Draft UNIDROIT Convention on International Interests in Mobile Equipment and Draft Protocol on Matters Specific to Aircraft Equipment

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BUSINESS LAW SECTION
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PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers, students and judges across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This Submission was prepared by a committee of the National Business Law Section consisting of practitioners with many years of experience in aircraft finance matters and academics with considerable expertise in secured transaction matters generally. The National Business Law Section has more than 11,000 members.

A list of committee members is attached as Appendix "A". Most committee members are also members of the Personal Property Security Law Subcommittee of the Business Law Section of the Canadian Bar Association -- Ontario. National Office assistance was provided by the Legal and Governmental Affairs Directorate (Legislation and Law Reform).

This Submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Business Law Section of the Canadian Bar Association.

Draft UNIDROIT Convention on International Interests in Mobile Equipment and Draft Protocol on Matters Specific to Aircraft Equipment

I. Introduction

This Submission constitutes the comments and recommendations of the National Business Law Section of the Canadian Bar Association on the Draft UNIDROIT Convention on International Interests in Mobile Equipment (the Convention) and on the Draft Protocol on Matters Specific to Aircraft Equipment (the Protocol), which were distributed for review and comment by the Government of Canada.

The National Business Law Section agrees with the stated objective of the Convention and the Protocol, which is to provide a framework for the creation and the effects of an international interest in high-value uniquely identifiable mobile equipment, such as airplanes, aircraft engines and helicopters. We understand that other interested parties have responded to the questionnaire provided by the Government of Canada. The purpose of this Submission is to identify some issues of concern and to offer recommendations for the Government of Canada's consideration.

II. Analysis and Recommendations

A. Article 1 of the Convention: Definition of "writing"

A "writing" is defined in Article 1 of the Convention to mean "an *authenticated* record of information (including information sent by teletransmission) which is in tangible form or is capable of being reproduced in tangible form" (emphasis added). The term "authenticated" is not defined in the Convention or the Protocol. We recommend that the word "authenticated" be deleted from the definition of "writing". Unless the word "authenticated" is clearly defined, the inclusion of it in the definition of "writing" will lead to a great deal of uncertainty as to whether the agreement creating or providing for the international interest is valid. In comparison, we note that personal property security legislation in Canada simply requires the security agreement to be in writing and signed by the debtor for evidentiary purposes. If this notion of a signature of the obligor is the intended meaning of the term "authenticated", then this should be defined.

Recommendation:

1. The National Business Law Section of the Canadian Bar Association recommends that the word "authenticated" in the definition of "writing" in Article 1 of the Convention be deleted or defined more clearly.

B. Article 2(1) of the Convention: Sphere of Application

Article 2(1) of the Convention states that the Convention provides for "the constitution and effects of an international interest in mobile equipment and associated rights". Article 2(1) appears to describe the scope of the Convention. It is clear from reviewing the Convention that it deals not only with the constitution of an international interest in mobile equipment and associated rights and its effects, but also with a "contract of sale", an "assignment", a "prospective assignment", a

"prospective international interest" and a "prospective sale". The preamble and the commentaries of the Convention and the Protocol, which are referred to in Articles 7(1) and (2), respectively, will undoubtedly refer to these other concepts, but these concepts should be expressly set out in Article 2 of the Convention.

Recommendation:

2. The National Business Law Section of the Canadian Bar Association recommends that Article 2(1) of the Convention be expanded to expressly refer to a "contract of sale", an "assignment", a "prospective assignment", a "prospective international interest" and a "prospective sale" because detailed rules relating to each of these terms are contained in the Convention and/or the Protocol.

C. Article 3 of the Convention and Article I(2) of the Protocol: Definitions of "airframes", "aircraft engines" and "helicopters"

Article 3 of the Convention lists the objects to which the Convention applies including, in particular, airframes (Article 3(a)), aircraft engines (Article 3(b)) and helicopters (Article 3(c)). Each of these terms are defined in Article I(2) of the Protocol.

We believe that the definitions of "airframes" and "aircraft engines" are too narrow for a number of reasons. Firstly, the definitions exclude aircraft which are powered other than by jet propulsion or turbine technology and they exclude aircraft below the defined power thresholds for thrust or take-off shaft horsepower. Many aircraft with piston propulsion or with less powerful jet propulsion or turbine power are still of significant value and valid commercial reasons exist to include these in the scheme of the Convention and the Protocol. Secondly, the decision to restrict airframes to those capable of transporting at least eight persons or goods in excess of 2750 kilograms would unnecessarily eliminate other valuable aircraft. Thirdly, we do not see the rationale in excluding aircraft used in military, customs or police

services. The distinction is somewhat arbitrary and difficult to determine as many aircraft are used alternatively for different purposes, may be owned by a commercial enterprise and leased to certain customs or police services, or may come onto the market following their military, customs or police use. Fourthly, certain of the background materials provided to us suggest that the Convention is to be limited to mobile equipment in existence at the time the agreement creating or providing for the international interest is concluded. To make it clear that such limitation is not intended to apply to the words that follow the word "together" in the second last line of the definition of "airframes" and "aircraft engines", the words "present and future" should be added to the last two lines of such definitions after the word "all".

The definition of "helicopters" is defined in substantially the same manner as the definition of "airframes". Accordingly, all of the above reasons with respect to the term "airframes" (except for the first reason) are equally applicable to the definition of "helicopters". If the definition of "helicopters" were changed to reflect the above comments, then the definition of "helicopters" would read as follows:

> 'helicopters' means heavier-than-air machines supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes, together with all present and future installed, incorporated or attached accessories, parts and equipment (including rotors), and all present and future data, manuals and records relating thereto.

If similar changes were made to the present definition of "airframes", the definition would become even more circular than it already is. The above-modified definition of "helicopters" could form the basis of a new definition of "airframes".

Although "aircraft engines" are designated as a separate object to which the Convention can apply, helicopter engines are not similarly designated. Since helicopter engines can also be separately identified and constitute valuable

equipment, we do not understand the rationale for omitting them as a separate category.

Recommendation:

3. The National Business Law Section of the Canadian Bar Association recommends that the definitions of "airframes", "aircraft engines" and "helicopters" in Article I(2) of the Protocol be expanded to include a wider range of objects, that the term "helicopter engines" be included as a separate object in the Convention and that the exclusion from the application of the Convention and the Protocol of airframes, aircraft engines and helicopters that are used in military, customs or police services be deleted.

D. Article 4 of the Convention: Application of Convention

Article 4 of the Convention states that if at a specific point in time there is a connection to a Contracting State as specified in such Article, then the Convention will apply to the international interest. (In the case of an aircraft, this rule is to be modified by Article III(1) of the Protocol.) The relevant point in time is to be determined at the time of the "conclusion" of the agreement creating or providing for the international interest. There are at least two problems with this approach.

The word "conclusion" is not defined in either the Convention or the Protocol. In most cases, when the relevant agreement is executed and delivered will probably be the date that it is concluded. It is not uncommon, however, for such an agreement to be signed and delivered on a particular date, but the effective date of the creation of the international interest to be made as of an earlier or later date. The Convention should be clearer on the meaning that is intended to apply to the word "conclusion".

A second problem with the apparent static nature of Article 4 is illustrated by the following example. At the time that an international interest is created in an aircraft, (i) the Convention and the Protocol are in force, (ii) the chargor is not located in a Contracting State and (iii) the airframes and aircraft engines, which are in the process of being built, have not been registered in a national aircraft register. Accordingly, at the time that the international interest was created (which we will assume is the time that the agreement creating or providing for the international interest was executed and delivered by the chargor), the Convention would not have applied to it. A year later, the chargor sells the aircraft with the consent of the chargee, but subject to the international interest. The buyer of the aircraft is located, for the purposes of the Convention, in a Contracting State.

Since the Convention and the Protocol were in force at the time the international interest was created, any transitional provisions of the type set forth in any personal property security act in Canada would not apply. We would have expected, however, that the Convention would subsequently apply to that aircraft and that both the chargee and the buyer would have been able to benefit from the application of the Convention. The static nature of Article 4 of the Convention and the absence of Article 4 in Article IV of the Protocol (which Article sets out those provisions of the Convention that are to apply to a sale and a prospective sale) mean that the Convention will not apply to the sale or to the international interest. On the other hand, we acknowledge that to have the Convention subsequently apply to an aircraft after a transaction has been concluded and without the prior knowledge of the obligee would be unacceptable.

Recommendation:

4. The National Business Law Section of the Canadian Bar Association recommends that the term "conclusion" in Article 4 of the Convention be defined and that consideration be given to expanding the application of the Convention to subsequent transactions which

involve an aircraft that was not originally subject to the Convention's application and which transactions are known to the applicable obligee.

E. Article 5 of the Convention: Meaning of "located"

Article 5 of the Convention is an extremely important section because one of the elements in determining whether there is a connection with a Contracting State for the purpose of the Convention is the location of the obligor. Article 5 of the Convention states that "a party is located in a State if it is *incorporated* or *registered* or has its *principal place of business* in that State" (emphasis added). In the context of an aircraft, the most relevant connecting factor set out in the Convention will be the national aircraft register in which the airframe, aircraft engine or helicopter, as applicable, has been registered (see Convention, Article 4(b) and Protocol, Article III(1)). If, however, the particular aircraft is in the process of being built and a manufacturer serial number has been assigned, but obviously the aircraft has not been registered in a national aircraft register, then Article 4(a) of the Convention will be the only connecting factor upon which an aircraft financier or buyer can rely in determining whether the Convention applies at that time to an international interest in that aircraft. Accordingly, Article 5 should be as certain as possible.

We have a number of comments and concerns on Article 5. First, the reference to "party" should refer instead to "obligor", which is the word that is used in Article 4(a) of the Convention. Second, the reference to "State" in the first and second lines of Article 5 should refer instead to "Contracting State". Third, the reference to "incorporated or registered" should be easily determined by the obligee, but that reference assumes that the obligor is either a corporation or some other entity that is registered. It is arguable that the term "registered" could be interpreted to apply to a general partnership or a limited partnership where, as a condition to the establishment of such partnership, the law of the applicable jurisdiction requires it to be registered in such jurisdiction. Such a term would not apply to a trust or an individual who is using the aircraft or helicopter for personal purposes as opposed to a business purpose in the form of a sole proprietorship. As presently drafted, the

definitions for the terms "airframes", "aircraft engines" and "helicopters" would not likely be owned or leased by an individual for personal purposes. Such a possibility could occur if the definitions of "airframes", "helicopters" and "aircraft engines" are expanded as recommended above in paragraph 3. Fourth, the phrase "principal place of business" is ambiguous and could lead to a great deal of litigation as parties attempt to determine the meaning of such phrase. A similar phrase "chief place of business", which appeared in the 1962 version of Article 9 of the Uniform Commercial Code and in the original *Personal Property Security Act* (Ontario), was replaced because of its ambiguity. In order to reduce this ambiguity, we would recommend that such a phrase (and the corresponding phrase for an individual, as mentioned below in this paragraph) be defined. Fifth, if the definitions of "airframes", "helicopters" and "aircraft engines" are expanded as recommended above in paragraph 3, then Article 5 should be amended to also refer to the obligor's "principal place of residence".

Recommendation:

5. The National Business Law Section of the Canadian Bar Association recommends that Article 5 of the Convention be revised to deal with the concerns raised in the above paragraph.

F. Articles 8(b) and (d) of the Convention: Constitution of an International Interest

Article 8 of the Convention sets out the formalities for the constitution of an international interest. By the express terms of the Convention, an international interest is created by the Convention itself and is not to be derived from or be dependent upon national law. Accordingly, Article 8 must, as much as possible, be free from any ambiguity. Unfortunately, there are problems with Articles 8(b) and (d) of the Convention.

It is not clear, in the case of Article 8(b), what is meant by the word that the chargor, conditional seller or lessor has the "power" to enter into the agreement creating or providing for an international interest. If the chargor is a corporation, is "power" referring to whether the corporate chargor has the "corporate capacity" to grant the security interest? Or does "power" mean something more like all necessary corporate action has been taken by the directors and/or the shareholders? Or does "power" refer to an even broader concept in the sense that there is no agreement to which the chargor is a party which contains a provision prohibiting the chargor from granting a security interest in the aircraft? (This uncertainty is equally applicable to non-corporate chargors.) The Convention must clearly set out what is meant by the word "power", so that an obligee can be satisfied that it has an enforceable and valid international interest in the applicable aircraft. The broader the meaning that is given to the word "power", the more difficulty an obligee will have in being able to get a legal opinion that the obligor has the requisite power. For example, if the word "power" is intended to be limited to the first-mentioned meaning (i.e., "corporate capacity"), then obtaining a corporate capacity opinion from a Canadian lawyer of a corporation existing under the *Canada Business Corporations Act* (Canada) or similar provincial legislation would be fairly straightforward. More legal analysis would probably be required if the corporation was not one which was existing under such statutes.

The second problem with Article 8 is the requirement, in the case of a security agreement, that the secured obligations be identified (see Convention, Article 8(d)). The first concern with this requirement is that such a limitation could be construed so as to not permit a chargee from having the international interest secure all present and future indebtedness, liabilities and obligations howsoever arising of the chargor to the chargee without specifying the different types of obligations that are intended to be so covered. Secondly, such a limitation would appear to preclude a chargee from cross-securing different loan transactions with the same chargor which are entered into at different times. Although we believe that Article 8(d) should be deleted, if it is retained then the Convention should clearly provide that a general

description of the secured obligations (which obligations may be direct or indirect, joint or several, absolute or contingent, committed or uncommitted, and which description does not need to refer to any specific document between the parties) will be sufficient for the purpose of Article 8(d).

Recommendations:

6. The National Business Law Section of the Canadian Bar Association recommends that the word “power” that is used in Article 8(b) of the Convention be defined and that such definition be a narrow one.

7. The National Business Law Section of the Canadian Bar Association further recommends that Article 8(d) of the Convention be deleted or a specific reference inserted confirming that a general description of the secured obligations, as described in the third paragraph of section F, is sufficient for the purpose of Article 8(d).

G. Article 9(5) of the Convention: Distribution of Excess Proceeds from Realization

Article 9(5) of the Convention sets out to whom any excess is to be distributed by the chargee. The excess is required to be paid by the chargee to the holder of the international interest registered immediately after the chargee’s international interest or, if there is none, to the chargor. The persons who are entitled to receive any excess do not track the classes of persons who are entitled to receive notice of a proposed sale or lease pursuant to Article 9(3) of the Convention. Article 9(5) should more closely track the definition of “interested persons” in Article 9(6)(c) and (d) of the Convention.

If our recommended change to Article 9(5) is made, then the chargee should be permitted to require any interested person mentioned in the amended Article 9(5) to furnish proof of that interested person's interest in the aircraft and, if no proof is furnished by such interested person to the chargee within a specified period of time (such as 10 calendar days) after demand by the chargee, the chargee need not pay over any portion of the excess to that interested person. As well, if the chargee has any questions as to who is entitled to receive payment of the excess under Article 9(5), then the chargee may pay it into any court established by the Contracting State where the remedies are being enforced.

Recommendations:

8. The National Business Law Section of the Canadian Bar Association recommends that Article 9(5) of the Convention be amended so that the persons to whom the excess is to be paid should more closely track the definition of "interested persons" in Article 9(6)(c) and (d) of the Convention before any of the excess is paid to the chargor.

9. The National Business Law Section of the Canadian Bar Association further recommends that because of the potential for competing subordinated interests in the aircraft, the prior-ranking chargee should have the right to require a subordinate-ranking interested person to provide proof to such chargee of the latter's interest and if there is any dispute as to the payment of the excess to pay the excess into court for distribution to any subordinate-ranking interested persons and the chargor.

H. Article 12(2) of the Convention: Meaning of "substantial default"

The term "substantial default" in Article 12(2) of the Convention is extremely imprecise. We expect that obligees will ensure that their agreements set out the

events of default that are relevant to them. Accordingly, the lack of a definition for the term "substantial default" should not, in practical terms, cause any problems, because Article 12(2) should never apply. Obviously, the drafters of the Convention were concerned that occasionally a short form agreement would be used and no defaults would be set out in such agreement. If the drafters wish Article 12(2) to be of any assistance, then the term "substantial default" must be defined in the Convention. A "substantial default" should be defined to expressly include, at a minimum, a failure to pay when due any amount owing by the obligor to the obligee. You may wish to consider whether it is appropriate for this term in the Convention to be extended to cover non-monetary defaults under the agreement creating or providing for the international interest, and customary bankruptcy and insolvency-related defaults. In Canada, the inclusion of insolvency-related defaults may, however, be in conflict with the *Bankruptcy and Insolvency Act* (Canada).

Recommendation:

10. The National Business Law Section of the Canadian Bar Association recommends that the term "substantial default" in Article 12(2) of the Convention be expressly defined to include, at a minimum, monetary defaults and, if appropriate, non-monetary defaults and customary bankruptcy and insolvency-related defaults.

I. Article 18 of the Convention: Registration System

Both the Convention and the Protocol contemplate that the specific rules on how to describe an aircraft in a registration made under the Convention and the Protocol are to be set out in the regulations. We recommend that the regulations be as clear as possible, because Article 18 of the Convention states that the conditions and

requirements for the identification of the object must be fulfilled in order to effect a registration. Because it will not be possible to deal with all potential description issues in the regulations, we recommend that an objective curative provision be added to the Protocol. One example of an objective curative provision, based on the curative provision in the *Personal Property Security Act* (Ontario), is as follows: "An error or omission in a registration shall not invalidate the registration nor impair the effect of the registration, unless a reasonable person is likely to be misled materially by the error or omission".

Recommendation:

11. The National Business Law Section of the Canadian Bar Association recommends that detailed rules on how to describe an aircraft in a registration be set out in the regulations and that an objective curative provision be added to the Protocol.

J. Article 28(1) of the Convention: General Priority Rule

We support the principle that is intended to be provided by Article 28(1) of the Convention. Two terms (i.e., "other interests" and "unregistered interest") are used in that Article and are not defined in the Protocol or elsewhere in the Convention.

Recommendation:

12. The National Business Law Section of the Canadian Bar Association recommends that the reference to "other interests" in Article 28(1) of the Convention be replaced with the words "other registered interests" and that the words "unregistered interests" be defined.

K. Article 29 of the Convention: Commencement of Bankruptcy; Trustee in Bankruptcy

Article 29(1) of the Convention provides that an international interest is valid against the trustee in bankruptcy of the obligor if prior to the commencement of a bankruptcy that interest was registered in conformity with the Convention. In practice, it will be difficult to apply this provision. Bankruptcy searches of any type (even uncertified by a governmental authority or body) are not necessarily available in all jurisdictions and even in those jurisdictions where available, the effective date of such searches may not be current enough. The ability to effect registrations in respect of prospective sales, prospective assignments and prospective international interests will provide the obligee with a reasonably effective way of overcoming this latter problem. Nevertheless, an obligee needs assurance that its registration was made prior to the commencement of the obligor's bankruptcy.

This concern is also applicable to Article 37(1) of the Convention. Article 37(1) provides that an assignment of an international interest is valid against the trustee in bankruptcy of the assignor if prior to the commencement of the assignor's bankruptcy the assignment was registered under the Convention.

The definition of "trustee in bankruptcy" as set out in Article 29(2) of the Convention, and as applicable to Article 37 of the Convention, appears to be too narrow as it provides for "a liquidator, administrator or other person appointed to administer the estate of the obligor for the benefit of the general body of creditors" but does not specifically refer to persons such as a debtor-in-possession.

Recommendations:

13. The National Business Law Section of the Canadian Bar Association recommends that each Contracting State declare at the time of its signature, ratification, acceptance, approval of, or accession to the Protocol the availability of conducting a search against an obligor or

assignor located in that Contracting State, which search result would be certified by a governmental authority or body in that Contracting State, in order to disclose the commencement of the bankruptcy of the obligor or assignor (a "bankruptcy search") and the customary time lag between the date of the bankruptcy search and the currency date of the bankruptcy search. If a Contracting State declares that it is not possible to do a certified bankruptcy search in that Contracting State or that the customary time lag of a bankruptcy search in that Contracting State is more than 30 days, then the bankruptcy of an obligor that is located in that Contracting State should be deemed to constitute a "registrable non-consensual right or interest" under the Convention.

14. The National Business Law Section of the Canadian Bar Association further recommends that the words "debtor-in-possession" be added to the definition of "trustee in bankruptcy".

L. Article 30(2)(c) of the Convention: Identification of Secured Obligations

Article 30(2) of the Convention sets out the formalities necessary for a valid assignment of an international interest. If the assignment is by way of security, then the agreement providing for the assignment by way of security will only be valid if the obligations secured by such assignment are identified therein. The reasons given above in the third paragraph of section F for deleting this similar requirement in Article 8(d) of the Convention are equally applicable to the assignment by way of security of an international interest. Any ambiguity in Article 30(2)(c) is unacceptable because the consequences of not satisfying this requirement will be to cause the assignment to be invalid.

Recommendation:

15. The National Business Law Section of the Canadian Bar Association recommends that Article 30(2)(c) of the Convention be deleted or a specific reference inserted confirming that a general description of the secured obligations, as described above in the third paragraph of section F, is sufficient for the purpose of Article 30(2)(c).

M. Articles 39 and 40 of the Convention: Non-Consensual Rights and Interests

We support the adoption of non-consensual rights and interests within the scope of the Convention. The Convention should provide, however, that each non-consensual right or interest that is set out in an instrument deposited with the depositary of the Protocol, as contemplated by Articles 39 and 40 of the Convention, be specifically described.

Recommendation:

16. The National Business Law Section of the Canadian Bar Association recommends that Articles 39 and 40 of the Convention be adopted in final and that any non-consensual rights and interests that are listed by a Contracting State in accordance with such Articles be specifically described.

N. Article V of the Convention and Article III(2) of the Protocol: Application of Protocol to Purely Domestic Transactions

Article V of the Convention provides that a Contracting State may declare that the Convention will not apply in relation to a purely domestic transaction. Although an aircraft may be located solely within one jurisdiction, the mobile nature of an aircraft means that an aircraft can easily be found within other jurisdictions, leading to some confusion with respect to the governing law. Any attempt to make a distinction between a purely domestic transaction and an international transaction for mobile

equipment, like aircraft, will produce confusion and litigation. The distinction between these two types of transactions would appear to serve no apparent purpose. Indeed, the Convention expressly covers aircraft because it is a type of equipment that is normally used by an obligor in more than one jurisdiction. The drafters of the Protocol appear to recognize this reality, because Article III(2) of the Protocol proposes that, notwithstanding the provisions of Article V of the Convention, the Protocol shall apply to a purely domestic transaction.

Recommendation:

17. The National Business Law Section of the Canadian Bar Association recommends that Article III(2) of the Protocol be adopted as presently drafted and, thus, cover a purely domestic transaction.

O. Article V(1)(b) of the Protocol: Meaning of "power" of the Transferor

Article V(1) of the Protocol sets out the formalities necessary for a valid contract of sale. One of the elements of a valid contract of sale is that the transferor of an aircraft has the "power" to enter into the contract of sale (see Article V(1)(b)). The reasons given above in the second paragraph of section F for deleting this similar requirement in Article 8(b) of the Convention in relation to an international interest are equally applicable to a contract of sale. Any ambiguity in Article V(1)(b) is unacceptable because the consequences of not satisfying this requirement will be to cause the contract of sale to be invalid.

Recommendation:

18. The National Business Law Section of the Canadian Bar Association recommends that the word "power" that is used in Article V(1)(b) of the Protocol be defined and that such definition be a narrow one.

P. Article VI of the Protocol: Meaning of "related interest"

The words "related interest" are used in Article VI of the Protocol and those words are not defined in either the Convention or the Protocol.

Recommendation:

19. The National Business Law Section of the Canadian Bar Association recommends that the words "related interest" be defined in the Protocol or that Article VI of the Protocol be revised so that it is clear what the words "related interest" mean.

Q. Article VIII(1) of the Protocol: Choice of Law

Article VIII(1) of the Protocol provides that the parties to an agreement or a contract of sale or a related suretyship contract or subordination agreement may agree on the law which is to govern their rights and obligations under the Convention, wholly or in part. This provision should only apply to those matters where the Convention expressly refers to applicable law. We understand that the Convention, itself, is intended to create the international interest and that the rights and obligations with respect thereto are to be governed by the Protocol and the Convention.

Recommendation:

20. The National Business Law Section of the Canadian Bar Association recommends that Article VIII(1) of the Protocol be amended by

adding immediately after the words "wholly or in part" in the last line of such Article the following words: ", but only in respect of those matters which the Convention or the Protocol expressly provides are to be governed by applicable law".

R. Article IX(3)(b) 2 of the Protocol: Meaning of "commercially reasonable"

Article IX(3)(b) 2 of the Protocol provides that an agreement between an obligor and an obligee as to what is commercially reasonable shall, subject to a very narrow exception in Article IX(3)(b) 3 of the Protocol, be conclusive. This provision would appear to be inconsistent with Article 13(1) of the Convention, which provides that any remedy provided by Chapter III of the Convention shall be exercised in conformity with the procedural law of the place where the remedy is to be exercised. Personal property security legislation in most jurisdictions of Canada provides that all rights, duties or obligations arising under a security agreement or under any applicable law shall be exercised or discharged in good faith and in a commercially reasonably manner. As to whether an obligee's rights and remedies have been exercised in a commercially reasonable manner is an objective test, which standard may not be waived or varied by agreement or otherwise. Accordingly, it is doubtful whether Article IX(3)(b) 2 of the Protocol would be effective in those jurisdictions in Canada that have a personal property security act in force.

Recommendation:

21. The National Business Law Section of the Canadian Bar Association recommends that Article IX(3)(b) 2 of the Protocol be amended by adding the words "and to applicable procedural law" immediately after the words "subject to paragraph 3".

S. Article IX(4) of the Protocol: Minimum Notice Period

Article IX(4) of the Protocol requires that at least 10 working days of prior written notice be given to each interested person of any proposed sale or lease. Personal property security legislation in Canada requires, subject to certain statutory exceptions, that a secured party give certain specified persons at least 15 or 20 days (depending upon the particular jurisdiction) of written notice before the secured party is permitted to sell, lease or otherwise dispose of its collateral. The notice period is a procedural matter. Pursuant to Article 13(1) of the Convention, procedural matters are to be determined by the law of the jurisdiction in which the remedy is to be exercised. Ten working days will rarely be equivalent to at least 15 days. Under personal property security legislation in Canada, it is possible after the default for all of the persons entitled to receive the notice to waive compliance with the statutory notice period. Accordingly, unless 10 working days is equivalent to 15 or 20 days or all of the relevant persons have agreed after the default to shorten the statutory notice period, Article IX(4) will not be effective in those jurisdictions in Canada that have a personal property security act in force.

Recommendation:

22. The National Business Law Section of the Canadian Bar Association recommends that Article IX(4) of the Protocol be amended by adding the words “or such period of time as is required by applicable procedural law” immediately after the words “interested persons” in the second line of such Article.

T. Articles IX(4), X(2), XI(4) and XIX(2) of the Protocol: Meaning of "working days"

The Protocol is inconsistent in its use of the term of "days". Article X(1) of the Protocol refers to "calendar days", which would seem to be an appropriate term since all Contracting States can be expected to use the Gregorian calendar. The use of the term "working days", as found in Articles IX(4), X(2), XI(4) and XIX(2) of the Protocol, should be avoided because working days can be expected to differ between various Contracting States.

Recommendation:

23. The National Business Law Section of the Canadian Bar Association recommends the consistent use of the term "calendar days" throughout the Protocol and the Convention in substitution for the term "working days".

U. Article XIII(2) of the Protocol: Meaning of "certified designee"

Article XIII(2) of the Protocol provides that a "certified designee" is entitled to exercise the remedies specified in Article IX(1) of the Protocol. We do not understand what type of certified designation is contemplated as this is not set out in the Protocol.

Recommendation:

24. The National Business Law Section of the Canadian Bar Association recommends that the word "certified" in Article XIII(2) of the Protocol be deleted or clearly defined.

V. Article XVII(1) of the Protocol: Basic Regulatory Responsibilities

Article XVII(1) of the Protocol provides that the International Registry Authority or the International Regulator, as the case may be, (the **"Regulator"**) is to act in a non-adjudicative capacity. Nevertheless, the Regulator may perform the functions specified in Articles 17(6) and (7) of the Convention. If the Regulator should reject any registration because it did not comply with the Protocol or the regulations relating to registrations, then the Regulator should be required to give the reason or reasons for such rejection.

Recommendation:

25. The National Business Law Section of the Canadian Bar Association recommends that Article XVII(1) of the Protocol provide that if the Regulator refuses to register any registrations proposed to be made under the Convention because such registration does not comply with the Protocol or the regulations thereunder, the Regulator shall be required to give the registering party the reason or reasons for such refusal.

W. Article XVIII(2) of the Protocol: Registration Facilities

Article XVIII(2) of the Protocol provides that a Contracting State may only designate registration facilities as points of access to the International Registry in relation to helicopters or airframes pertaining to aircraft for which it is the State of registry. We have assumed that the goal of the International Registry is to make access available to all persons from any number of input points so as to allow for the most easy access.

Recommendation:

26. The National Business Law Section of the Canadian Bar Association recommends that access to the International Registry for purposes relating to any aircraft which is to be the subject of a registration be available through the registration facilities of any Contracting State.

III. Summary of Recommendations

The National Business Law Section of the Canadian Bar Association recommends that:

1. the word "authenticated" in the definition of "writing" in Article 1 of the Convention be deleted or defined more clearly.

2. Article 2(1) of the Convention be expanded to expressly refer to a "contract of sale", an "assignment", a "prospective assignment", a "prospective international interest" and a "prospective sale" because detailed rules relating to each of these terms are contained in the Convention and/or the Protocol

3. the definitions of "airframes", "aircraft engines" and "helicopters" in Article I(2) of the Protocol be expanded to include a wider range of objects, that the term "helicopter engines" be included as a separate object in the Convention and that the exclusion from the application of the Convention and the Protocol of airframes, aircraft engines and helicopters that are used in military, customs or police services be deleted.

4. the term "conclusion" in Article 4 of the Convention be defined and that consideration be given to expanding the application of the Convention to subsequent transactions which involve an aircraft

that was not originally subject to the Convention's application and which transactions are known to the applicable obligee.

5. Article 5 of the Convention be revised to deal with the concerns raised in the second paragraph of section E.

6. the word "power" that is used in Article 8(b) of the Convention be defined and that such definition be a narrow one.

7. Article 8(d) of the Convention be deleted or a specific reference inserted confirming that a general description of the secured obligations, as described in the third paragraph of section F, is sufficient for the purpose of Article 8(d).

8. Article 9(5) of the Convention be amended so that the persons to whom the excess is to be paid should more closely track the definition of "interested persons" in Article 9(6)(c) and (d) of the Convention before any of the excess is paid to the chargor.

9. because of the potential for competing subordinated interests in the aircraft, the prior-ranking chargee should have the right to require a subordinate-ranking interested person to provide proof to such chargee of the latter's interest and if there is any dispute as to the payment of the excess to pay the excess into court for distribution to any subordinate-ranking interested persons and the chargor.

10. the term "substantial default" in Article 12(2) of the Convention be expressly defined to include, at a minimum, monetary defaults and, if appropriate, non-monetary defaults and customary bankruptcy and insolvency-related defaults.

11. detailed rules on how to describe an aircraft in a registration be set out in the regulations and that an objective curative provision be added to the Protocol.

12. the reference to "other interests" in Article 28(1) of the Convention be replaced with the words "other registered interests" and that the words "unregistered interests" be defined.

13. each Contracting State declare at the time of its signature, ratification, acceptance, approval of, or accession to the Protocol the availability of conducting a search against an obligor or assignor located in that Contracting State, which search result would be certified by a governmental authority or body in that Contracting State, in order to disclose the commencement of the bankruptcy of the obligor or assignor (a "bankruptcy search") and the customary time lag between the date of the bankruptcy search and the currency date of the bankruptcy search. If a Contracting State declares that it is not possible to do a certified bankruptcy search in that Contracting State or that the customary time lag of a bankruptcy search in that Contracting State is more than 30 days, then the bankruptcy of an obligor that is located in that Contracting State should be deemed to constitute a "registrable non-consensual right or interest" under the Convention.

14. the words "debtor-in-possession" be added to the definition of "trustee in bankruptcy".

15. Article 30(2)(c) of the Convention be deleted or a specific reference inserted confirming that a general description of the secured obligations, as described in the third paragraph of section F, is sufficient for the purpose of Article 30(2)(c).

16. Articles 39 and 40 of the Convention be adopted in final and that any non-consensual rights and interests that are listed by a Contracting State in accordance with such Articles be specifically described.

17. Article III(2) of the Protocol be adopted as presently drafted and, thus, cover a purely domestic transaction.

18. the word “power” that is used in Article V(1)(b) of the Protocol be defined and that such definition be a narrow one.

19. the words “related interest” be defined in the Protocol or that Article VI of the Protocol be revised so that it is clear what the words “related interest” mean.

20. Article VIII(1) of the Protocol be amended by adding immediately after the words “wholly or in part” in the last line of such Article the following words: “, but only in respect of those matters which the Convention or the Protocol expressly provides are to be governed by applicable law”.

21. Article IX(3)(b) 2 of the Protocol be amended by adding the words “and to applicable procedural law” immediately after the words “subject to paragraph 3”.

22. Article IX(4) of the Protocol be amended by adding the words “or such period of time as is required by applicable procedural law” immediately after the words “interested persons” in the second line of such Article.

23. the consistent use of the term “calendar days” throughout the Protocol and the Convention in substitution for the term “working days”.

24. the word “certified” in Article XIII(2) of the Protocol be deleted or clearly defined.

25. Article XVII(1) of the Protocol provide that if the Regulator refuses to register any registrations proposed to be made under the Convention because such registration does not comply with the Protocol or the regulations thereunder, the Regulator shall be required to give the registering party the reason or reasons for such refusal.

26. that access to the International Registry for purposes relating to any aircraft which is to be the subject of a registration be available through the registration facilities of any Contracting State.

IV. Conclusion

The National Business Law Section is prepared to comment further and in greater detail on any of the issues identified or recommendations made in this Submission. We look forward to another opportunity to comment on the next draft of the Convention and the Protocol that will result from the consultations scheduled to take place in February 1999.

APPENDIX "A"

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