

UNIDROIT 1998
Study LXXII - Doc. 45 /
Study LXXIID – Doc. 6
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
=====

COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND
A DRAFT PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

*PRELIMINARY DRAFT UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT*

and

*PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT:*

COMMENTS

(submitted jointly by the International Air Transport Association and the Aviation Working Group)

Rome, December 1998

INTRODUCTION

(by the Unidroit Secretariat)

In the period between the end of October and the beginning of December 1998 the Unidroit Secretariat communicated to those intergovernmental Organisations and those international non-governmental Organisations invited to designate representatives to participate in the first session of a committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol on Matters specific to Aircraft Equipment, convened jointly by Unidroit and I.C.A.O., to take place in Rome from 1 to 12 February 1999, the texts of a preliminary draft Unidroit Convention on International Interests in Mobile Equipment, as established by an Unidroit Study Group and revised, in accordance with a decision taken by the Unidroit Governing Council at its 77th session, held in Rome from 16 to 20 February 1998, by a Steering and Revisions Committee, meeting in Rome from 27 to 29 June 1998, (Study LXXII – Doc. 42) and a preliminary draft Protocol thereto on Matters specific to Aircraft Equipment, as established by a special working group (the Aircraft Protocol Group), constituted under the authority of the President of Unidroit and the core members of which were the International Civil Aviation Organization (I.C.A.O.), the International Air Transport Association (I.A.T.A.) and an aviation working group (A.W.G.) organised jointly by Airbus Industrie and The Boeing Company, and subsequently revised pursuant to the aforementioned procedure decided upon by the Governing Council (Study LXXIID – Doc. 3). On that occasion the Unidroit Secretariat invited these Organisations to formulate comments on the aforementioned texts with a view to the forthcoming session of governmental experts.

On 1 December 1998 the Unidroit Secretariat received comments from A.W.G. Subsequently the Unidroit Secretariat was informed that these comments were to be treated as the joint comments of I.A.T.A. and A.W.G. These comments are set out hereunder.



PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

and

PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT:

COMMENTS

(submitted jointly by the International Air Transport Association and the Aviation Working Group)

We would start by reiterating our **first principle** on all matters relating to the texts. The desirability of individual provisions in the texts, and the instruments as a whole, should be judged against a simple criterion: will they facilitate asset-based financing and leasing of aircraft equipment, increasing the availability and/or reducing the cost of aviation credit. Any policy concerns associated with such provisions should be addressed by the mechanism of contemplated

reservations. Vague standards, inconsistent with the basic objective of providing commercial predictability, should be avoided.

A number of technical and drafting type comments are set out in the attachment hereto. This format is designed to permit us to emphasise the following four major points:

1. – **Correcting Article 15(1) of the preliminary draft Convention: Expedited Remedies**

As noted in paragraph 39 of the Steering and Revisions Committee Report (Unidroit 1998 Study LXXII - Doc. 41), it is necessary to remove the potential ambiguity arising by virtue of the bracketed wording in Article 15(1).

The intention of this provision, as evolved from an earlier position of the Aviation Working Group, is that **any of the enumerated remedies plead by the obligee** would be available promptly upon its adducing *prima facie* evidence of default. Any wording that is inconsistent with the foregoing will “reduce [the contemplated] financing-related benefits” of the preliminary draft Convention. See A. Saunders and I. Walter, Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment, September 1998 at p. 12 (emphasis added) [hereinafter **Economic Impact Assessment**].

Accordingly, in order to achieve the basic objective of this critically important provision, we suggest replacing the words “one or more of the following orders” with the words “any of the following plead by the obligee”.

In the event this provision, as so clarified, raises policy concerns for any Contracting State, it may enter a reservation, wholly or in part, pursuant to Article Z of the preliminary draft Convention.

2. – **Need for Commentary**

Square brackets have been placed around Article 7(2) of the preliminary draft Convention, the provision that contemplates the preparation of the commentaries on the future Convention and Protocol. In our view, the preparation of such commentaries, on a timely basis, will greatly enhance the utility of the proposed treaty instruments. There are a significant number of material points that need to be elaborated upon in such commentary in order to ensure the required level of predictability.

To give but a few examples, the commentary should (i) articulate the “general principles” underlying the texts referred to in the gap-filling provisions of Article 7(3) of the preliminary draft Convention; (ii) address select aspects of the relationship between the proposed instruments and national law, including the exhaustive character of the constitutive elements relating to an international interest contained in Article 8 of the preliminary draft Convention; (iii) set out the parameters of the notion of public order as a limitation on the availability of non-judicial remedies in Article IX(3)(b)(3) of the preliminary draft Protocol; (iv) confirm the absence of any requirement to establish a reasonable relationship between a law chosen on contractual matters and the transaction and/or parties for purposes of Article VIII of the preliminary draft Protocol; (v) contain a clear statement of the *sui generis* nature of the expedited judicial relief rule contained in Article 15 of the preliminary draft Convention; and (vi) provide greater detail on the international standard applicable to error and omission liability of the International Registry.

3. – Inclusion of Non-Consensual Rights and Interests

The texts currently contain square brackets around all references to non-consensual rights and interests. The inclusion of non-consensual rights and interests, as flexibly addressed in Chapter IX of the preliminary draft Convention, is a condition to the transparency and efficiency of the proposed international registry system and the contemplated priority regime. *See* Economic Impact Assessment at pp. 11-12.

4. – Structure of International Registry

We support the deletion of Alternative B in Article XVI of the preliminary draft Protocol, the provision that sets out the basic structure of the international registry for aircraft equipment. We believe that the other member of the Aircraft Protocol Group, namely I.C.A.O., also supports this proposition.

On a procedural point, we believe that it is necessary to accelerate the development of the international registry, and would encourage all involved to provide a mechanism for intensive work on the subject at this stage.

We will be preparing a background and information note on aircraft registry issues for distribution, as appropriate, to interested parties at the upcoming session.

TECHNICAL AND DRAFTING COMMENTS

**(submitted by the International Air Transport Association and
the Aviation Working Group)**

In addition to the major comments set out above, the Aviation Working Group would suggest that the following points be considered and/or technical and drafting amendments be made:

RE THE PRELIMINARY DRAFT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

A table of contents should be prepared. That table should list the Articles, which should be individually titled in the text. This is consistent with the approach taken in the preliminary draft Protocol.

Recitals should be drafted, and should be similar to those contained in the preliminary draft Protocol. Recitals contained in the preliminary draft Protocol might then be eliminated or simplified.

Re Article 1

Amend definition of “contract of sale” to clarify that the contract must transfer ownership of the object or all interests of the transferor therein.

Re Article 3

Consideration should be given to deleting the list, and replacing the words “of any of the following categories” in the lead-in with the words “of a kind defined in any Protocol”.

Re Article 4

Through the Protocol, this connecting factor provision should apply to a contract of sale when, at the time of its conclusion, the transferor is located in a Contracting State or the aircraft is registered in a national aircraft register located in a Contracting State.

Re Article 5

The term “party” should be replaced by the term “obligor”.

Re Article 7(2)

See major comment 2 above.

Re Article 7

Add clause confirming that, as regards the constitution of an international interest, the remedies available upon default, and the priority of competing interests, the preliminary draft Convention is exhaustive. Its provisions are not to be qualified by conditions, restrictions or limitations under applicable law (except where the text expressly so provides). *See* para. 21 of the Steering and Revisions Committee Report.

Re Article 8(d)

Remove the square brackets.

Re Article 15(1)

See major comment 1 above.

Re Article 16(2)

This provision should also apply to the International Regulator or International Registry Authority, as the case may be.

Re Article 24

In addition to removing the square brackets, the Registrar should also be required to maintain a list of Contracting States. That list should specify any reservations entered into by the subject Contracting State.

Re Article 27(1)

It is unclear as to whether the International Registry or its operator is liable for errors or system malfunctions. Settling on the basic structure of the International Registry is probably a condition to resolving this issue.

Re Article 28(5)

Remove the square brackets or, alternatively, retain the relevant wording in Article XIV(2) of the preliminary draft Protocol.

Re Article 30(2)

Add a clause analogous to Article 8(b) of the preliminary draft Convention.

Re Article 31(1)(b)

Remove the square brackets or, alternatively, retain the relevant wording in Article XV(2) of the preliminary draft Protocol.

Re Chapter IX

See major comment 3 above.

Re Article 42(1)(b)

Redraft so as to clarify that one party is not deemed to have automatically submitted to the jurisdiction of the courts where its counterparty is located. Such submission must be by contract. Beyond this point, we support broad bases of jurisdiction, with a preference, in any hierarchy, to the courts selected by the transaction parties.

Re Article 43

Combine with Article 42. There is no principled distinction between the two Articles. Clarify the relationship between the last clause of Article 43 and Article 27(2) of the preliminary draft Convention.

Re Article U

We support the insertion of a small number of required ratifications, and note that the relevant provision in the preliminary draft Protocol requires three, although the same is currently in square brackets.



RE PRELIMINARY DRAFT PROTOCOL TO THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

Re Article I(2)

Amend definition of “aircraft engines” to make it more objective. Consideration should be given to having the manufacturers of aircraft engines certify the pounds of thrust potential of the relevant aircraft engine type, and deeming such certification conclusive for purposes of this definition.

Re Article VI

Replace the words “an agreement” the second time they appear on the first line with the words “such agreement or contract of sale”.

Re Article IX(3)(b)(3)

Insert the word “manifestly” before the words “contravenes public order” in the second line. In the same line, replace the word “disruption” with the word “interference”.

Re Article X(2)

Consideration should be given to qualifying this provision to ensure that applicable airworthiness standards are satisfied.

Re Article XVI

See major comment 4 above. In addition, replace the word “International” with the word “Intergovernmental” where the former appears in the preliminary draft Convention and Protocol.

Re Article XXXIV(2)

Amend so as to require an initial review conference no later than five years after the preliminary draft Protocol comes into force.

Re new Article

Add additional final provision requiring the preparation of an official consolidated text synthesising the terms of the preliminary draft Convention and Protocol.