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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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

*REVISED DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT*

(as proposed by the Drafting Group at its fourth session, held in Würzburg
from 24 to 26 July 1997):

COMMENTS

(by the Aircraft Protocol Group)

Rome, October 1997

**COMMENTS OF THE AIRCRAFT PROTOCOL GROUP
ON
REVISED DRAFT ARTICLES OF A FUTURE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
October 1997**

The Aircraft Protocol Group, whose core members are representatives of the International Civil Aviation Organization, the International Air Transport Association and the Aviation Working Group organised by Airbus Industrie and The Boeing Company, submits the following joint comments on the revised draft articles of a future Convention on International Interests in Mobile Equipment (Unidroit 1997 Study LXXII-Doc. 35) (**Convention**) for consideration by the Unidroit Study Group (**Study Group**).

These comments have been prepared in light of the Aircraft Protocol Group's work on the draft Aircraft Equipment Protocol to the future Convention. The current version of the draft Aircraft Equipment Protocol reflecting the decisions taken at the 25-27 August 1997 meeting of the Aircraft Protocol Group (APG 1997 Doc. 7) is attached for information as **Annex 1**. The Aircraft Protocol Group will be meeting 19-21 November 1997 to consider that document in view of, *inter alia*, the results of the upcoming meeting of the Study Group.

The first part below sets out comments on the relationship between the future Convention and the Aircraft Equipment Protocol and are thus fundamental in nature. The second part contains other comments on the future Convention.

**Relationship between the future Convention and the Aircraft Equipment Protocol:
Article 2(3) and related provisions of the future Convention**

1. We highly recommend the *deletion of Article 2(3)*1* of the future Convention. That provision, which limits the ability of the Aircraft Equipment Protocol to "derogate from or vary" select provisions of the future Convention, raises two fundamental problems. First, the Article, as amplified by Introductory Remark 19, is inconsistent with numerous provisions of the Aircraft Equipment Protocol. See the summary contained in **Annex 2**. Secondly, the Article is inconsistent with the notion of the *Aircraft Equipment Protocol as the controlling instrument* relative to aircraft objects. Not only was that the basis on which the Aircraft Protocol Group was formed and undertook its work, but its displacement also raises potential problems in the context of governmental consensus-building. It is thought that governments should be able to reach agreement in the aviation context, and have that agreement reflected in the proposed legal instruments. Governmental experts would ensure the *technical compatibility* of the future Convention and Aircraft Equipment Protocol. Any retention by the Study Group of the protocol-limiting concept contained in Article 2(3) of the future Convention should in our view be extremely narrow and in all cases consistent with the contents of the Aircraft Equipment Protocol.

2. In line with the notion of the Aircraft Equipment Protocol as the controlling instrument relative to aircraft objects, it is the act of ratifying, accepting, approving or acceding to the Aircraft Equipment Protocol that establishes the definitive international legal relation among parties to it. Similarly, the Aircraft Equipment Protocol, rather than the future Convention,

*1 All Articles referred to in Arabic numerals are those in the future Convention. All Articles referred to in Roman numerals are to those in the draft Aircraft Equipment Protocol.

should contain procedures relating to subsequent amendments affecting aircraft objects. No other amendments to the future Convention should be binding on parties to the Aircraft Equipment Protocol in that capacity. See, e.g., Articles XXXII-XXXIII and XL, respectively, in the Final Provisions Addendum to the Aircraft Equipment Protocol.

Comments on the Future Convention

3. Paragraph 4 of Article 1, permitting the application, through a Protocol, of Chapters V and VI of the future Convention to transfers, is too narrow. The Aircraft Equipment Protocol, by way of example, also addresses the *lex situs* issue in the context of transfers. This has been done in a manner analogous to Article 7 of the future Convention. See Chapter II of the Aircraft Equipment Protocol.

4. To the extent that Article 3 is deemed necessary, it should be drafted to permit the broadest application of the future Convention consistent with accepted principles of international law. In view of the nature of mobile equipment, and the basic objective of resolving priority disputes, Article 3 should invoke the future Convention if the object or obligor is located in a Contracting State.

5. The provisions referred to in Introductory Comment 21 for inclusion in Article 5 appear to be appropriate. Article 5, however, should be amended to make clear that it does not imply that a Protocol may not derogate from or vary the effect of the referred provisions. See, e.g., paragraph 2 of Article VII of the Aircraft Equipment Protocol (amending paragraph 2 of Article 8).

6. For the reasons stated in Introductory Remark 22, we support Alternative B for inclusion as Article 6.

7. We believe that the second sentence of paragraph 2 of Article 8 should be deleted to more readily permit supplementation in the relevant Protocol.

8. Consideration should be given as to whether the remedies in favor of a seller or lessor specified in Article 10 are sufficient. At a minimum, the ability to apply for a court order authorising or directing the Article 10 remedies should be included.

9. We believe that more precision is required as to when declarations are permitted through (i) the future Convention or (ii) the applicable Protocol, and the effect of each mechanism. The issue first arises under paragraphs 2 and 4 of Article 12, and recurs in paragraph 5 of Article 14 and paragraphs 1 and 2 of Article 35.

10. Since the ability to re-lease an object is a basic remedy under the future Convention, and that remedy is intended to supersede otherwise applicable national law, paragraph 3 of Article 12 would appear to be unnecessary.

11. In our view, the designation of a "court" in paragraph 4 of Article 12 should be mandatory, not permissive.

12. We believe that the ability of parties to confer jurisdiction by agreement should be qualified by the concept that no fundamental public policy is violated thereby. This point applies to both paragraph 4 of Article 14 and the future drafting of Chapter IX.

13. Article 16 sets out the general framework applicable to the international registry system. That Article requires amendment to ensure compatibility with Article XVIII of the Aircraft Equipment Protocol. Two points are particularly noteworthy. First, Article XVIII of the Aircraft Equipment Protocol contains two alternatives. Alternative A contemplates a *unitary registry structure*, that is, a structure in which an intergovernmental entity both operates and regulates the registry. That intergovernmental entity would be accountable to the Contracting States to the Aircraft Equipment Protocol. Alternative B contemplates a *binary registry structure* in which the operational and regulatory functions are separated. The operator would be controlled by and accountable to the intergovernmental regulator that, in turn, would be accountable to the Contracting States to the Aircraft Equipment Protocol. The current draft of Article 16 is consistent with Alternative B, but not Alternative A, and should be revised to ensure compatibility with both.

Secondly, the reference to an "adjudicator empowered to review acts and omission" should be replaced by a reference to the [International Registry Authority] [International Regulator]. In the context of aircraft objects, and subject to questions of jurisdiction matters generally, administrative relief should be granted by the *appointed regulatory body rather than a newly created entity*.

14. Query whether the privileges and immunities implications of the first conjunct of paragraph 4 of Article 16 are appropriate, and whether that concept will be acceptable to the Contracting States.

15. We firmly believe that the international registry system should embody the *transparency principle*. The principle holds that a party searching the registry will be put on notice of all actual or potential interests which might have priority over its interests.**/ It seeks to eliminate concealed interests. *The failure to embody the transparency principle would reduce the economic value of the future Convention.****/ We, therefore, suggest that:-

(i) the words "over an unregistered interest" at the end of paragraph 1 of Article 26 be deleted and replaced by the following: ", subject to paragraph (2) of Article 35, over any other right or interest of any kind that is not registered or registerable";

(ii) analogous amendments be made to sub-paragraph (a) of paragraph 3 to Article 26; and

(iii) sub-paragraph (a) of paragraph 4 of Article 26 be deleted.

16. We support Alternative A for insertion as paragraph 2 of Article 26 and, accordingly, the deletion of sub-paragraph (b) of paragraph 4 of that Article and the relevant parenthetical phrase in Article 33.

17. We are concerned about the breadth of paragraph 4 of Article 27, and believe that additional efforts should be made to preserve the general "validity" of international interests in the context

**/ The one exception to this rule--in the case of categories of equipment for which transfers are not registerable--would be the interest of a buyer. This is addressed in paragraph 3 of Article 26.

***/ See pp. 8 and 17-18 of the draft economic impact assessment study document being prepared for the Aircraft Protocol Group under the auspices of INSEAD and the New York University Salomon Center (APG 1997 Doc. 8).

of insolvency. This is the clear intent of paragraph 1 of that Article, and may impact the important precatory insolvency provision contained in Article XIV of the Aircraft Equipment Protocol. At the very least, amendments are required to ensure (i) the recognition of their proprietary nature and (ii) the superiority of that proprietary interest in the object to any right or claim of unsecured creditors or the administrative representatives. The Study Group should identify and expressly address preferential or undervalued transactions since these would appear to be the problematic issues. Analogous considerations apply to paragraph 2 of Article 34.

18. With a view toward facilitating the assignments of international interest, paragraph 2 of Article 28 sets forth the substantial requirements for a valid assignment. This important provision is the functional equivalent of Article 7 as relates to the validity of international interests. These two provisions underpin the *sui generis* nature of international interests and their assignments. The most recent amendments to sub-paragraph (b) of paragraph 1 of Article 29, and to Article 31, significantly reduce the value of Article 28 by deferring to "applicable law" on the question of assignability. We recommend the reinsertion of the previous text and the elimination of this deference to applicable law.

19. In order to ensure clear rules on which transaction parties can rely, we suggest the deletion of paragraph (c) of Article 31 and its subjective knowledge standard.

20. Under the current wording of Article 35, a tax lien cannot be a registrable non-consensual interest, and a materialman's lien cannot be a preferred non-consensual interest. Query whether any non-consensual interests should be eligible, at the declaration of the relevant Contracting State, for either category.

Representatives of the Aircraft Protocol Group will be in attendance at the upcoming meeting of the Study Group to elaborate on the foregoing and to provide additional comments of a drafting or technical nature.

APG 1997

Doc. 7

(Original: English)

AIRCRAFT PROTOCOL GROUP

PROPOSED CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

AIRCRAFT EQUIPMENT PROTOCOL

(second draft of Aircraft Equipment Protocol and introductory remarks prepared by
Chairman of the Aircraft Protocol Group to reflect the decisions taken at the 25-27
August 1997 meeting of the Aircraft Protocol Group)

N.B.: This document is not intended as a statement of the positions or views of any group or entity, but rather as a working document of the Aircraft Protocol Group. The Aircraft Protocol Group will be meeting 19-21 November 1997 to discuss this document.

September 1997

INTRODUCTORY REMARKS

1. - The Aircraft Protocol Group held its first session at the offices of the International Civil Aviation Organization in Montreal from 25 to 27 August 1997. The session was opened at 1:00 p.m. on the 25th by its host, Dr. L. Weber, and was chaired by Mr. J.A. Wool, in his capacity as Chairman of the Aircraft Protocol Group.

2. - The session was attended by the following members of the Aircraft Protocol Group, liaison observers to the Aircraft Protocol Group and special guests:

Aircraft Protocol Group Members:

Mr. L.S. Clark	General Counsel and Corporate Secretary International Air Transport Association
Dr. L. Weber	Director, Legal Bureau International Civil Aviation Organization
Mr. J.A. Wool	Partner, Perkins Coie, London Coordinator, Aviation Working Group Consultant to the Unidroit Study Group

Aircraft Protocol Group Support:

Mr. D. Clancy	Assistant General Counsel The Boeing Company
Ms. G. Deyhimy	Legal Counsel International Air Transport Association
Mr. S. Espínola	Principal Legal Officer International Civil Aviation Organization

Liaison Observers:

Mr. M. Comber <i>(Representing the International Association of Latin American Air Transport as Latin American Liaison Observer)</i>	Relationship Director, ICAO Affairs International Air Transport Association
Ms. C. Duffy <i>(European Liaison Observer)</i>	Partner, A & L Goodbody, Dublin
Mr. M. Fanqiu <i>(China Liaison Observer)</i>	Department of Restructuring Regulations and Enterprise Supervision of Civil Aviation of China
Mr. J. Fengchun <i>(China Liaison Observer)</i>	Department of Restructuring Regulations and Enterprise Supervision of Civil Aviation of China
Mr. C.W. Mooney, Jr. <i>(United States Liaison Observer)</i>	Professor of Law, University of Pennsylvania

Special Guests:

Mr. P. Bustos	Alternate on ICAO Council National Delegation-Bolivia
Mr. A. Djojonegoro	General Affairs Directorate Indonesian Aircraft Industry Ltd.
Mr. N. Kasirer	Director, Quebec Research Centre of Private and Comparative Law McGill University
Mr. G.H. Lauzon	General Counsel, Constitutional & International Law, Ministry of Justice Canada
Dr. M. Milde	Director, Institute and Centre of Air and Space Law McGill University
Honorable AM Trahan	Cour Supérieure Palais de Justice, Canada Member, Unidroit Governing Council

3. - Mr. P.V. Kapur, representative of the Indian International Law Foundation, the Indian institution liaising with the Aircraft Protocol Group, was unable to attend the session and sent written comments for consideration by the Aircraft Protocol Group. Those comments were duly noted at the outset of the session.

4. - The business of the Aircraft Protocol Group at the session was to: (i) discuss preliminary matters relating to the organisation, working methods and tasks of the Aircraft Protocol Group; (ii) discuss the basic principles on which the draft Aircraft Equipment Protocol will be developed; (iii) discuss the relationship between the future Convention on International Interests in Mobile Equipment (**future Convention**) and the draft Aircraft Equipment Protocol; and (iv) consider the initial draft of the Aircraft Equipment Protocol in light of the documents listed in paragraph 5 *infra*.

5. - The basic working documents of the session were:

(1) Basic outline of Aircraft Equipment Protocol and select explanatory notes, draft provisions and cross-references (prepared by the Chairman of the Aircraft Protocol Group to reflect the initial terms of reference as set forth in the foundational correspondence) (APG 1997, Doc.1, May 1997);

(2) Comments from the International Civil Aviation Organization and the Asociación Internacional de Transporte Aéreo Latinoamericano on the basic outline of the Aircraft Equipment Protocol and related materials (prepared by the Director, Legal Bureau of the International Civil Aviation Organization and the Executive Director of the Asociación Internacional de Transporte Aéreo Latinoamericano, respectively) (APG 1997, Doc. 1.1, June 1997);

(3) Annotated outline relating to the economic impact assessment study (prepared under the auspices of INSEAD and the New York University Salomon Center by Professors A. Saunders and I. Walter) (APG 1997, Doc. 2, June 1997);

(4) Summary Report of the 26-28 May 1997 session of the working group to consider the legal and technical issues raised by the establishment of an international register (prepared by Unidroit Secretariat) (APG 1997, Doc. 3, July 1997);

(5) Initial draft of the Aircraft Equipment Protocol (prepared by the Chairman of the Aircraft Protocol Group to reflect the basic outline and comments thereon) (APG 1997, Doc. 4, July 1997);

(6) Comments from the International Civil Aviation Organization on the initial draft of Chapter VI of the Aircraft Equipment Protocol (prepared by the Director, Legal Bureau of the International Civil Aviation Organization) (APG 1997, Doc. 4.1, August 1997);

(7) Preliminary comments of the Indian Liaison Observer to the Aircraft Protocol Group (prepared by Mr. P.V. Kapur on behalf of the Indian International Law Foundation) (APG 1997, Doc. 4.2, August 1997);

(8) Memorandum to the drafting sub-group of the Unidroit study group relating to the coordination between the Convention and the Aircraft Equipment Protocol (prepared by the Chairman of the Aircraft Protocol Group as a resource for the drafting sub-group at its 24-27 July 1997 meeting) (APG 1997, Doc. 5, July 1997); and

(9) Revised draft of the proposed Convention (prepared by the Drafting Group at its fourth session, held in Würzburg from 24-26 July 1997, together with related introductory remarks prepared by the Unidroit Secretariat) (APG 1997, Doc. 6, August 1997).

6. - As a threshold matter, the Aircraft Protocol Group agreed as to the desirability of expressing a common view both on the matters addressed in the future Convention and on the contents of the Aircraft Equipment Protocol. In particular, the Aircraft Protocol Group agreed to submit a single set of comments on the current draft of the future Convention to the Unidroit Study Group for consideration at its final session to be held 3-8 November 1997.

7. - There was agreement on the basic objective of the Aircraft Protocol Group. That objective is to prepare a draft legal instrument that has the potential to both (i) significantly facilitate the asset-based financing of the aircraft objects, in terms of reducing the cost and increasing the availability of such financing and (ii) gain wide acceptance from states. As regards the former, it was agreed that the principles underlying asset-based financing and the notion of transaction party autonomy (re matters *inter se*) would guide the Aircraft Protocol Group in its work. As regards the latter, the importance of a high quality government consultation process was acknowledged.

8. - The Aircraft Protocol Group agreed, as a general principle, that the use of provisions on which reservations are expressly permitted ("**precatory provisions**") offer a means of avoiding tension between the two strands of the basic objective noted in paragraph 7 *supra*, and would thus enable the Aircraft Protocol Group to pursue them in tandem. Precatory provisions would address matters that directly relate to the asset-based financing principles yet have the potential to raise policy questions under many national legal systems.

9. - After a thorough discussion of the relationship between the future Convention and the Aircraft Equipment Protocol, it was agreed to recommend to the Unidroit Study Group that Article 2(3) of the future Convention be deleted. That provision, which limits the ability of the Aircraft Equipment Protocol to "derogate from or vary" select provisions, is thought to be inconsistent with the notion of the Aircraft Equipment Protocol as the

controlling instrument. It would also raise potential problems in the context of governmental consensus building. It is thought that governments should be able to reach agreement in the aviation context, and have that agreement reflected in the legal instruments. The technical compatibility of the future Convention and Aircraft Equipment Protocol would be ensured by governmental experts. Any retention by the Unidroit Study Group of the protocol-limiting concept contained in Article 2(3) of the future Convention should, in the view of the Aircraft Protocol Group, be extremely narrow and in all cases consistent with the contexts of the Aircraft Equipment Protocol.

10. - In line with the concept of the Aircraft Equipment Protocol as the controlling instrument, there was consensus that the act of ratifying, accepting, approving or acceding to the Aircraft Equipment Protocol establishes the definitive international legal relation among parties to it. In a similar vein, there was agreement that the Aircraft Equipment Protocol, rather than the future Convention, should contain procedures relating to subsequent amendments affecting aircraft objects, and that no other amendments should be binding upon parties to the Aircraft Equipment Protocol.

11. - The Aircraft Protocol Group discussed, in broad terms, the relationship between the proposed legal instruments and the existing international legal framework applicable to international civil aviation, particularly the Convention of 1948 on the International Recognition of Rights in Aircraft ("**Geneva Convention**"), and existing systems of registration and recordation of interests in aircraft objects. A number of the points made are reflected in the revisions to the Aircraft Equipment Protocol summarised in paragraph 33 *infra*.

12. - The text of the revised draft of the Aircraft Equipment Protocol as proposed by the Aircraft Protocol Group is set out following these Introductory Remarks. That revised draft remains subject to the views of the International Civil Aviation Organization, International Air Transport Association and the Aviation Working Group.

Chapter-by-Chapter¹ consideration of the revised draft of the Aircraft Equipment Protocol²

Re Chapter I

13. - One of the purposes of Article I of the Aircraft Equipment Protocol is to make clear that, in the event of conflict between the future Convention and the Aircraft Equipment Protocol, the terms of the Aircraft Equipment Protocol control. Concern was noted that to ensure this result it might be desirable to employ stronger language and/or to note that, as regards aircraft objects, the future Convention is "amended" by the Aircraft Equipment Protocol. Agreement was ultimately reached that the current draft language was satisfactory, and that the point noted above could be confirmed in the interpretive note contemplated by Article III of the Aircraft Equipment Protocol.

14. - The concept of a binding interpretive note was recognized as useful in the effort to keep the text of the Aircraft Equipment Protocol as short and simple as possible, yet at the same time providing the requisite amount of detail to advance the commercial objective of the instrument. This reasoning was thought to be equally applicable to the desirability of

¹ Minor and technical matters, as well as those that merely reflect the revised numbering of the current version of the future Convention, will not be summarised.

² Unless otherwise indicated, the numbering employed hereunder in respect of individual Articles refers to their numbering in the revised draft of the Aircraft Equipment Protocol.

an interpretive note to the future Convention. It was agreed, however, that no final views should be expressed on the appropriateness of the concept of an interpretive note until a draft is prepared and its contents reviewed. See paragraph 36 *infra*.

Re Chapter II

15. - Article V of the Aircraft Equipment Protocol addresses transfers. There was agreement on the desirability of that Article and on its consistency with aviation finance law and practice. A new paragraph 4 was added as a consequence of the revisions to the modifications of the priority rules summarised in paragraph 32 *infra*.

Re Chapter III

16. - It is customary practice for one airline to operate air transport services, using both its aircraft and employees, on routes of another airline. These contractual arrangements in which care, custody and control of the aircraft remains with the former airline are referred to in aviation parlance as *wet lease* transactions. Given the breadth of the term *leasing agreement* in paragraph (e) of the Appendix to the Convention, paragraph 1 of Article VI of the Aircraft Equipment Protocol is required to exclude such transactions from the scope of the future Convention. Drafting changes were made to that provision. Further amendments may also be advisable in order to coordinate with the terminology employed by the European Civil Aviation Conference in its work on the subject of wet leasing.

17. - Former paragraph 3 of Article VI of the Aircraft Equipment Protocol addressed two matters now treated separately in the revised text. The first item is the ability of one party to act as agent, trustee or other representative of other parties. As a threshold matter, it was thought that this provision might well be a candidate for inclusion in the basic text of the future Convention. Should the Unidroit Study Group decide otherwise, it was agreed that the ever-increasing importance of agency and trust arrangements in aviation finance justified a provision in the Aircraft Equipment Protocol. Such a provision is included as paragraph 3 of Article VI of the Aircraft Equipment Protocol. There does remain, however, an important question as to whether that provision, in addition to addressing the technical matter of recognition under the future Convention, should (i) defer to national law, (ii) create substantive law, or (iii) provide a choice-of-law rule. The narrow, substantive rule continued in sub-paragraph (b) is proposed as a means of addressing this difficult question. The provision has been inserted in square brackets to indicate its provisional nature.

18. - Paragraph 4 of Article VI of the Aircraft Equipment Protocol confirms that, subject to the connecting-factor provision of the future Convention, the rights and interests of any party to an agreement should not be conditioned on its domicile or residence in, or its being a national of, any particular Contracting State. This provision, which is intended to override any national restrictions limiting the ability of foreign parties to hold security or to lease objects, was also viewed as a candidate for the basic text of the future Convention and has, accordingly, been placed in square brackets.

19. - Two amendments were made to sub-paragraph (a) of paragraph 1 of Article VII of the Aircraft Equipment Protocol. That sub-paragraph addresses the additional remedy of nationality deregistration under the Chicago Convention of 1944 on International Civil Aviation ("**Chicago Convention**"). The first amendment reflects the fact that aircraft engines, as unique items, are not given separate nationality under the Chicago Convention and thus can not be separately deregistered. The second amendment follows convention in making use of the phrase *state of registry*, rather than country of nationality registration, in defining the nationality of airframes and helicopters under the Chicago Convention.

Corresponding changes have been made in Articles VIII and XVII and paragraph 10 of Annex 1 to the Aircraft Equipment Protocol.

20. - The previous draft of paragraph 2 of Article VII of the Aircraft Equipment Protocol supplemented the commercial reasonableness standard applicable to the exercise of remedies under paragraph 2 of Article 8 of the future Convention by providing that transaction parties may conclusively agree on that standard provided, first, that no exercise of remedies contravened public order and, secondly, that the remedy of sale be publicised for a minimum period. In deference to the principle of transaction party autonomy, it was agreed to delete the publication requirement. The deletion was also made in recognition of the difficulties of articulating a bright line rule, and problems associated with a general standard, relating to publication.

21. - The amendments contained in paragraphs 4 and 5 of Article VII of the Aircraft Equipment Protocol are responsive to changes to Articles 29-31 of the future Convention relating to assignments. As such changes were significant, and will thus be subject to close scrutiny at the upcoming meeting of the Unidroit Study Group, these provisions have been placed in square brackets.

22. - The previous draft of paragraph 2 of Article VIII of the Aircraft Equipment Protocol relating to express waivers of sovereign immunity was thought to be too narrow to achieve the objective of that provision. Without expanding the scope of the provision, the amendments make clear that, where the other conditions to jurisdiction have been satisfied, the express waiver of sovereign immunity will be effective to confer such jurisdiction.

23. - Paragraph 2 of Article IX of the Aircraft Equipment Protocol, addressing certain points between financiers and lessors of airframes and of aircraft engines, has been provisionally deleted on grounds that, although useful, it is not essential to the objectives of the Aircraft Equipment Protocol. That deletion is subject to views of, *inter alia*, the aircraft engine financing community.

Re Chapter V

24. - As indicated in paragraph 8 *supra*, the Aircraft Protocol Group confirmed its support for use of the precatory provisions contained in Chapter V as the principal means of pursuing the commercial and diplomatic objectives of its work in tandem. In reaching this view, the Aircraft Protocol Group took note of the preliminary conclusions reached in the Economic Impact Assessment study currently being prepared under the auspices of INSEAD and the New York University Salomon Center (APG 1997 Doc. 2, June 1997). These preliminary conclusions assign very great weight to the contribution of the precatory provisions to the potential economic value of the future Convention and Aircraft Equipment Protocol.

25. - Paragraph 2 of Article XII of the Aircraft Equipment Protocol of the previous draft contained an affirmative statement to the effect that the precatory provisions represent the public policy of a Contracting State and, as such, are to be applied (where no relevant reservation has been entered) on a mandatory basis. The Aircraft Protocol Group thought it appropriate to delete that paragraph but to capture its essence in the interpretive note relating to the third recital to the Aircraft Equipment Protocol.

26. - The Aircraft Protocol Group noted the amendment to Article 14 of the future Convention in which the phrase "provisional or interim" was dropped from the notion of speedy "judicial relief" contained therein. A corresponding change was made to paragraph 1

of Article XIII of the Aircraft Equipment Protocol. More broadly, the Aircraft Protocol Group expressed its approval with that amendment and its intent, namely, to ensure that the judicial relief under Article 14 of the future Convention is *sui generis*, non-discretionary and non-exclusive.

Re Chapter VI

27. - The entirety of Chapter VI has been placed in square brackets to reflect the fact that its provisions were not formally reviewed at the meeting of the Aircraft Protocol Group. A provisional agreement was reached for purposes of the revised draft of the Aircraft Equipment Protocol, however, on the matters summarised in paragraphs 28-30 *infra*.

28. - Two alternative formulations of Article XVIII of the Aircraft Equipment Protocol have been inserted into the text. That Article addresses the general structure of the proposed international registry system. Square brackets have been placed around these alternative provisions to indicate both their provisional nature and the need for further consideration by the Aircraft Protocol Group of their terms.

29. - Alternative A has been prepared with a view towards leaving governmental experts with maximum flexibility in their consideration of the structure of the proposed international registry system. That alternative itself contains two mutually exclusive bracketed provisions. The first provision contemplates a *unitary registry structure*, that is, a structure in which an intergovernmental entity both operates and regulates the registry. That intergovernmental entity would be accountable to the Contracting States. The second provision contemplates a *binary registry structure*. Such a structure is the type envisaged by the Convention. In a binary registry structure, the operational and regulatory functions are separate. While the regulator of the system would be intergovernmental and accountable to the Contracting States, the operator could well be a private sector service provider acting under the supervision and oversight of the intergovernmental regulator. Alternative A does not, moreover, suggest the identity of the entities to perform the operational and/or regulatory functions. The objective of leaving maximizing flexibility again underlies this aspect of Alternative A.

30. - Alternative B, conversely, seeks to provide governmental experts with guidance and detail on a possible international registry system. It adopts the binary registry structure approach. It then identifies both the Council of the International Civil Aviation Organization or a body designated by it as a potential intergovernmental regulator, and a newly created, special purpose independent affiliate of the International Air Transport Association as a potential initial registrar. These entities have been identified, for consideration by governments, based on their respective significant roles in international civil aviation. The objectives of expediting governmental consideration of the new system and the creation of the proposed registry underlie this aspect of Alternative B.

31. - The amendments to Articles XIX-XXV of the Aircraft Equipment Protocol reflect the inclusion of the two alternative formulations of Article XVIII of the Aircraft Equipment Protocol as summarised in paragraphs 28-30 *supra*.

Re Chapter VII

32. - Article XXVI, formerly Article XXVII, of the Aircraft Equipment Protocol, has been reformulated as modifications to the priority rules now contained in Article 26 of the future Convention rather than as a deletion and replacement of that Article. This was made possible by virtue of the amendments to Article 26 of the future Convention bringing it

into line with the priority rules envisaged for the Aircraft Equipment Protocol. The reformulation of Article XXVI of the Aircraft Equipment Protocol is technical, rather than, substantive, except that the concept contained in paragraph 1 of Article 26 of the future Convention to paragraph 3 of that Article.

Re Chapter VIII

33. - The changes to Article XXVII, formerly Article XXVIII, of the Aircraft Equipment Protocol, which addresses the relationship between the future Convention and the Geneva Convention would permit obligees to exercise *inter partes* remedies against an obligor under either the substantive rules of the Geneva Convention or the future Convention. This amendment, together with provisions contained in paragraph 1 of Article XXVII of the Aircraft Equipment Protocol, seeks to coordinate the two Conventions to the extent practicable, thus minimizing the impact of paragraph 2 of that Article. That paragraph establishes a rule of decision that, in the case of inconsistency, the future Convention shall prevail. These coordinative provisions recognise, on the one hand, the important role of the Geneva Convention, and its recognition of rights system, in the development of the international legal framework applicable to aviation finance. The rule of decision recognises, on the other hand, the inherent limitations of a recognition of rights system and the need for a truly international aviation finance standards over the coming years. Given the importance of this provision, it should be viewed as provisional in nature.

Re Chapter IX

34. - Former Chapter IX contained a set of complex transitional rules applicable to the future Convention. The Aircraft Protocol Group agreed to delete that Chapter in its entirety, replacing it with a proposed rule in the Final Provisions Addendum, discussed in paragraph 35 *infra*, that the Aircraft Equipment Protocol applies to rights and interests in aircraft objects *created or arising on or after the date* on which the Protocol enters into force in the relevant Contracting State. It was thought that the previous approach, which required transfer registrations from current registries to the new International Registry, presented several major problems. As a starting point, it was recognised that unless parties that failed to make transfer registrations were subordinated to subsequent registered interests, the proposed transitional rules would not result in definitive priority rules (re aircraft objects subject to previous financing arrangements). The view of the Aircraft Protocol Group was that it would be inequitable to jeopardise the vested rights of parties under existing transitions. It was believed, moreover, that efforts to minimise this problem by governmental assistance, such as having national aviation authorities take responsibility for effecting transfer registrations, were likely to be resisted on practical grounds. Finally, the Aircraft Protocol Group recognised the potential cost the transitional rules would impose on transaction parties, particularly airlines, including legal costs of ensuring compliance.

35. As indicated in the bracketed explanatory note contained under the Chapter IX heading, it is envisaged that, in accordance with established procedures, the plenipotentiaries at the diplomatic conference will develop the final provisions to the Aircraft Equipment Protocol. To facilitate their work, and to indicate the suggestions of the Aircraft Protocol Group, a preliminary set of draft final provisions are set out in the Final Provisions Addendum to this text. Particular reference should be made to three such draft provisions which are viewed as necessary extensions of the developmental work on the text of the Aircraft Equipment Protocol: *Article XXXII (5)* (addressing the effect of ratification, acceptance, approval or accession of the Aircraft Equipment Protocol by a Contracting State that is not a Contracting State to the future Convention; *Article XXXVII (3)* (limiting the

effect any of denunciation or future declaration or reservation as relates to previously established rights; and *Article XL* (establishing a review board, and contemplating review and revision of the Aircraft Equipment Protocol).

Re Annexures

36. - Article III of the Aircraft Equipment Protocol contemplates the attachment of an interpretive note as Annex 2. In view of the derivative character of the interpretive note, it is intended that the Aircraft Protocol Group would retain responsibility for preparing it during the government consultation phase of the project, in parallel with its future revisions to the Aircraft Equipment Protocol. An outline of the general points to be included in the interpretive note will be discussed at the next meeting of the Aircraft Protocol Group noted in paragraph 41 *infra*.

37. - An initial draft of the form of irrevocable de-registration and request authorisation contemplated by paragraph 1 of Article XVII of the Aircraft Equipment Protocol has been prepared and attached to the revised draft as Annex 3. That initial draft has not yet been formally reviewed by the Aircraft Protocol Group.

38. - The Aircraft Protocol Group will be considering whether the conditions and requirements for registration contemplated by Article 17 of the future Convention and paragraph 1 of Article XXIII of the Aircraft Equipment Protocol will be contained in Annex 4 or, alternatively, in the Regulations. In either event, the Aircraft Protocol Group will, similar to Annex 2, develop these requirements in parallel with governmental consideration of the Aircraft Equipment Protocol.

39. - As mentioned in the first footnote in the Final Provisions Addendum of the Aircraft Equipment Protocol, it is recommended that a resolution be adopted at, and contained in the Final Acts and Proceeding of, the Diplomatic Conference, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for making and/or withdrawing declarations and reservations. This concept replaces former Annex 5, which, accordingly, has been deleted.

Final Notes

40. - In accordance with Unidroit practice, the work of the Aircraft Protocol Group will be produced and considered in French as well as English by virtue of the assistance provided by the Canadian Ministry of Justice in collaboration with the Quebec Research Centre of Private and Comparative Law at McGill University. In accordance with International Civil Aviation Organization practice, the Aircraft Equipment Protocol shall, in due course, also be formally translated into Arabic, Spanish and Russian in preparation for its distribution to Governments.

41. - The next session of the Aircraft Protocol Group has been set for 19-21 November 1997, and will be hosted by the International Air Transport Association at its executive offices in Geneva. The business of that session will be to revise the Aircraft Equipment Protocol, in light of comments received as well as the final amendments to the draft future Convention, with a view towards (i) subsequent distributions to governments, and (ii) submission to the Governing Council of Unidroit and the Council of the International Civil Aviation Organization.

PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT RELATIVE TO AIRFRAMES, AIRCRAFT ENGINES AND HELICOPTERS

THE CONTRACTING STATES TO THIS PROTOCOL

MINDFUL of the demand for and utility of aircraft [objects] [equipment]¹ and the need to finance their acquisition and use as efficiently as possible,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these transactions by establishing clear rules to govern them,

BELIEVING that such rules must (i) reflect the **principles underlying asset-based financing and leasing of aircraft objects**² and (ii) provide transaction parties with autonomy to allocate risks and benefits to the extent consistent with the **policy decisions made by Contracting States** in this Protocol,

CONSCIOUS of the need to establish an international registry system as an essential feature of the international legal framework applicable to the financing and leasing of aircraft objects,

CONSIDERING it desirable to modify the Convention on International Interests in Mobile Equipment, concluded at [] on [], to reflect the requirements of aircraft finance and the purposes described above,

HAVE AGREED as follows:

CHAPTER I GENERAL PROVISIONS

Article I

The Convention shall be modified relative to aircraft objects by the terms of this Protocol.

Article II

Terms used in this Protocol and defined in the Appendix to the Convention or Annex 1 to this Protocol have the meaning there stated.

Article III

The **interpretive note** contained in Annex 2 to this Protocol **shall be referred to** regarding the matters there described.

¹ It is unclear which of these terms will be employed in the final version of the Convention and its title. For consistency with the current version of the Convention, the term "object" will be used in this draft.

² The concepts identified by bold text are to be elaborated upon in the interpretive note envisaged as Annex 2. See Article III below.

Article IV

The Annexures to this Protocol form an **integral part** of this Protocol.³

CHAPTER II EXTENSION OF CONVENTION TO TRANSFERS

Article V

1. - A transfer agreement that is in writing, relates to an aircraft object in respect of which the transferor has the power to enter into the agreement, and identifies the aircraft object by its manufacturer's serial number is sufficient to:

(a) **transfer the interest** of the transferor in the aircraft object to the transferee; and

(b) entitle the transferee to register the interest in the International Registry in conformity with this Protocol and the Regulations.

2. - The provisions of paragraph 1 of Article 15 and Articles 17-19 of the Convention shall apply *mutatis mutandis* in relation to the registration of a transferee's interest.

3. - The provisions of Article 27 of the Convention shall apply *mutatis mutandis* to the interest of a transferee as against the trustee in bankruptcy and the creditors of a transferor.

4. - The provisions of paragraph 2 of Article 35 of the Convention shall apply *mutatis mutandis* to the priority of a non-consensual right or interest (other than a registrable non-consensual interest) as against a registered interest in an aircraft object of a transferee.

CHAPTER III AVIATION FINANCE PROVISIONS

Article VI

1. - No minimum period shall apply for purposes of paragraph (e) of the Appendix to the Convention. To constitute a "leasing agreement" for such purposes, the lessor must be obliged to surrender **possession** of the aircraft object.

2. - A description of an aircraft object that contains its manufacturer's serial number, the name of the manufacturer and its model designation is sufficient to identify the object for purposes of sub-paragraph (c) of Article 7 of the Convention.

[3. - A party may enter into an agreement or transfer agreement, or register a related interest in an aircraft object, in an agency, trust or other representative capacity. Where this has occurred:

³ This provision may be moved to the Final Clauses of this Protocol.

(a) that party, to the exclusion of the party or parties represented, shall be entitled to assert rights and interests under the Convention; and

(b) that capacity may not be used as a defense for the failure by any party to any such agreement to perform its obligations thereunder.]

[4. - Subject to Article 3 of the Convention, the rights and interests arising under the Convention shall not be conditioned upon the place of domicile or residence, or the nationality, of any party to any agreement.]

Article VII

1. - In addition to the remedies specified in paragraph 1 of Article 8 and in Article 10 of the Convention, and the forms of judicial relief specified in paragraph 1 of Article 14 of the Convention, the obligee may in the circumstances specified in such Articles:

(a) deregister the airframe or helicopter from its state of registry; and

(b) **export and physically transfer** the aircraft object from the territory in which it is situated.

2. - The second sentence of paragraph 2 of Article 8 of the Convention shall be deleted and replaced⁴ by the following:

"An agreement between the chargor and the chargee as to what is commercially reasonable shall be conclusive to the extent that the chargee does not, as regards the remedy specified in sub-paragraph (a) of the preceding paragraph, **contravene public order.**"

3. - A chargee giving ten or more days' prior written notice of a proposed sale or lease to interested persons shall satisfy the requirement of providing "reasonable notice" specified in paragraph 3 of Article 8 of the Convention. The foregoing shall not prevent the chargee and the chargor from agreeing to a longer prior notice period.

[4. - The phrase "so far as such rights are assignable under applicable law" shall be deleted from sub-paragraph (b) of paragraph 1 of Article 29 of the Convention.]

[5. - Article 31 of the Convention shall be deleted and replaced⁵ by the following:

"1. - To the extent an international interest has been assigned in accordance with provisions of this Chapter, the obligor in relation to that interest is bound by the assignment, and has a duty to make payment or give other performance to the assignee, if but only if:

(a) the obligor has consented in writing to the assignment;

⁴ If such sentence is deleted from the Convention, this provision will be reformulated as a supplement to the first sentence of paragraph 2 of Article 8 of the Convention.

⁵ Depending upon the final formulation of this rule in the Convention, it may be possible to make more limited modifications.

(b) the obligor has been given notice of the assignment in writing by or with the authority of the assignor; and

(c) the notice identifies the international interest.

2. - The written consent of the obligor referred to in sub-paragraph (a) of the previous paragraph may be made in advance of the assignment and need not specifically identify the assignee."]

Article VIII

1. - [In addition to those specified in paragraphs 2 and 4 of Article 14 and Chapter IX of the Convention, the courts of a Contracting State in the state of registry shall have jurisdiction over disputes giving rise to legal proceedings involving an airframe or helicopter and relating to the Convention].⁶

2. - A waiver of sovereign immunity from jurisdiction of the courts specified in preceding paragraph, paragraphs 2 and 4 of Article 14 or Chapter IX of the Convention or relating to enforcement as specified in Chapter III or Article 32 of the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

Article IX

The Convention shall have no effect for purposes beyond its scope including the application of national rules relating to:

(a) taxation or depreciation of aircraft objects; and

(b) liability, death, personal injury or property damage caused by aircraft objects.

CHAPTER IV AIRCRAFT OBJECTS DETERMINATIONS

Article X

A Contracting State shall⁷ declare at the time of ratification, acceptance, approval or accession the relevant "court" for purposes of paragraph 4 of Article 12 of the Convention.

⁶ This provision will be reformulated based on the drafting of Chapter IX of the Convention. As for the basis of jurisdiction, it has been recommended, *inter alia*, that jurisdiction should lay in courts of a Contracting State (i) in which the centre of the obligor's main interests is situated, (ii) in which the aircraft object is based or situated, and (iii) designated by the transaction parties (so long as such jurisdiction does not violate the fundamental public policy of the Contracting State in which such designated court sits).

⁷ This provision may require a technical amendment to paragraph 4 of Article 12 of the Convention which permits, but does not require, the declaration of the relevant court.

Article XI

A Contracting State may declare at the time of ratification, acceptance, approval or accession:

- (a) the extent to which the exercise of remedies under the Convention requires application to the court as specified in paragraph 2 of Article 12 of the Convention;
- [(b) that while the charged aircraft object is situated within or controlled from its territory the chargee shall not grant a lease of the object in that territory as specified in paragraph 3 of Article 12 of the Convention;]
- (c) that it will disapply the provisions of Article 14 of the Convention, wholly or in part, as specified in paragraph 4 of such Article;
- (d) the registrable non-consensual interest holders (if any) as specified in paragraph 1 of Article 35 of the Convention; and
- (e) the preferred non-consensual interest holders (if any), and the extent of their preference, as specified in paragraph 2 of Article 35 of the Convention.

CHAPTER V PRECATORY ASSET-BASED FINANCING AND LEASING PROVISIONS

Article XII

A Contracting State may declare at the time of ratification, acceptance, approval or accession that it will disapply the provisions of any of Articles XIII-XVII of this Protocol, wholly or in part.

Article XIII

1. - For purposes of paragraph 1 of Article 14 of the Convention, "speedy judicial relief" shall mean a period **not to exceed** thirty days from the date on which the instrument initiating the proceedings is lodged with the court or its administrative office. A **final non-appellable** decision or ruling shall be issued by the court during that period.

2. - The remedies specified in sub-paragraphs (a) and (b) of paragraph 1 of Article VII of this Protocol shall be made available by the appropriate administrative authorities in Contracting States no longer than three working days after the issuance of the court decision or ruling specified in the previous paragraph.

3. - The parties may, by agreement in writing, derogate from the effect of the provisions of the paragraphs 1 and 2 of this Article XIII.

Article XIV

1. - This Article XIV applies, subject to paragraph 8 below, where:

- (a) any **insolvency proceedings** have been commenced by the obligor or against it or its assets under applicable national law; or

(b) the obligor has declared its intention to suspend, or has actually suspended, payment of its debt or rental obligations to creditors generally.

2. - The phrase "insolvency date" shall refer to the first date on which one of the events specified in sub-paragraphs (a) or (b) of the previous paragraph shall have occurred.

3. - Within a period **not to exceed** [thirty/sixty] days from the insolvency date the obligor shall:

(a) cure all defaults, and agree to perform all future obligations, under the **agreement and related transaction documents**; or

(b) return and deliver the aircraft object to the obligee in accordance with, and in the condition specified in, the agreement and related transaction documents.

4. - Where sub-paragraph (b) of the previous paragraph applies, the remedies specified in sub-paragraphs (a) and (b) of paragraph 1 of Article VII of this Protocol shall be made available by the appropriate administrative authorities in Contracting States no later than three working days after the date on which the aircraft object is returned.

5. - No exercise of remedies permitted by the Convention may be **prevented or delayed** after the period specified in paragraph 3 of this Article XIV.

6. - No obligations of the obligor under the agreement and related transactions may be **modified** without the consent of the obligee.

7. - No creditors except for preferred non-consensual interest holders declared under paragraph (e) of Article XI of this Protocol and which relate to insolvency proceedings shall have priority in such proceedings over interests registered under the Convention.

8. - The parties may, by agreement in writing, derogate from the effect of the provisions of paragraphs 1-6 of this Article XIV.

Article XV

1. - Contracting States in which an aircraft object is situated shall on an expedited basis cooperate with and assist the appropriate authorities in the primary insolvency jurisdiction in carrying out the provisions of Article XIV of this Protocol.

2. - For purposes of the previous paragraph, the "primary insolvency jurisdiction" shall mean the country in which the centre of the obligor's **main interests** is situated.

Article XVI

The parties to an agreement and the related transaction documents may agree on the body of national law to govern their **contractual rights and obligations**, wholly or in part. The agreement and transaction need not bear a relationship to the selected body of national law. References in this Article XVI to a body of national law excludes its choice of law rules.

Article XVII

1. - Where the obligor has issued an **irrevocable de-registration and export request authorisation** substantially in the form of Annex 3 to this Protocol and **submitted such instrument** to the aviation authorities in the state of registry, the succeeding paragraphs shall apply.

2. - The person in whose favor the authorisation has been issued (the "authorised party") shall be the sole person entitled to take the actions specified in sub-paragraphs (a) and (b) of paragraph 1 of Article VII of this Protocol, and may do so only in accordance with the authorisation. The authorisation may not be revoked by the obligor without the consent of the authorised party.

3. - Authorities in Contracting States shall cooperate with the authorised party relating to the **speedy completion** of the actions specified in the previous paragraph. The foregoing shall not permit the taking of such action where the holder of a registered interest in the aircraft object having priority over the interest of the authorised party has not consented thereto.

[CHAPTER VI AIRCRAFT OBJECTS REGISTRY PROVISIONS⁸

Article XVIII

Alternative A

[1. - [The International Registry shall be regulated and operated by the International Registry Authority.] [The International Registry shall be regulated by the International Regulator⁹ and operated by the Registrar.]]¹⁰

Alternative B

1. - The International Registry shall be regulated by the Council of the International Civil Aviation Organization or such other permanent body designated by it to be the International Regulator.

2. - The initial Registrar hereby designated to operate the International Registry shall be a newly created, independent special purpose affiliate of the International Air Transport Association to be known as the *Registry Operating Entity*.

⁸ The entirety of Chapter VI has been placed in square brackets to reflect the fact that its provisions were not formally reviewed at the 25-27 August 1997 meeting of the Aircraft Protocol Group.

⁹ Further consideration needs to be given as to whether the appropriate term is *International Regulator* or *Intergovernmental Regulator*.

¹⁰ The two bracketed provisions in this Alternative A are mutually exclusive. If the first bracketed provision in Alternative A is adopted, then the various references in Articles XIX-XXV to the International Regulator and/or to the Registrar, paragraph (c) of Article XX and, possibly, paragraph (e) of Article XX and Article XXV, would be deleted. If the second bracketed provision in Alternative A or the approach represented by Alternative B is adopted, then the various references in Articles XIX-XXV to the International Registry Authority would be deleted.

3. - The Registry Operating Entity shall be organised in consultation with the International Regulator. Its constitutive documents shall contain provisions which:

- (a) restrict it to acting as Registrar and performing ancillary functions; and
- (b) ensure that it has no greater duties (fiduciary or otherwise) to members of the International Air Transport Association than to any person or entity in the performance of its functions as Registrar.

4. - The initial Registrar shall operate the International Registry for a period of five years from the date of entry into force of this Protocol. Thereafter, the Registrar shall be appointed or re-appointed at regular five-year intervals by the [Contracting States] [International Regulator].]

Article XIX

1. - The manner in which the regulation [and oversight] of the International Registry is conducted by the [International Registry Authority] [International Regulator], and the associated responsibilities of the operators of the International Registry and registration facilities, shall be specified in the Regulations.

2. - The [International Registry Authority] [International Regulator] shall act in a non-adjudicative capacity. This shall not prevent the [International Registry Authority] [International Regulator] from undertaking the functions specified in sub-paragraph (a) of paragraph 5 or in paragraph 6 of Article 16 of the Convention as contemplated by paragraph 1 of Article XXII of this Protocol.

3. - The [International Registry Authority] [International Regulator] shall be responsible to the Contracting States, and shall report thereto on its regulatory [and oversight] functions. Such reports shall be made on a yearly basis or more frequently as the [International Registry Authority] [International Regulator] deems appropriate.

4. - The initial Regulations shall be promulgated by the [International Registry Authority] [International Regulator] prior to the entry into force of this Protocol.

Article XX

The [International Registry Authority] [Registrar] shall:

- (a) operate the International Registry efficiently and responsibly;
- (b) perform the functions assigned to it under the Convention, this Protocol and the Regulations;
- [(c) report to the International Regulator on its performance of these functions and otherwise comply with the oversight requirements specified by the International Regulator;]
- (d) maintain financial records relating to its functions [in a form specified by the International Regulator]; and

[(e) insure against liability for its errors and omissions [in a manner acceptable to the International Regulator.]]

Article XXI

1. - The **centralised functions** of the International Registry shall be operated and administered by the [International Registry Authority] [Registrar] on a **twenty-four hour basis**. The various registration facilities shall be operated and administered during **working hours** in their respective territories.

2. - At the time of ratification, acceptance, approval or accession, a Contracting State may, subject to the succeeding paragraph 3:

(a) designate its operators of registration facilities (if any) as specified in paragraph 2 of Article 16 of the Convention; and

(b) declare **the extent to which** any such designation shall preclude **alternative entry [or access] to the International Registry**.

3. - A Contracting State may only designate registration facilities as points of entry or access to the International Registry as relates to:

(a) airframes and helicopters for which it is the state of registry; and

(b) registrable non-consensual interests created under its national law.

Article XXII

1. - The actions specified in sub-paragraph (a) of paragraph 5 and in paragraph 6 of Article 16 of the Convention shall apply to this Protocol. The procedures pursuant to which such actions may be taken shall be specified in the Regulations.

2. - The medium for the transmission of information referred to in Article 18 of the Convention shall be specified in the Regulations. This shall not modify the conditions and requirements to registration referred to in paragraph 1 of Article XXIII of this Protocol [and specified in the Regulations].

3. - For purposes of paragraph 5 of Article 19 of the Convention, the search criterion for aircraft objects shall be their manufacturer's serial number, as supplemented to ensure uniqueness. Such supplemental information shall be specified in the Regulations.

4. - For purposes of Article 23 of the Convention, the categories of preferred non-consensual creditors shall be searchable by the name of the declaring Contracting State.

5. - For purposes of paragraph 4 of Article 20 of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a prospective assignment of an international interest shall take the actions within its power to effect a discharge thereof no later than three days after the receipt of the demand described in such paragraph. The foregoing shall not prevent the parties from agreeing to a shorter period in their agreement.

6. - For purposes of Article 21 of the Convention, registration of an international interest shall, unless discharged, remain effective for an indefinite period of time.

Article XXIII

1. - [The Regulations shall specify] [Annex 4 contains] the conditions and requirements referred to in Article 17 of the Convention.

2. - The [International Registry Authority] [Registrar] and the operators of the registration facilities shall not effect any registrations or enter other information into the data base until the conditions and requirements specified in the previous paragraph and in the Regulations have been satisfied.

Article XXIV

1. - The [International Registry Authority] [International Regulator] shall set and may from time to time amend:

(a) the fee schedule to be paid by the users of the International Registry;
and

(b) the annual fees to be paid as compensation for the operation and administration of the International Registry and the registration facilities.

2. - The fee schedule referred to in sub-paragraph (a) of the preceding paragraph shall be determined so as to **recover the costs** of operating the International Registry and, in the case of the initial fee schedule, of designing and implementing the International Registry system.¹¹

3. - The fees and amounts referred to in paragraph 1 of this Article XXIV shall be set forth in the Regulations.

[Article XXV]

1. - The [International Registry Authority] [Registrar] [and operators of the registration facilities] shall be liable for [its] [their respective] errors and omissions in the operation and administration of the International Registry.

2. - The measure of liability referred to in the preceding paragraph shall be the monetary damages actually incurred as a result of the error or omission.

3. - Notwithstanding paragraph 4 of Article 16 of the Convention:

(a) the persons who have been damaged by the error or omission shall have standing to bring legal actions against the [International Registry Authority] [Registrar] [or the operators of the registration facilities, as the case may be,] seeking the damages specified in paragraph 2 of this Article XXV; and

¹¹ A proposed initial fee schedule should be developed and transmitted to governments in the information package accompanying this Protocol.

(b) the courts [of the Contracting State[s] in which the [International Registry Authority] [Registrar] [or the operators of the registration facilities, as the case may be,] [is] [are]] situated shall have jurisdiction to resolve any disputes relating to this Article XXV.]]

CHAPTER VII MODIFICATIONS TO PRIORITY RULES¹²

Article XXVI¹³

1. - The words "over an unregistered interest" at the end of paragraph 1 of Article 26 of the Convention shall be deleted and replaced by the following: ", subject to paragraph (b) of Article 35, over any other right or interest of any kind which is not registered or registrable."

2. - The words "free from an unregistered interest" at the beginning of sub-paragraph (a) of paragraph (c) of Article 26 of the Convention shall be deleted and replaced by the following: "subject to paragraph (b) of Article 35, free from any right or interest of any kind which is not registered or registrable." The provisions of sub-paragraph (a) of paragraph 3 of Article 26 of the Convention, as modified by the preceding sentence, shall apply only to the extent the transferee¹⁴ registers its interest in the International Registry in accordance with this Protocol.

3. - Paragraph 4 of Article 26 of the Convention is deleted in its entirety.

CHAPTER VIII RELATIONSHIP WITH OTHER CONVENTIONS

Article XXVII

1. - Where a Contracting State is a party to the Convention of 1948 on the International Recognition of Rights in Aircraft (the "Geneva Convention"):

(a) the reference to the "laws" of such Contracting State for purposes of Article I (1)(i) of the Geneva Convention should be to such laws after giving effect to this Convention;

(b) for purposes of that Convention, the term "aircraft" as defined in Article XVI of the Geneva Convention shall be deleted and replaced by the terms "airframes" and "aircraft engines" as defined in this Protocol; and

¹² Depending on the final formulation of the priority rules in the Convention, it may be possible to make more limited modifications and place them in Chapter III of this Protocol.

¹³ This Article XXVI assumes that Alternative A in Article 26 of the Convention is adopted. If it is not, further modifications to that Article will be required.

¹⁴ The term "buyer" as used in that sub-paragraph should be replaced by the term "transferee" to conform to the provision authorising the coverage of transfers in protocols, paragraph 4 of Article 1 of the Convention.

(c) registrations in the International Registry shall be deemed to be regular recordations "in a public record of the Contracting State" for purposes of Article I (1) (ii) of the Geneva Convention.

2. - Subject to paragraph 3, this Convention shall, for the Contracting States referred to in the previous paragraph, supersede the Geneva Convention but only to the extent, after giving effect to the preceding paragraph, of inconsistency between the two Conventions.

3. - The provisions of the preceding paragraph shall not apply to Articles VII and VIII of the Geneva Convention where an obligee elects to exercise *inter partes* remedies against an obligor in accordance with those Articles of the Geneva Convention and provides the court with written evidence of that election.

Article XXVIII

The Convention shall, for Contracting States that do not make a declaration under paragraph (a) of Article XI of this Protocol, supersede the Convention of 1933 for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft to the extent that Convention is in force among them.

Article XXIX

The Convention shall, for Contracting States which are parties to it, supersede the Unidroit Convention on International Financial Leasing of 1988 as relates to aircraft objects to the extent that Convention is in force among them.

Article XXX

The Convention shall, for Contracting States that do not make a declaration under Article XII of this Protocol disapplying Article XVI of this Protocol, supersede where inconsistent with this Convention:

(a) the Rome Convention on the Law Applicable to Contractual Obligations 1980; and

(b) the Inter-American Convention on the Law Applicable to International Contracts 1994-

to the extent that such Conventions are in force among them.

CHAPTER IX FINAL PROVISIONS

[It is envisaged that, in accordance with established procedures, the plenipotentiaries at the diplomatic conference will develop the final provisions to this Protocol. To facilitate their work, and to indicate the suggestions of the Aircraft Protocol Group, a preliminary set of draft final provisions are set out in the Final Provisions Addendum to this text.

Particular reference should be made to three such draft provisions which are viewed as necessary extensions of the developmental work on the text of this Protocol: *Article XXXII*

(5) (addressing the effect of ratification, acceptance, approval or accession of this Protocol by a Contracting State that is not a Contracting State to the Convention; *Article XXXVII (3)* (limiting the effect any of denunciation or future declaration or reservation as relates to previously established rights; and *Article XL* (establishing a review board, and contemplating review and revision of this Protocol).]

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Protocol.

ANNEX 1

DEFINITIONS

In this Protocol:

(1) "aircraft engines" means aircraft engines powered by jet propulsion or turbine technology that:

(a) in the case of jet propulsion aircraft engines, have at least 1750 lbs of thrust or its equivalent; and

(b) in the case of turbine-powered aircraft engines, have at least [550 rated takeoff shaft horsepower] or its equivalent,

together with all **modules and other installed, incorporated or attached accessories, parts and equipment** and all **data, manuals and records** relating thereto,

except aircraft engines used by governmental authorities for military, customs or police purposes;

(2) "aircraft objects" means airframes, aircraft engines and helicopters;

(3) "airframes" means airframes that, when appropriate aircraft engines are installed thereon, are capable of transporting or are certified by the initial country of nationality registration to transport:

(a) at least ten (10) passengers; or

(b) goods [in excess of 2750 kilograms],

together with all **installed, incorporated or attached accessories, parts and equipment** (other than aircraft engines), and all **data, manuals and records** relating thereto,

except airframes used by governmental authorities for military, customs or police purposes;

(4) "authorised party" means the party referred to in paragraph 2 of Article XVII of this Protocol;

(5) "aviation authorities" mean the governmental authorities in the state of registry with responsibility for the registration and de-registration of airframes and helicopters in accordance with the Chicago Convention;

(6) "Chicago Convention" means the Chicago Convention of 1944 on International Civil Aviation or any successor or superseding international agreement governing the nationality of aircraft objects;

(7) "deregister the airframe or helicopter" means in respect of the state of registry the deregistration of the airframe or helicopter from that country under such country's laws and regulations referred to in Article 19 of the Chicago Convention ;

(8) "Geneva Convention" means the Convention referred to in paragraph 1 of Article XXVII of this Protocol;

(9) ["helicopters" means heavier-than-air aircraft which depends principally for their support in flight on the lift generated by one or more rotors and which is capable of carrying:

(a) at least [five (5)] passengers; or

(b) [1000] pounds of cargo-

together with all **installed, incorporated or attached accessories, parts and equipment** (including rotors), and all **data, manuals and records** relating thereto-

except helicopters used by governmental authorities for military, customs or police purposes];

(10) "insolvency date" means the date referred to in paragraph 2 of Article XIV of this Protocol;

[(11) "International Registry Authority" means the permanent international body designated by the Contracting States as the International Registry Authority under this Protocol;]

[(12) "International Regulator" means [the permanent international body designated by the Contracting States as the International Regulator under this Protocol] [the entity designated as the International Regulator in paragraph 1 of Article XVIII of this Protocol];]

(13) "primary insolvency jurisdiction" means the jurisdiction of the insolvency proceedings referred to in paragraph 2 of Article XV of this Protocol;

[(14) "Registrar" means [the entity designated by the [Contracting States] [Intergovernmental Regulator] as the Registrar under this Protocol] [the entity initially designated or subsequently appointed or re-appointed as the Registrar, as the case may be, as specified in Article XVIII of this Protocol].]

(15) "state of registry" means in respect of an airframe or helicopter the Contracting State in which that airframe or helicopter is registered under the Chicago Convention; and

(16) "transfer agreement" means an agreement (other than a title reservation agreement), instrument or other writing by or in which one person ("the transferor") sells

or agrees to sell an aircraft object to another person ("the transferee") and that is expressed to fully divest the transferor of its interest in that aircraft object.

ANNEX 2
INTERPRETIVE NOTE

[to be developed]

ANNEX 3

FORM OF IRREVOCABLE DE-REGISTRATION AND EXPORT REQUEST
AUTHORISATION

[Insert Date]

To: [Insert Name of Aviation Authority]

Re: Irrevocable De-Registration and Export Request Authorisation

The undersigned is the registered [operator] [owner]* of the [insert the airframe/helicopter manufacturer name and model number] bearing manufacturer's serial number [insert manufacturer's serial number] and registration [number] [mark] [insert registration number/mark] (together with all installed, incorporated or attached accessories, parts and equipment, the ["aircraft"] ["helicopter"]).

This instrument is an **irrevocable de-registration and export request authorisation** issued by the undersigned in favor of [insert name of obligee] (the "**authorised party**") under the authority of Article XVII of the Aircraft Equipment Protocol to the Convention on International Interests in Mobile Equipment. In accordance with that Article, the undersigned hereby requests:

- (i) recognition that the authorised party is the sole person entitled to:
- (a) obtain de-registration of the [aircraft] [helicopter] from the [insert name of national aviation registry] maintained by the [insert name of national aviation authority] for purposes of Chapter III of the Chicago Convention of 1944 on International Civil Aviation; and
 - (b) export and physically transfer the [aircraft] [helicopter] from [insert name of country]; and
- (ii) confirmation that the authorised party may take the actions specified in clause (i) above on written demand without the consent of the undersigned and that, upon such demand, the authorities in [insert name of country] shall cooperate with the authorised party relating to the speedy completion of such actions.

The rights in favor of the authorised party established by this instrument may **not be revoked** by the undersigned without the written consent of the authorised party.

Please acknowledge your agreement to this request and its terms by appropriate notation in the space provided below and lodging this instrument in [insert name of national aviation registry].

Sincerely yours,

[insert name of operator/owner]

Agreed to and lodged this
[insert date]

By: [insert name of signatory]
Its: [insert title of signatory]

[insert relevant notational details]

* Select the term that reflects the relevant nationality registration criterion.

ANNEX 4

CONDITIONS AND REQUIREMENTS TO REGISTRATION

[to be developed*]

* See paragraph 1 of Article XXIII of the Protocol regarding the proposed alternative to this Annex 4.

ADDENDUM

FINAL PROVISION ADDENDUM

Article XXXI

The Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the [] *Convention on International Interests in Mobile Equipment as modified by the [] Aircraft Equipment Protocol.*

Article XXXII

1. - This Protocol is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Protocol to the Convention on International Interests in Mobile Equipment as Relate to Airframes, Aircraft Engines and Helicopters and will remain open for signature by all Contracting States at [] until [].

2. - This Protocol is subject to ratification, acceptance or approval by Contracting States which have signed it.

3. - This Protocol is open for accession by all States which are not signatory Contracting States as from the date it is open for signature.

4. - Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.*

5. - Ratification, acceptance, approval or accession of this Protocol by any Contracting State which is not a Contracting State to the Convention shall, as relates solely to aircraft objects, have the effect of adherence to the Convention as modified by this Protocol.**

Article XXXIII

1. - This Protocol enters into force on the first day of the month following the expiration of three months after the date of deposit of the [third instrument] of ratification, acceptance, approval or accession.

2. - For each Contracting State that ratifies, accepts, approves or accedes to this Protocol after the deposit of the [third instrument] of ratification, acceptance, approval or accession, this Protocol enters into force in respect of that Contracting State

* It is recommended that a resolution be adopted at, and contained in the Final Acts and Proceeding of, the Diplomatic Conference, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for making and/or withdrawing declarations and reservations.

** This provision will only be required if paragraph 2 of Article 2 of the Convention is amended so as to limit the ability of Contracting States to bring the Convention into force solely as relates to aircraft objects.

on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article XXXIV

1. - If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. - These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Protocol extends.

3. - If a Contracting State makes no declaration under paragraph 1 above, the Convention is to extend to all territorial units of that State.

Article XXXV

This Protocol applies to rights and interests in aircraft objects created or arising on or after the date on which this Protocol enters into force [in the Contracting State[s] referred to in paragraph 4 of Article 2 of the Convention].

Article XXXVI

1. - No declarations or reservations may be made to this Protocol at the time of signature but instead shall be specified at the time of ratification, acceptance, approval or accession.

2. - No declarations or reservations are permitted except those expressly authorised in this Protocol.

Article XXXVII

1. - This Protocol may be denounced, or a declaration may be made, by any Contracting State at any time after the date on which it enters into force for that Contracting State, by the deposit of an instrument to that effect with the depositary.

2. - Any such denunciation or declaration shall take effect on the first day of the twelfth month following the deposit of the instrument of denunciation or in which such declaration is made with the depositary. Where a longer period for the denunciation or declaration to take effect is specified in the instrument of denunciation or in which such declaration is made, it shall take effect upon the expiration of such longer period after its deposit with the depositary.

3. - Notwithstanding the previous paragraphs, this Protocol shall continue to apply in respect of all **rights and interests established prior to the effective date of any denunciation or declaration.**

Article XXXVIII

Any Contracting State may at any time withdraw a declaration or reservation that it has made. Any such declaration or reservation shall cease to have effect on the first day of the third calendar month after the date the depository has received the subject withdrawal.

Article XXXIX

1. - This Protocol shall be deposited with the [_____].
2. - The [_____] shall:
 - (a) inform all Contracting States which have signed or acceded to this Protocol and [_____] of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) each declaration made in accordance with this Protocol;
 - (iii) the withdrawal of any declaration;
 - (iv) the date of entry into force of this Protocol; and
 - (v) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;
 - (b) transmit certified true copies of this Protocol to all signatory Contracting States, to all Contracting States acceding to the Protocol and to [_____];
 - (c) post the contents of each Aircraft Objects Ratification Addendum in a manner which renders the information contained therein publicly accessible; and
 - (d) perform such other functions customary for depositaries.

Article XL

1. - A five-member review board shall promptly be appointed to prepare yearly reports to the Contracting States addressing the matters specified in sub-paragraphs (a)-(d) of paragraph 2 of this Article XL. The composition of the review board, and its organisation and administration, shall be determined, in consultation with other aviation interests, jointly by the International Institute for the Unification of Private Law and the International Civil Aviation.

2. - At the request of not less than twenty five percent of the Contracting States, conferences of the Contracting States shall be convened from time-to-time to consider:

(a) the practical operation of this Protocol and its effectiveness in facilitating the asset-based financing and leasing of aircraft objects;

(b) the judicial interpretations given to the terms of the Convention, this Protocol and the Regulations;

(c) the functioning the International Registry system, and performance of the Registrar and its oversight by the International Regulator; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

**Summary of Provisions in the Aircraft Equipment Protocol
That are Potentially Inconsistent with
Article 2(3) of the Future Convention**

Aircraft Equipment Protocol Provisions	Non-Modifiable Convention Provisions */
V (extension of Convention to transfers)	1 (4)
VI(1) (supplement to the definition of a leasing agreement)	4 (paragraph (e) in definitions appendix)
VII(1) (additional remedies)	8 and 10
VII(2) (elaboration on commercially reasonable exercise of remedies)	8(2)
VII(3) (supplement to the definition of reasonable notice)	8(3)
VII(4) (removal of deference to assignability of international interests under applicable law)	29 and 31
VII(5) (replacement of knowledge standard with consent requirement regarding the binding of an obligor)	31
VIII(1) (additional bases of jurisdiction)	14 and Chp. IX
XIII (precatory provision establishing a timetable for expedited remedies)	14
XIV (precatory special insolvency rule)	27(4)
XVII (additional remedy relating to nationality deregistration)	8 and 10
XVII-XX (constitution of international registry system)	Chp. IV
XXVI (modification to priority rules)	26

*/ This summary has been generated from the wording of Introductory Remark 19 which makes a general statement relating to the non-modification of the "core rules... regarding the constitution of international interests..., default remedies and priorities". It then lists certain provisions in Chapter I-III that the drafting group tentatively concluded should not be susceptible to modification. A broad interpretation of Introductory Remark 19 which combines this general statement and list would produce these provisions: 1, 2, 3, 4, 6, 7, 8, 9(4), 10, 12(1), 13, 14, 26, 27, 28, 29, 31, 32, 33, 34 and 35. Since the drafting group did not consider registry or jurisdiction provisions, we have also assumed the possibility that Chapters IV, V and IX might also be viewed in the same light.