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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 by the Government of Japan)

Rome, January 1999

INTRODUCTION

(by the Unidroit Secretariat)

Subsequently to its receipt of the preliminary observations by the Government of the United States of America on the preliminary draft Unidroit Convention on International Interests in Mobile Equipment (Study LXXII – Doc. 42) and the preliminary draft Protocol thereto on Matters specific to Aircraft Equipment (Study LXXIID – Doc. 3) reproduced in Study LXXII - Doc. 43/Study LXXIID – Doc. 4, of the comments from the Government of Australia on the aforementioned preliminary draft Convention (Study LXXII – Doc. 44) and the aforementioned preliminary draft Protocol (Study LXXIID – Doc. 5), of the comments submitted jointly by the International Air Transport Association and the Aviation Working Group on both texts (Study LXXII – Doc. 45/Study LXXIID – Doc. 6), of the comments submitted by the Government of Canada on the preliminary draft Convention (Study LXXII – Doc. 46) and the preliminary draft Protocol (Study LXXIID – Doc. 7) and of the comments submitted by the Government of Switzerland on the preliminary draft Convention and the preliminary draft Protocol, the Unidroit Secretariat also received preliminary observations from the Government of Japan on the preliminary draft Convention and the preliminary draft Protocol. This paper reproduces these comments set out hereunder.

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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:

PRELIMINARY OBSERVATIONS

(submitted by the Government of Japan)

1. Structure; Application of Convention and Protocols

We recognize that there is a certain logic in setting out basic principles in a relatively concise overarching Convention applicable to all mobile equipment, and confining the specifics relevant to particular classes of equipment to more detailed Protocols. However, we are concerned about adopting a Convention purporting to cover such a wide variety of mobile equipment (as specified in Article 3) at a time when the specifics relevant to only one class of equipment (i.e. aircraft) have actually been set out in a draft Protocol. Further, while this structure may be logical in theory, we are concerned that it may prove cumbersome in practice. In essence, the rules relevant for each class of equipment will be contained in two separate documents, with one no doubt amending and superseding the other in a number of key provisions. We note that at least a few countries have already commented on the desirability in having a document that consolidates the draft Convention and the draft Aircraft Protocol. Given the foregoing considerations, we have concerns about the wisdom and usefulness of attempting to draft and ratify an initial overarching Convention, as opposed to seriatim sets of comprehensive rules for each class of mobile equipment.

2. Priority Over Interests Registered in Non-Contracting States

We query if it is entirely clear under the Convention whether or not an interest registered pursuant to the Convention would always take priority over any other interest in the same object that is registered or otherwise perfected according to the rules of a non-Contracting State but not pursuant to the Convention. If that is indeed intended to be the case, we assume that a lender from a non-Contracting State would be permitted, and indeed required in order to protect its interest to register its interest pursuant to the Convention over any object if the relevant obligor is from a Contracting State or the object is registered in or otherwise has a close connection to a Contracting State.

3. Applicability to Sales and Prospective Sales

We note that Chapter X, and Article 41 thereunder, of the Convention is in square brackets. We would like to express our support for the applicability of the Convention to sales and prospective sales.

4. Exclusion of "Purely Domestic Transactions"

We do not support the inclusion of the bracketed language in Article V of the Convention providing for an exclusion for "a purely domestic transaction". We are doubtful as to whether any expanded definition of this phrase could be sufficiently precise. We would clearly want to avoid a situation where a transaction that might fit within the definition of being purely domestic could subsequently become not so by virtue of movement of the object or one of the parties, or *vice versa*.

5. Requirement of Court Approval for Exercising Default Remedies

Japan is one of the jurisdictions where a security interest is treated very differently from the interest of a lessor under a lease or a conditional seller under a title retention agreement. This is because, unlike the interest of a lessor or conditional seller, a security interest under Japanese law conveys no interest remotely comparable to an ownership interest. As such, a secured lender would never have the right upon a default on the secured obligation to exercise any right to take possession or sell the secured object without obtaining prior court approval. On the contrary, upon a default under a lease or conditional sale agreement, the lessor or conditional seller would have the right to exercise remedies attendant to ownership without obtaining the prior approval of a court.

We recognize that Article Y(2) of the Convention is intended to recognize this fundamental principle in jurisdictions such as Japan by allowing those Contracting States to opt out of the self-help provisions of the Convention and require court approval prior to exercise of any of the remedies specified in Article 9 or 11 of the Convention. We would assume that this opt-out would also apply to any additional self-help remedies that might be included in any Protocol, such as Article IX(1)(a) and (b) of the Aircraft Protocol. While this opt-out mechanism provides us some comfort, are would obviously prefer that the general rule be, at least with respect to remedies for defaults in the performance secured obligations as specified under Article 9, that prior court approval is always required unless a Contracting State opts not to require such approval.

6. Speedy Regulatory Relief under the Aircraft Protocol

Japanese principles of civil procedure provide in appropriate circumstances for the opportunity of a claimant to obtain provisional judicial relief in a relatively short time frame pending resolution of the claim on its merits. However, the time frame for granting such

provisional relief is generally left to the discretion of the court. Therefore, imposing under Article X(1) a 30-day deadline (or any deadline) for obtaining judicial relief would be inconsistent with concepts of civil procedure in Japan and, therefore, unacceptable.

We would like to clarify that the three working day requirement under Article X(2) of the Aircraft Protocol refers only to the time in which the national registry or other administrative officials of the Contracting State must act in order to deregister the aircraft and permit exportation of the aircraft object. There is perhaps minor ambiguity in the wording of Article X(2) as it refers to the "remedies specified in Article IX(1)" being made available within three working days. However, in addition to the remedies specified in clauses (a) and (b) of Article IX(1), there is also a cross-reference to the remedies specified in Articles 9(1), 11 and 15(1) in the Convention. We assume that there is no intention to impose a procedural requirement that courts act upon those remedies within three days. Therefore, we would suggest that the wording of Article X(2) of the Aircraft Protocol be revised so as to refer to the "remedies specified in *Article IX(1)(a) and (b)*".

7. Liabilities and Immunities of the International Registry

We support the provision in Article 27 of the Convention for an indemnity for compensatory losses caused by any "error or system malfunction" in the International Registry. We query whether it is envisioned that there would be a special administrative proceeding pursuant to which an aggrieved party could seek this indemnity or whether recourse would have to be made directly to the courts, which we assume would in any event be possible given the qualifying introductory language in Article 27(3). We also query whether the term "error" would include, for example, a clerical mistake of an employee of the International Registry.

8. Remedies on Insolvency

We would not be able to support any remedial provisions under the Convention or Protocols that would supersede the procedures under our domestic insolvency proceedings. For example, Article XI(3) of the Aircraft Protocol suggests that an obligor would be required either to cure all defaults or give possession of the aircraft object to the obligee within 30 or 60 days after the insolvency date of the obligor. However, if the obligor were subject to Japanese insolvency proceedings, any such action would likely require the consent of a court, bankruptcy trustee or other appropriate administrator. To the extent that Article XII is intended to require the courts of the Contracting State to ensure the remedial result specified in Article XI even if that would not otherwise be the result under the Contracting State's own insolvency laws, we could not support such a principle.