7). This had to be seen in the overall context of the need, in making the proposed Convention as acceptable as possible to States, to demonstrate that it would disrupt current national practice as little as possible.
91. - Clarification was sought as to the meaning of the term "valid" as employed in Article 19(4)(a), in particular in the context of each of the different types of interest (security interests *stricto sensu*, the seller's interest under a title reservation agreement and the lessor's interest under a leasing agreement) encompassed in the concept of the international interest. It was explained that, to the extent that the national insolvency law would find it relevant to know how the particular interest would be characterised at the pre-insolvency stage, that is what was the status of that interest outside insolvency to which the insolvency law rules of that State would respond, the idea was that each should apply the characterisation that would follow from the application of its own conflicts of law rules. The rule proposed here was modelled directly on Article 7(2) of the Unidroit Convention and was predicated on the assumption that each State's insolvency law rules recognised the principle that parties other than the debtor might have proprietary interests in the assets involved and in general respected such proprietary interests, not therefore tending to confiscate them in the interests of the debtor's estate. It was on this assumption that Article 19(4)(a) proposed that in insolvency proceedings national law should recognise, respect and therefore, in one way or another, preserve the interest held by the holder of an international interest as a right *in rem*. The restriction on this substantive law rule set out in Article 19(6) however reflected the fact that it was not intended to interfere with any special rules of national procedural law applicable in insolvency proceedings, for example rules against fraudulent transfers and preferences on the eve of bankruptcy and regarding whether the court could order the sale of an asset in which parties other than the debtor had proprietary interests. It was explained that, in the context of the realisation of an asset subject to an international interest, this meant that it would be for each State to apply its own national insolvency rules in determining the process to be followed, and thus whether or not this involved sale of the charged asset by the trustee/liquidator with the latter accounting to any secured creditors for the proceeds. It was pointed out that in some jurisdictions, such as France, the rules applicable in insolvency proceedings would permit such a sale, whereas in others, such as the United Kingdom, they would not, charged assets under these legal systems not being considered bankruptcy assets. It was agreed that, to the extent that it would probably be difficult to provide such clarification in the text of Article 19(4)(a) itself, this was a matter that should be addressed in the explanatory report.

92. - Professor Mooney and Mr Whalen in their comments on the first draft (Study LXXII - Doc. 26 Add. 1, p. 6) proposed that, if the Convention were to retain the special priority exception for a registered international interest holder making discretionary advances with knowledge of a subsequent registered interest, a similar exception be considered to the priority rule contained in Article 19(3) so as to avoid the possibility of circular priorities created by the application of Article 19(1) with Article 19(3).

*Re Chapter V of the draft aviation text*

93. - Chapter V of the draft aviation text, in particular Articles 13 and 14, was designed to ensure, on the one hand, the availability of expeditious judicial remedies for the recapture of charged assets and, on the other, that the insolvency process did not inhibit enforcement action. Both the aforementioned provisions were intended to be optional. Contracting States would be free to indicate, at the moment of ratification or accession, in accordance with Article 31(2) of the same draft aviation text, whether they wished to apply them or not. The Aviation
Working Group's decision to present these proposals as optional provisions was designed to take account of the sensitive nature of the issues involved. While these proposals might be found to be equally relevant to equipment other than aircraft equipment, they were based on considerations which applied with particular force in the context of aircraft financing, where many debtors and lessees were Government entities, and might therefore be calculated to make them especially acceptable in that context rather than in others. The principal motive behind these proposals was to facilitate the secured party's access to the charged asset in the event of default or bankruptcy, seen as an essential prerequisite to the encouragement of asset financing. It was the considered opinion of the Aviation Working Group that an important element in the creation of that degree of legal certainty necessary to bring about this result was the ability for prospective financiers to know that, in the event of default and/or insolvency, their right to repossess and sell a charged asset would be enforced on a reasonable time scale. Evidence had been submitted to the Aviation Working Group attesting to the way in which the pricing of secured financing transactions was directly related to perceptions of the probable timetable for repossession and sale in the event of default and/or insolvency. Attention was drawn in this context to the way in which the timetable laid down for repossession by a secured creditor or a lessor of its asset in Section 1110 of the U.S. Bankruptcy Code, on which Article 14 of the draft aviation text was based, was seen as permitting the pricing of secured financing transactions. The Aviation Working Group believed that the inclusion of such optional provisions would significantly improve the future Convention's chances of opening up asset financing possibilities for aircraft. It was noted that the Aviation Working Group was not wedded to the wording of its proposed new articles and was committed, at the request of Unidroit, to the building of further consensus both within the aviation industry and in Government circles regarding the concepts embodied therein.

94. - Concern was expressed by certain members of the Study Group lest Article 13 of the draft aviation text be seen by States as unduly interfering in the exercise of their judicial sovereignty and Article 14 of the same text as unduly interfering with their national insolvency laws, in direct contrast, moreover, with the philosophy underlying Article 19(6). These same members of the Study Group stressed how vital it would be as a matter of general policy for the rules of the future Convention to be perceived as reflecting a balance between the interests of all the parties concerned, as well as responding to the underlying objectives of the Convention, and as being consistent with the requirements of other branches of the law, in particular the law governing insolvency procedures. It was however submitted that the optional character of the proposed provisions should somewhat mitigate these concerns, in particular where Article 14 of the draft aviation text was concerned.

95. - While there was nevertheless recognition within the Study Group of the importance of the goal that underlay the Aviation Working Group's proposals in this regard, to wit the need to ensure that the remedies to be conferred under the proposed Convention on the holders of international interests were effective in practice, this was therefore tempered by an awareness of the need to tread carefully with regard to the sensitivities of States in the formulation of the rules designed to achieve this goal. It was in particular feared that courts might experience difficulty in seeking to comply with the very short time-limits allowed for the completion of judicial proceedings under Article 13 of the draft aviation text, a factor that would depend upon the conduct of litigation in a disputed case. It was recalled that the Aviation Working Group was concerned not so much with the wording of the provisions
proposed but rather with the fundamental notion underlying the same. This led to support
developing for the seeking of a method by which the objectives identified in Articles 13 and 14
of the draft aviation text could be formulated in a manner that would be perceived as somewhat
lighter from the point of view of their potential interference with the sensitivities of States.

96. – In respect of the issues raised by Article 13 of the draft aviation text, it was
suggested that what was needed was a formula in effect enjoining States to complete judicial
proceedings in the most expeditious manner possible under their law. It was agreed that in
practice the chargee’s single most effective weapon in the type of circumstances contemplated
was the ability to obtain interim injunctive relief to have the asset held in one place rather than
the ability to have it actually delivered up within a set time\(^{(*)}\). This led the Study Group to
decide that the most appropriate solution in the circumstances was to empower the chargee,
seller or lessor to apply to the court for interim relief or similar provisional measures. The aim
of such relief would be to order whatever might be necessary in the particular circumstances of
the case to protect the position of the chargee, seller or lessor, as the case might be, whether
this take the form of preservation of the charged asset or the possession, the management or
even, if necessary, the sale of the same. It was recognised that the advantage of this solution lay
in the manner in which it would permit the court to make an order by way of interim relief
without having to adjudicate on the merits of the case so that in contested litigation the court’s
consideration of the substantive issues need not hold up questions relating to the granting of
interim relief. It was explained that there were two fundamental elements in the solution
adopted by the Study Group. First, there was the ability to have the asset held in one place
under judicial supervision and control, a matter of great importance to the chargee who would
not want to find that, when the case came to court, the asset was no longer in the jurisdiction
with the risk that it might be for another court in the jurisdiction to which the asset had
moved to deal with the case or that it had not been properly preserved. Secondly, the court
would have the power to appoint a receiver to realise the value of the asset as speedily as
possible, thus meeting the principal concern of financiers in such cases, namely to ensure that
the complexity of the substantive issues to be decided should not imperil the realisation of the
value of the asset.

97. – While there was widespread agreement on the principle of the solution adopted by
the Study Group, a decision in respect of which Mr Wool nevertheless reserved the position of
the Aviation Working Group for the time being, hesitations were voiced by certain members
of the Study Group as regards the modalities of achieving the desired result. Whilst it was true
that each legal system had its own speedy interim relief procedures, it needed to be borne in
mind that, if the Study Group were to pursue the route it appeared to have chosen of including
a rule in the future Convention imposing on Contracting States the duty to follow a particular
form of such procedure, it ran the risk of creating major difficulties for itself, insofar as it
would thereby be proposing rules of civil procedure special to the future Convention which
would have to be added to the rules of civil procedure of each State. Hesitations were also
expressed as to the wisdom of purporting in the proposed Convention to alter national law
rules governing attachment. As a suggestion for avoiding any impression that the proposed

\(^{(*)}\) It should be noted in this context, however, that the Aviation Working Group attaches great
importance to the proposed timing elements/standards of these provisions as well as their proposed optional
card. The Aviation Working Group was invited by the Study Group to continue its consultations with aviation industry
participants on this point and to revert in due course to the wording of the revised text to be prepared by the
Drafting Group.
Convention was purporting to interfere in the civil procedure rules of each State, it was proposed that the Convention should limit itself to laying down the objective to be achieved by such interlocutory proceedings and leave the method to be employed to be decided by each State in accordance with its national rules of civil procedure. It was agreed that the task of the Drafting Group would be to capture the essential idea of the solution agreed by the Study Group, namely the drafting of a formula which would permit the chargee, seller or lessor to obtain expeditious relief in order to protect his position and to permit the prompt exercise of in rem remedies and the realisation of asset value in relation to the charged asset, and that in seeking the most appropriate formulation it should have regard to the wide variety of measures available to achieve the necessary degree of protection.

98. – In the course of the Study Group's consideration of Chapter V of the draft aviation text a number of related issues were raised. First, it was agreed that the question of which courts should have jurisdiction to hear proceedings of the type envisaged in Article 13 was a matter to which the Study Group would have to revert when it reached the general question of jurisdiction. In setting timetables for the completion of judicial proceedings, it was pointed out that consideration would need to be given to the question of any appeals that might be brought against orders issued by courts of first instance. It was noted that the Aviation Working Group had proposed in § 19 of the Annexure to the draft aviation text that the term "judicial proceedings" as employed in that text include all appeals necessary for the issuance of a final decision or ruling.

99. – In the context of the Study Group's consideration of the aptness of the interim relief solution, attention was drawn to the fact that, with the increasing trend towards privatisation of the railway sector, it was foreseeable that Governments would, as a matter of public policy, tend to insist on rolling stock remaining in place even where the user became insolvent with a view to installing a replacement provider of services who would also need access thereto. It would not be easy to legislate for the delivering up of charged rolling stock. In proceedings involving wagons located in a given State railway system it would need to be borne in mind that the charger himself would often not be in a position to deliver up such wagons and the chargee would probably require a court order directing the local railway to provide transportation facilities to move the wagons out of the possession of one party to a given place.

Re proposed new Chapter VII of the first draft

100. – Following the Drafting Group's proposal (cf. Study LXXII - Doc. 22, § 14) that the future Convention should include a set of provisions dealing with the transfer of international interests and the specific provisions on this subject contained in the draft aviation text, the Chairman of the Study Group had built into his proposed revised new structure of the first draft (cf. Appendix III, pp. ii-iii) a new Chapter VII on assignments and charges of international interests. In this proposed structure he had distinguished those provisions of the draft aviation text dealing with outright transfers under contracts of sale, creating international interests, from those dealing with assignments of international interests that had already been created. This chapter was designed to deal with those cases where the holder of an international interest, the chargee, wished to assign it, either outright or by way of security, or to create a charge over it. The Chairman briefly introduced the issues which he proposed should be dealt with in each of the seven articles included in his proposed new Chapter VII.
(1) **Mode of assignment or charge of an international interest and the effect on third parties**

It would be necessary, if the future Convention were to provide for the registration of assignments and charges of international interests to have some basic rules as to the form of the assignment or charge necessary for it to qualify for filing in the international register.

(2) **Effect of the assignment or charge on the debtor**

The basic notion to be conveyed would be that, once the debtor, that is the original chargor, had been notified of the assignment or charge, he would be under an obligation to respect it.

(3) **Default remedies of the assignee or chargee under a security assignment or charge**

The basic situation to be addressed in this case was a kind of second order stage where the benefit of the international interest had been assigned by way of security and, following default in performance by the assignor, the assignee sought to enforce his remedies against the assignor.

(4) **Additional remedies of assignee or chargee**

The idea would be that there would be a similar provision for additional remedies to the one provided for under Article 11 of the first draft as revised by the Study Group.

(5) **Registration of assignment or charge**

Rules would need to be drafted dealing with registration of assignments or charges.

(6) **Priority as between successive assignments or charges**

The basic idea here would not be to deal with priority as between competing assignments neither of which was on the international register but only with priority as between competing registered assignments or as between a competing registered assignment and unregistered assignment.

(7) **Succession to priority of assignor or chargor**

Although it was arguable that such a provision would be self-evident but might be useful, the basic idea would be to provide that, where an assignment had taken place, in terms of priority in relation to the original interest, the assignee would stand in the shoes of the assignor, that is where there were two successive international interests and the first of these was assigned the assignee was to be considered as the assignee of the first-ranking interest.

101. - One member of the Study Group, whilst indicating that he found the objective of seeking to deal with all the issues proposed by the Chairman an admirable one and whilst he did not doubt that such an approach was feasible for large commercial aircraft where parties would in any case expect to register against the serial number of the underlying asset, nevertheless expressed reservations as to whether the same approach would prove to be as
suitable for all the other types of equipment intended to be covered by the proposed Convention. He suggested that receivables financiers might in respect of such other equipment be found to prefer a system where they would only have to search and perfect against the debtor's name rather than, as with the system envisaged under the proposed Convention, having to find the serial number of each item in a pool of receivables and then conduct an item-by-item search and perfection. He accordingly suggested that the Study Group should first look at the issues proposed with large commercial aircraft in mind and then ask itself whether to attempt to encompass other types of equipment might not be perceived as doing more harm than good in terms of current patterns of receivables financing. It was recalled in this context that the Study Group was in any case already considering the possibility of certain of the provisions of the proposed Convention being special to aircraft equipment. Whilst it was pointed out that it was important to remember that the proposed Convention was intended to be limited to interests flowing out of registration in identified items of equipment and that it would not be desirable to broaden its scope to facilitate the general financing of receivables that were unrelated to registered equipment, it was nevertheless acknowledged that in situations where potentially large numbers of items of equipment were involved then parties might well have an incentive for wanting to stay with their national filing system.

102. – It was pointed out that it might appear somewhat confusing for a text which started out by creating a single new international interest, where previously there would have been three distinct interests, to wit a security interest, a seller's interest under a title reservation agreement and a lessor's interest under a leasing agreement, to go on, in a second phase, to make a distinction between an assignment and a charge of that international interest. It was explained that the intention was thereby to cover two different situations, that where the holder of an international interest might wish to make an outright assignment of that interest and that where he might simply wish to grant some form of security over his interest, for instance by way of hypothecation or mortgage. By way of solution it was agreed that a better distinction in this context would be between an outright assignment by way of sale and the granting of a security interest, whether this took the form of an assignment or was by way of charge, in the sense given to that term elsewhere in the Convention.

103. – This led to a discussion as to the consequences of the assignment of an international interest or the granting of a security interest over the international interest. It was explained that where, for example, a lessor made an outright assignment of his international interest, then the purchaser of that interest would stand in the shoes of the original lessor and would be able to file in the international registry; where, on the other hand, the lessor chose to grant a security interest over his international interest, then both the lessor and the chargee would be entitled to avail themselves of the remedies provided under the Convention, such as the right to take possession, the latter in effect having a sort of sub-security. This showed the infinite variety of assignments that might exist between the assignor and the assignee as to how the international interest was to be shared between them: it could be purely to secure a short-term loan just as it could involve an outright transfer of ownership. It was suggested that these aspects of the question could be left to be dealt with by local law. What would be important for the purposes of the Convention would be to establish a mechanism whereby a person thus acquiring rights in an international interest would be able to file his interest in the international register, so that a third party seeking to find out who had the right to payment in a given case would, by making a search against the serial number of the item of equipment which secured
that right or which was leased, be able to find out the current holder of the international interest. It was suggested that it should be that person who should be entitled to deal with the record for the purposes of further assignment, release or amendment. The question as to who should have the right to enforce was, it was submitted, a matter that might be left to the agreement of the parties. This analysis was found to confirm the idea that the international interest would maintain its unitary character notwithstanding the assignment of that interest or the granting of a security interest over the same, with the question of any distinction as regards the manner in which the holder’s interest was transferred not being a matter to be dealt with by the proposed Convention but rather being left to be dealt with by the agreement and the law applicable to that agreement.

104. – It was suggested that, with a view to clarifying the notion of the assignment of an international interest, it would be helpful to distinguish between the assignment of a security interest *stricto sensu*, the assignment of a seller’s interest under a title reservation and the assignment of a lessor’s interest under a leasing agreement, as it was not clear that all three could be assigned in the same way. As far as the assignment of security interests *stricto sensu* was concerned, it was suggested that it would be useful to distinguish between the assignment of a secured debt, in which case the security interest would follow the secured debt, and the assignment of a security interest not involving the assignment of the debt itself. In response, it was submitted that, to the extent that the Convention was concerned with registrable interests held in mobile equipment and that the primary concern of the transferee or assignee of such a registrable interest would therefore be his ability to make sure that his interest appeared on the international register, what was relevant in this context for the purposes of the Convention was the transfer of the interest securing the debt, as that was what would go onto the international register, and not the actual debt itself. It was proposed that, as it would be important for the Convention to ensure that, once the assignee/transferee had filed his interest on the international register, he would enjoy priority as regards the right to payment, it might be necessary to envisage the Convention containing a rule stating that all the contractual and real rights of the assignee/transferee in the asset would be protected by virtue of the filing of such an assignment/transfer in the international register (cf. also § 15 supra). However, it was pointed out that it would not be for the Convention to deal with the assignment of receivables detached from the interest in the underlying mobile equipment and that whatever rights were acquired could only be rights related to an assignment of the registered interest in the mobile equipment. The Convention should not therefore concern itself with sales of the receivables or loans on the security of the receivables detached from the underlying security interest. It was acknowledged that there would indeed seem to be a case for distinguishing between the assignment of security interests *stricto sensu*, the assignment of a seller’s interest under a title reservation agreement and the assignment of a lessor’s agreement under a leasing agreement. With a view to avoiding a situation arising in which the assignee might claim that he was the assignee of the debt but that the interest in the mobile equipment shown on the international register was still that of the assignor, it was acknowledged that it might be useful to provide a rule stating that, where the debt secured was assigned, then the interest in the equipment followed it and the assignment became registrable in the international register. It was however pointed out that, in the specific context of aircraft in which the proposal for rules governing assignments had first been made, the assignments in question, particularly those of lessors’ interests under leasing agreements, were to be seen as part of integrated transactions, in which, simultaneously with the conclusion of, say, the leasing agreement, there would, in about 80%
of cases, be an assignment by the lessor to a lender (cf. also Study LXXII - Doc. 23, footnote 24).

105. - It was agreed that the Drafting Group would do its best to capture the various ideas put forward in the course of the Study Group’s consideration of the proposed new Chapter VII and that, in so far as the origins of this chapter lay in the draft aviation text, it might in this respect enlist the assistance of Mr Wool.

Re Chapter VIII of the draft aviation text (special provisions for aircraft property)

106. - Mr Wool explained that Chapter VIII of the draft aviation text contained a number of provisions conceived in principle as being peculiar to the special needs of aircraft financing, in particular questions relating to deregistration of aircraft. In the context of aircraft financing deregistration was an element of repossession: pursuant to the 1944 Chicago Convention on International Civil Aviation, an aircraft had first to be deregistered in one jurisdiction before it could be reregistered. The draft aviation text also contained recommendations regarding the relationship between the proposed future Convention and the Geneva Convention: it recommended that the general rule of that Convention, referring to the law of the country of registration for security matters, should remain intact, amended only to take account of the future Convention, and that where there were matters on which the two international instruments were inconsistent the future Convention should override the Geneva Convention. Chapter VIII of the draft aviation text also contained a number of provisions regarding definitions, some of which were technical, for instance that concerning how an aircraft should be referred to for registration purposes, whilst others were broader, for example that proposing that the limitation of the Convention’s coverage to leasing agreements of at least three years’ duration should not apply in the context of aircraft, where it was felt that the asset was so valuable that the parties would wish to have the protection of the Convention’s provisions even in the case of short-term leases. The draft aviation text also contained a rule, that might be relevant to other types of mobile equipment too, proposing that, where a sovereign party in a particular transaction waived sovereign immunity, that waiver should be recognised as valid and binding for the purposes of the future Convention. Another set of provisions proposed in the draft aviation text that might be of relevance to other types of mobile equipment, for example ships carrying containers, dealt with the situation where remedies were exercised against an airframe on which engines were installed which were not subject to the same security and therefore were not subject to the same inter partes rights and the same priority rules as the airframe.

107. - It was suggested that one solution to the problem of engines that were installed on airframes would be to treat them in all circumstances as distinct items of equipment for the purposes of the future Convention. This would avoid any risk of the treatment of aircraft engines as separate items of identifiable equipment that could be financed separately being undercut by the application of national accession rules.

108. - Concern was expressed by certain members of the Study Group lest the trend evidenced by the Aviation Working Group’s proposed Chapter VIII might cause the future Convention to overreach itself by seeking to deal with all matters seen as having a bearing on the effectiveness of the international interest. It was suggested that the effect of following such
an ambitious approach would be seriously to jeopardise the chances of the Convention ever being accepted by national parliaments. Other members of the Study Group, whilst acknowledging the ambitious character of the proposals in question, submitted that it was nevertheless important to bear in mind that, if the Study Group failed to deal with the questions which needed to be addressed for full use to be able to be made of the international interest, then it would not have created something very useful. It was pointed out that questions of jurisdiction, sovereign immunity and enforcement procedure were all part of the decision that had to be made by a financier contemplating financing a valuable item of equipment. The creation of a new international regime designed to facilitate such asset-based financing required all the relevant issues to be faced. Failure to do so carried with it the risk that the Study Group might after all have failed to achieve the objective of making the financing of the type of equipment envisaged by the proposed Convention easier and cheaper for those involved in such transactions.

109. – Regarding the Aviation Working Group’s proposals concerning the enforceability of waivers of sovereign immunity, the enforceability of which, it was pointed out, would otherwise not necessarily be clear in some jurisdictions, a suggestion was made that perhaps the most appropriate solution would be to allow Contracting States, at the time of ratification or accession, to indicate whether they intended to waive sovereign immunity in respect of the transactions covered by the Convention. In considering this issue it was indicated that it would be important to bear in mind the extent to which waivers of sovereign immunity might be unconstitutional in certain States and that the inclusion of a specific rule in the Convention on this subject might therefore make it impossible for such a State to accept the Convention, thus enhancing the attractiveness of dealing with this issue by means of an optional provision.

110. – Regarding the Aviation Working Group’s proposals for dealing with the relationship between the future Convention and the Geneva Convention, reservations were expressed as to the acceptability of the drafting technique employed. It was explained that, whilst it might be acceptable to provide in one international instrument that that instrument was intended to prevail over or replace another international instrument dealing with the same subject-matter, it was not acceptable for one international instrument to interpret the text of another. It was suggested that a more suitable drafting technique would be to provide that as between States that were Parties to both the Geneva Convention and the future Convention the former was amended in certain specified ways by the latter.

111. – Mr Rosen expressed support for removal of the restriction of registrable leases to leases concluded for at least three years (cf. also §§ 34 - 35 supra). It was pointed out that lessors had an exposure on an asset whether it was leased for two or for four years. Removal of the restriction would, it was argued, encourage operating lease finance, since it would give operating lessors the valuable protection of registration of their interests under the Convention. It was suggested that for the purposes of the definition of those leasing agreements to be covered by the Convention a distinction might usefully be drawn between dry and wet leases, that is between those leases where responsibility for care, custody and control of the leased asset passed to the lessee for the duration of the lease (dry leases) and those where it did not (wet leases). It was pointed out that the Aviation Working Group had indeed proposed an amendment to the definition of a leasing agreement contained in the first draft designed specifically to exclude wet leases, on the ground that these did not involve the separation between ownership and use of the asset that was characteristic of leasing (cf. Study LXXII -
Doc. 23, § 20 of the Annexure to the draft aviation text). Regarding the proposal for allowing short-term leases to obtain the benefits of the proposed Convention, it was explained that one of the main obstacles to acceding to such a proposal lay in the fact that, failing some limitation on the lease term, a lessee under, say, a one-day lease would, under the Convention as at present drafted, be able to give good title to any third party where there had not been a registration of the lessor's interest in the lease. A possible solution that would allow the coverage of short-term leases without producing such an undesirable result, it was suggested, would be not to exclude such leases from the sphere of application provisions of the Convention but rather from the mandatory application of the priority rules so that a registered short-term lease would obtain a good many of the benefits of the Convention without the failure to register such a lease resulting in the lessee being able to give good title to, or a good mortgage in respect of the leased asset to a third party.

112. – It was agreed that the Aviation Working Group should be invited to take account of the comments made by the Study Group in this connection with a view to seeing how it would like to respond and that an attempt should be made by the Drafting Group to incorporate those elements of Chapter VIII of the draft aviation text, suitably amended to take account of the points made by the Study Group, consistent with the achievement of a balance between the need to avoid straying beyond what it was strictly necessary for the Convention to deal with in order to give effect to the international interest, on the one hand, and the need to ensure the efficacy in practice of the international interest, on the other, or in other words the striking of a balance between what the Convention should properly regulate and what should rather be left to be dealt with by the applicable law as determined by the private international law rules of the forum. It should moreover be borne in mind that the provisions of Chapter VIII had in fact been put forward to meet needs specific to aircraft and that in many cases both lessees and the agencies giving financial support, through export credit guarantees, would be Government entities, which indicated the direct interest Governments would have in ensuring that the international interest was made as effective as possible. It was suggested that, for the purposes of determining those matters which would need to be taken account of in the revised text to be prepared by the Drafting Group, a distinction might be drawn between those matters that were peculiar to aircraft, such as deregistration, and those that, while not peculiar to aircraft, were of especial interest to aircraft interests.

Re jurisdiction

113. – Reference had been made on a number of occasions by members of the Study Group to the importance of the planned Convention containing some rules on jurisdiction. The rules proposed on this point by the Aviation Working Group were essentially to be found in Article 24 of the draft aviation text, which, in its experience, by and large tracked practice and the existing rules relating to jurisdiction. It was noted that the Aviation Working Group's recommendations in this context included a provision allowing the parties to select a forum provided that such a selection would not violate the fundamental public policy rules of any court that would thereby be ousted of jurisdiction. They also included a rule which would support an exclusive forum jurisdiction provided again that that would not violate any fundamental public policy rules of other jurisdictions.
114. – It was suggested by certain members of the Study Group that it would be advisable to proceed with extreme caution in deciding whether to include special jurisdiction rules in the planned Convention, all the more so since the rules envisaged here would be of the kind intended to indicate directly which courts were to have jurisdiction in an international conflict of jurisdictions. Reference was in particular made to the Brussels and Lugano Conventions which were already binding on a certain number of European Union member States and to which it would therefore be difficult to introduce exceptions. The Hague Conference on Private International Law would moreover shortly be commencing work on the preparation of a general universal Convention on this subject, along the lines of the Brussels and Lugano Conventions. It was accordingly suggested that before the Study Group decided to embark on the preparation of special jurisdiction rules to be included in the future Convention it should first satisfy itself that there were serious reasons for doing so and, in particular, that the rules on jurisdiction laid down in the relevant international instruments were not suitable to regulate the special situations arising under the future Convention. It should moreover be borne in mind that, if special rules conferring exclusive jurisdiction were indeed found to be necessary, then these rules would have to be made mandatory in their application since otherwise the effect would only be to add to the difficulties already existing.

115. – One issue that it was felt would absolutely need to be clarified under any jurisdiction rules to be included in the future Convention was that it should not be possible for one court to treat an international interest as valid and for another court to treat the same international interest as invalid.

116. – Reference was made to the jurisdiction rule proposed in Article 9(5) of the first draft. It was agreed that this was a rule of internal jurisdiction designed to permit Contracting States to designate the courts or tribunals empowered to make orders under Article 9(3) of the same draft (cf. § 67 supra).

117. – It was agreed that, whilst the Aviation Working Group's recommendations on this subject provided a useful starting-point for the Study Group's consideration of the issues that should be dealt with in any jurisdiction rules to be included in the future Convention, it would be necessary, in view of the complexity of the issues involved and the international instruments either already in force or planned on this subject, to proceed with extreme caution in seeking to identify the issues which it would be absolutely indispensable for the Convention to regulate in the form of special jurisdiction rules in order to achieve its basic underlying objectives and that it would be helpful if a paper could be prepared in readiness for the next session of the Study Group setting out a reasoned case for any special jurisdiction rules to be embodied in the future Convention.

*Re the relationship of the future Convention to other existing Conventions*

118. – The Aviation Working Group had proposed a number of provisions dealing with the relationship of the proposed future Convention to a number of related other international instruments, foremost among these being the 1948 Geneva Convention on the International Recognition of Rights in Aircraft (cf. also § 110 supra). The Chairman of the Study Group in his proposed revised structure of the first draft had listed what he saw as the relevant international instruments (cf. § 7 in fine, supra at p. 8) although it was pointed out that there could well be others, in particular the successive international Conventions regulating maritime
liens and mortgages. As a general rule the Study Group recognised that the proposed Convention should not purport to impose variations on Contracting States in respect of obligations they had assumed under other international instruments save to the extent that these States were Parties to both the future Convention and the other relevant international instrument. As regards the identification of any international instruments that might be relevant in addition to those identified by the Chairman of the Study Group and the successive Conventions regulating maritime liens and mortgages, it was agreed that the assistance should be enlisted of the Organisations representing the different interest groups likely to be affected by the future Convention.

Re additional issues suggested for inclusion in the future Convention

119. - It was pointed out that the deliberations of the Study Group had shown that a whole range of issues would be referred by the future Convention to the applicable law and attention was in this context drawn to Article 27 of the draft aviation text in which it was proposed that the Convention should contain a general statement that all matters not addressed therein, including the characterisation of an agreement for the purposes of taxation and liability in tort, would be governed by otherwise applicable law. Leasing circles, in particular in Japan, were anxious to ensure that the future Convention did not affect the characterisation of leases for taxation or other purposes. In some countries, for example the United States of America, revenue authorities considered the commercial law treatment of a lease relevant for the purposes of its tax analysis. The question of liability in tort was also a very important issue in aircraft financing and the Aviation Working Group therefore proposed in Article 27 that the Convention give a clear signal that neither was it intended to affect the characterisation of an agreement for the purposes of tortious liability.

120. - It was pointed out that the rule proposed in Article 27 of the draft aviation text to deal with the question of the characterisation of an agreement contradicted the rule of private international law generally admitted in this respect. The question of characterisation was a matter that was hotly disputed in private international law but it was generally admitted that such questions were determined by the lex fori rather than the lex causae, as proposed by the Aviation Working Group. It was further pointed out that the characterisation of a transaction for fiscal purposes was a matter for the interpretation of the relevant taxing statute and, as a matter of public law, was not susceptible to rules of private international law. It was suggested that an adequate answer to the problem which Article 27 was designed to address moreover already existed in the shape of the new article on the interpretation of the future Convention which it had been decided to include (cf. § 38 supra).

121. - It was suggested that the formula employed in Article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as C.I.S.G.), namely the reference to the applicable law for the purpose of settling questions concerning matters governed by the future Convention but not expressly settled therein, might not be perfectly adapted to the situation that would obtain under the future Convention. It was suggested that the incorporation of such a rule might be seen as paradoxical in view of the fact that the international interest was a creation of the Convention, not existing in any national legal order, and that it had indeed been proclaimed in Article 1(1) to be autonomous in character. It was submitted that a more appropriate solution might therefore be, while following the text of Article 7(2) of C.I.S.G. as regards the reference to the general principles
underlying the future Convention to replace the reference to the applicable law by one to the concept of autonomous interpretation that had been developed by the Court of Justice of the European Communities specifically to deal with such problems. It was however recalled that, to the extent that the rules of the proposed Convention governing security interests stricto sensu, a seller's interest under a title reservation agreement and a lessor's interest under a leasing agreement would differ, it would be necessary for the applicable law to characterise a given interest in order to determine which rules were to apply. It was in this context also to be borne in mind that the nature and incidents of the international interest were defined in the text of the Convention. It was also pointed out that the fact that there would not be exact parallels for the European patent and the Community trademark under national law did not stop the authors of the Convention for the European Patent for the Common Market and the Council Regulation on the Community trademark from making reference therein to national law; it was submitted that these had to be read as references to analogous rules of national law.

122. – It was nevertheless agreed that, in preparing its next draft, it would be important for the Drafting Group to consider carefully, on an issue-by-issue basis, whether the concepts it was proposing might create difficulties at the level of the applicable law.

123. – It was suggested that, in view of all the matters which it was proposed under the future Convention to leave to the applicable law and given the divergencies between the conflicts of law rules of the different States, consideration might usefully be given to the preparation of uniform conflicts of law rules on certain matters of particular importance. There was general agreement that the desirability of preparing such uniform conflicts of law rules on certain matters was a question that could be assessed by the Study Group as work on preparation of the future Convention proceeded but that before taking any decision to draft such rules the Study Group should first satisfy itself that the issues were ones that lent themselves to such treatment and that there was a good reason for drafting such rules.

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CONCLUDING REMARKS

124. – In closing the session the Chairman indicated that the next step would be for the Drafting Group to complete its revision of the first draft in the light of the Study Group’s deliberations (cf. § 76 supra). A revised draft would be circulated for comment in due course among members of the Study Group and the Organisations represented thereon by observers.

In advance of the next session of the Study Group, which would be held in Rome from 9 to 13 December 1996, a specimen commentary would be prepared on an article which raised the type of concerns addressed in the draft aviation text with a view to illustrating how some of the detail at present contained in that text might be dealt with in a future explanatory report (cf. § 9 supra).

The first session of the special Working Group called to consider the legal and technical issues raised by the establishment of the international register posited under the future Convention was held immediately after the Study Group’s session.
The Chairman stated how urgent it was for the relevant interest groups other than the aviation industry to organise their position in relation to the proposed Convention in advance of the next session of the Study Group. He noted that Dr Remé had kindly agreed to use his good offices to organise a working group, under the auspices of the International Maritime Committee, to ascertain, first, the degree of interest shown by shipping circles in the future Convention and, depending on the answer to that question, the desirable content of the same as it related to shipping. In addition Mr Rosen had kindly agreed to sound railway rolling stock interests and he invited Mr Kouvshinov to pursue his contacts with the Russian Cosmic Space Agency with a view to galvanising a more active participation by satellite interests in the development of the future Convention. He also invited the Secretariat to indicate to the relevant circles the Study Group's desire to know where the container and oil industries stood in relation to the proposed Convention. He was anxious in particular to know whether the special rules proposed for aircraft might be of interest beyond aviation circles and whether analogous special rules might be felt to be necessary for such other interest groups too.

125. - The Secretary-General of Unidroit outlined Unidroit's tentative thinking regarding future work on this subject. He explained that, following the December 1996 session of the Study Group, it would be necessary to hold one more Study Group session, which he envisaged for the early autumn of 1997. Unidroit practice required the submission of Study Group texts to the Governing Council for approval prior to the convening of governmental experts. So as not to hold up the pace of progress, it was however his intention, already at the April 1997 session of the Governing Council, to seek that body's approval, on the basis of the text to emerge from the third session of the Study Group, for the idea of circulating among Governments the text that would emerge from the subsequent fourth session of the Study Group without waiting for the Governing Council's consideration of that final text, which would not take place until its Spring 1998 session. This would, he hoped, permit the speedy convening of governmental experts immediately after that Spring 1998 Council session. It would, on that timetable, be possible to convene the first session of governmental experts in Autumn 1998, with Governments having the advantage of already having seen the Study Group text, with its explanatory report, as soon as possible after the final Study Group session. It was the Secretariat's hope that, planned in this way and with sufficiently lengthy sessions, of between ten days' and two weeks' duration, it would be feasible to allow for only two sessions of governmental experts, permitting the convening of a diplomatic Conference of adoption as speedily as possible thereafter. He emphasised, however, how much the feasibility of such a timetable was dependent on the text to emerge from the Study Group being able to be perceived as representing a genuine consensus.

126. - In the context of the achievement of solutions that could properly be considered to reflect consensus, the Aviation Working Group was invited, through the person of Mr Wool, to continue to build consensus, not only within the aviation industry, but also in Government circles and with the International Civil Aviation Organization and the International Air Transport Association, for the concepts embodied in its proposals. This would enable the Study Group to have an even more complete picture of the situation regarding aircraft at its next session.
APPENDIX I

STUDY GROUP FOR THE PREPARATION OF UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(Second session: Rome, 12 - 16 April 1996)

AGENDA

1. Approval of the further revised draft agenda.

2. Preparation of uniform rules on international interests in mobile equipment in the light of:

   (a) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment, established by the Drafting Group of the Subcommittee on 19 December 1995 as revised by the same on 4 March 1996 (Study LXXII - Doc. 24);

   (b) Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 23);

   (c) Second Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: summary of principal concepts prepared by Mr Jeffrey Wool (expert consultant to the Study Group on international aviation finance matters) (Study LXXII - Doc. 25).

3. Consideration of the best means of giving due effect to the Aviation Working Group’s proposals, including in particular the most appropriate place for the different elements of the Draft Aviation Text in the overall structure to be put in place under the future Convention.

4. Any other business.
APPENDIX II

FIRST SET OF DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(established by the Drafting Group of the Sub-committee on 19 December 1995
as revised by the same on 4 March 1996):

COMMENTS

(by the European Federation of Equipment Leasing Company Associations)

On the occasion of its meeting on 22 April 1996, the Legal Affairs Committee of the
Federation considered the first set of draft articles of a future Unidroit Convention on
International Interests in Mobile Equipment (Study LXXII - Doc. 24).

Let us straight away reiterate all the reservations already voiced in our letter of 1 August
1995 (regarding Study LXXII - Doc. 16). In other words, LEASEEUROPE wishes to confirm in
the clearest way possible its concern at seeing the right of ownership assimilated, in one way or
another, to a security interest, whatever form this might take.

For this reason, the Federation is of the view that the right of ownership as such should be
mentioned in the title of the planned Convention.

Re Article 4 (a)

The members of the Legal Affairs Committee take the view that the concept of the
"international interest" is too vague to encompass the notion of the right of ownership, which is the
prerogative of the lessor alone. Whether in English or French, the word "interest" or "sûreté" is
not adequate to describe the lessor's right.

Re Article 1 (2)(c)

This sub-paragraph refers to an interest "retained by a lessor under a leasing agreement"
("détenue par un bailleur en vertu d'un contrat de bail"). The members of the Legal Affairs
Committee are also of the view that the term "retained" is inadequate in so far as the right of
ownership vests in the lessor under a contract for the acquisition of the asset which is prior in
time to the leasing agreement. It is therefore not a question of the lessor "retaining" this right,
as it would be in the case of a simple security interest, since a leasing agreement does not
necessarily involve at the outset of the transaction any transfer of the right of ownership.
Re Article 9 (1)(b)

This sub-paragraph provides that "in the event of default by the chargor under a security agreement, the chargee may take possession of any such object or sell or grant a lease of any such object ...". The first of the two conjunctions "or" should be replaced by "and / or".

Re Article 19 (6)

The members of the Legal Affairs Committee noted that the planned Convention would not affect any special rules of insolvency law applicable in States. Does this provision not contradict the terms of the Convention of the European Union on Insolvency Proceedings?

General remarks

Generally, the members of the Legal Affairs Committee doubt whether it will in practice be possible for the planned Convention to be applied in the context of the daily running of their activities.
APPENDIX III

REVISED STRUCTURE OF THE FIRST SET OF DRAFT ARTICLES PROPOSED BY THE CHAIRMAN OF THE STUDY GROUP

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1  types of transaction. Add outright sales

Article 2  types of equipment: Change "aircraft" to "airframe" and add helicopters and cosmic space objects

Article 3  definitions - refer to Annexure

Article 4  connection to a Contracting State

Article 5  interpretation (as Vienna Sales Convention)

CHAPTER II

THE INTERNATIONAL REGISTER SYSTEM

Article 6  international register system, management, etc.

CHAPTER III

CONDITIONS OF APPLICATION OF CHAPTERS IV TO IX

Article 7  Creation of interest; formalities of agreement

CHAPTER IV

EFFECTS OF AN AGREEMENT FOR AN INTERNATIONAL INTEREST AS BETWEEN THE PARTIES

Article 8  as old Article 7, with amendments

Article 9  old Article 8 expanded to cover freedom to choose applicable law
Article 10  default remedies of secured party, as old Article 9, expanded to refer to terms of agreement

Article 11  default remedies of seller or lessor - as old Article 10

Article 12  additional remedies - as old Article 11

Article 13  conformity with procedural law - expanded version of old Article 12

Consider new Chapter proposed by Aviation Group

CHAPTER V
REGISTRATION OF AN INTERNATIONAL INTEREST

Article 14  requirements for registration - expanded version of old Article 14

Article 15  requirements for amendment or discharge of registration - expanded version of old Article 15

Article 16  evidential effect of certificate of registration - as old Article 16

Article 17  extension to prospective international interests - as old Article 17

Article 18  liability of international registry

CHAPTER VI
EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Article 19  priority rules; effectiveness in bankruptcy - revised and expanded version of old Article 19

CHAPTER VII
ASSIGNMENTS AND CHARGES OF INTERNATIONAL INTERESTS

Article 20  mode of assignment or charge and effect on third parties

Article 21  effect of assignment or charge on [account] debtor, etc. (see Aviation Text, Article 16)
Article 22  default remedies of assignee or chargee under security assignment or charge (see Aviation Text, Article 10)
Article 23  additional remedies of assignee or chargee
Article 24  registration of assignment or charge
Article 25  priority of successive assignments, charges, etc.
Article 26  succession to priority of assignor or chargor (see Aviation Text, Article 22(2))

CHAPTER VIII

SPECIAL PROVISIONS FOR AIRCRAFT PROPERTY

Article 27  special provisions for aircraft property - see Aviation Text, Article 23

CHAPTER IX

JURISDICTION

Article 28  jurisdiction - see Aviation Text, Article 24
Article 29  non-application of mandatory rules of third State

CHAPTER X

RELATIONSHIP WITH OTHER CONVENTIONS

Article 30  relationship with Rome Convention
Article 31  relationship with Brussels and Lugano Conventions
Article 32  relationship with Geneva Convention
Article 33  relationship with Ottawa Conventions
Article 34  relationship with Outer Space Convention
CHAPTER XI

OTHER FINAL CLAUSES

Article 35  declarations
Article 36  other clauses

ANNEXURE

DEFINITIONS

Part 1

Definitions common to all classes of object

Part 2

Definitions exclusive to aircraft property

Part 3

etc.
APPENDIX IV

FIRST SET OF DRAFT ARTICLES OF A
FUTURE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT

(as revised by the Drafting Group on 13 and 15 April 1996 in the light of the Study
Group's first reading of the text established by the Drafting Group on 19 December 1995
as revised by the same on 4 March 1996) (*) (**) (***)

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

1. - This Convention provides for the creation and effects of an international
interest in mobile equipment.

2. - For the purposes of this Convention an international interest in mobile
equipment is an interest in an object of a kind listed in Article 2:

(a) granted by a chargor under a security agreement;
(b) retained by a seller under a title reservation agreement; or
(c) retained by a lessor under a leasing agreement.

Article 2

1. - This Convention applies in relation to objects of any of the following kinds:

(a) airframes;
(b) aircraft engines;
(c) helicopters;

(*) The use of an asterisk (*) against a particular provision indicates that the provision in question is
envisioned as forming part of the Final Clauses of the future Convention.
(**) The use of a double asterisk (**) against a particular provision indicates that the provision in
question is envisioned as forming part of the Chapter dealing with the relationship of this Convention to
other Conventions.
(***) It was agreed that the provisions of those Chapters marked by a triple asterisk (***) would be looked
at by the Working Group to consider the legal and technical issues raised by the establishment of an
international register with a view to their revision, in particular in the light of the recommendations made by
the Aviation Working Group.
the court shall have regard to any terms of the security agreement relating to the manner of exercise of such remedies.

3. – Any sum collected or received by the chargee as a result of exercise of any of the above remedies shall be applied toward discharge of the amount secured by the security interest.

Article 10

1. – At any time after default in the performance of a secured obligation, the interested persons may agree or the court may, on the application of the chargee, order that ownership of any object covered by the security interest shall vest in the chargee in satisfaction of all or any part of the secured obligation.

2. – The court shall grant an application under the preceding paragraph only if the amount of the secured obligation to be satisfied by such vesting is reasonably commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

3. – The object the ownership of which is acquired by the chargee under paragraph 1 shall be free from any other interest over which the chargee’s security interest has priority under the provisions of Article 19.

4. – At any time before sale of the charged object or the making of an order under paragraph 1, the chargor or any of the interested persons may redeem it by paying the amount secured by the security interest, subject to any lease granted by the chargee under paragraph 1 of Article 9.

5. – A sale by the chargee under paragraph 1 of Article 9 shall pass title to the purchaser free from any other interest over which the chargee’s security interest has priority under the provisions of Article 19.

6. – Where the proceeds of a sale by the chargee under paragraph 1 of Article 9 exceed the amount secured by the security interest, then, unless otherwise ordered by the court, the excess shall be paid by the chargee to the holder of the international interest registered immediately after its own or, if there is none, to the chargor.

7. – In this Article "interested persons" means:

(a) the chargor;

(b) any surety under a guarantee given in respect of the secured obligation;

(c) any person entitled to the benefit of any registered security interest which is subordinate to that of the chargee; and

(d) any other person having rights in the object which have been notified in writing to the chargee.
Article 11

In the event of default by the buyer under a title reservation agreement or by the lessee under a leasing agreement, the seller or lessor, as the case may be, may take possession of any object to which the agreement relates.

Article 12

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are consistent with the provisions of this Chapter.

Article 13

The parties may provide in their agreement for any event other than default as giving rise to the rights and remedies specified in Articles 9 to 12.

Article 14

1. - Subject to paragraph 2, any remedy provided by this Chapter shall be exercised in conformity with the procedural law of the place where the remedy is to be exercised.

* 2. - Any remedy available to the chargee under Articles 9 to 11 which is not there expressed to require the intervention of the court may be exercised without reference to the court except to the extent that the Contracting State where the remedy is to be exercised has made a declaration under Article Y.

* 3. - A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that while the charged object is situated within its territory the chargee shall not in that territory sell or grant a lease of the object.

CHAPTER V ***

REGISTRATION OF AN INTERNATIONAL INTEREST
CHAPTER VI
EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

[ CHAPTER VII
ASSIGNMENTS AND CHARGES OF AN INTERNATIONAL INTEREST ]

[ CHAPTER VIII
SPECIAL PROVISIONS FOR AIRCRAFT PROPERTY ]

[Article ...

Add a provision providing for the application of the priority rules of the Convention to outright transfers under contracts of sale]

[ CHAPTER IX
JURISDICTION ]

[ CHAPTER X
RELATIONSHIP WITH OTHER CONVENTIONS ]

[ CHAPTER XI
OTHER FINAL PROVISIONS ]
APPENDIX

PART I

In this Convention:
(a) "international interest" means an interest to which Article 1 applies;
(b) "object" means an object of a kind listed in Article 2 (1);
(c) "agreement" means a security agreement, a title reservation agreement or a leasing agreement;
(d) "security agreement" means an agreement by which one person ("the chargor") grants or agrees to grant to another person ("the chargee") an interest ("security interest") in or over an object to secure the performance of an existing or future obligation of the chargor or of a third person;
(e) "title reservation agreement" means an agreement by which one person ("the seller") agrees to sell an object to another person ("the buyer") on terms that ownership will not pass until fulfilment of any of the conditions stated in the agreement;
(f) "leasing agreement" means an agreement by which one person ("the lessor") leases an object (with or without an option to purchase) to another person ("the lessee") for a period of not less than three years;
(g) "airframes" means airframes that, when appropriate aircraft engines are installed thereon, are capable of transporting, or are certified by the initial country of registration to transport, at least ten (10) passengers or goods [in excess of 2750 kilograms], all appurtenances, accessories, furnishings, appliances and other equipment and parts (other than the aircraft engines) installed or incorporated therein or attached thereto, and all technical data, manuals, log books and other records relating to all or part of any of the foregoing except any such airframe used by governmental authorities for military, customs or police purposes;
(h) "aircraft engines" means aircraft engines powered by jet propulsion or turbine technology that, in the case of jet propulsion aircraft engines, have at least 1750 lbs of thrust or its equivalent and, in the case of turbine-powered aircraft engines, have at least [550 rated take-off shaft horsepower] or its equivalent, all modules and other appurtenances, accessories and other parts and equipment installed or incorporated therein or attached thereto, and all technical data, manuals, log books and other records relating to all or part of any of the foregoing except aircraft engines used by governmental authorities for military, customs or police purposes;
(i) "helicopters" means ...;
(j) ["registered ships" means ...];
(k) "oil rigs" means oil rigs not intended to be permanently immobilised;
(l) "containers" means containers with a cubic capacity of not less than ...;

(2) Definitions common to all classes of object.
(m) "railway rolling stock" means ... ;
(n) "satellites" means cosmic ships, cosmic apparatus and other objects operating in the cosmic space; (3)
(o) "secured obligation" means an obligation secured by a security interest;
(p) "Rules" means rules laid down by the body referred to in Article 5 (2);
(q) "registered" means registered in the international register against the object or objects to which the agreement providing for an international interest relates [or, for the purpose only of Article 19 (4), registered either against such object or objects or against the name of the chargor, buyer or lessee];
(r) "unregistered" means not registered as stated in the preceding subparagraph;
(s) "registrar" means the registrar of the International Registry;
(t) "registration notice" means the notice in writing referred to in Article 14 (2);
(u) "registration amendment notice" means the notice in writing referred to in Article 15 (1);
(v) "registration discharge notice" means the notice in writing referred to in Article 15 (3);
(w) "writing" means an authenticated record of information (including information sent by teletransmission) which is in retrievable form.

[PART II
Definitions exclusive to aircraft property]

[PART III
Others]

(3) It was recognised that this definition will need to be refined.