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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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RESTRICTED EXPLORATORY WORKING GROUP TO EXAMINE THE FEASIBILITY
OF DRAWING UP UNIFORM RULES ON CERTAIN INTERNATIONAL ASPECTS
OF SECURITY INTERESTS IN MOBILE EQUIPMENT:

REPORT

(adopted by the Working Group on 11 March 1992)

Rome, March 1992

1. - The restricted exploratory Working Group to examine the feasibility of drawing up uniform rules on certain international aspects of security interests in mobile equipment, set up pursuant to a decision taken by the Unidroit Governing Council at its 70th session (Rome, May 1991), met in Rome at the seat of Unidroit from 9 to 11 March 1992. The session was opened at 10 a.m. on 9 March by Mr Riccardo MONACO, President of Unidroit. Mr Royston M. GOODE, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, was elected Chairman of the Working Group on a proposal by Mr Monaco.

2. - The meeting was also attended by the following experts and representatives of international organisations and one international professional association:

Mr Ronald C.C. CUMING
Professor of Law in the University of Saskatchewan

Mr Pietro GIRARDI
Legal Counsel, Alitalia - Linee Aeree Italiane S.p.A.

Mr Karl F. KREUZER
Professor of Law in the University of Würzburg

Mr Stephen J. MCGAIRL
Partner, Freshfields, Paris

Mr Gregory VOSS
Legal Counsel, Airbus Industrie, Blagnac

Mr Thomas J. WHALEN
Partner, Condon & Forsyth, Washington, D.C.

Mr Paolo CLAROTTI
Head of the Banking and Financial Institutions Division
Directorate-General for Financial Institutions and Company Law
Commission of the European Communities

Mr Georges A.L. DROZ
Secretary-General
Hague Conference on Private International Law

Mr Gregor HEINRICH
Legal Service
Bank for International Settlements

Mr Rolf HERBER
Professor of Commercial Law in the University of Hamburg
representing the *Comité Maritime International (CMI)*

Mr Heinrich J. SOMMER
Chairman
European Federation of Finance House Associations (Eurofinas)

3. - The Working Group was seised of the following materials:

- (1) International regulation of aspects of security interests in mobile equipment: study prepared by Professor Ronald C.C. Cuming (Study LXXII - Doc. 1);
- (2) International regulation of aspects of security interests in mobile equipment: questionnaire (Study LXXII - Doc. 2);
- (3) Analysis of the replies to the questionnaire on an international regulation of aspects of security interests in mobile equipment (Study LXXII - Doc.3);
- (4) Basic issues identified in responses to the Questionnaire on an international regulation of aspects of security interests in mobile equipment by Professor Ronald C.C. Cuming (Study LXXII - Doc. 4);
- (5) Creditors' security interests in satellites by Mr Paul B. Larsen (Security Interests - Misc. 1).

4. - After adopting the draft agenda (reproduced in the Appendix to this report), the Working Group expressed its particular appreciation of the invaluable preliminary work carried out by Mr Ronald C.C. CUMING, corresponding collaborator of Unidroit.

Utility of the project

5. - In the light of the materials presented and the experience of its members, the Working Group was satisfied that the absence of an international legal regimen governing security interests in mobile equipment created problems for sellers and lenders financing such equipment and constituted a negative factor in the latter deciding whether to provide finance on the security of mobile equipment. In particular, it was noted that as a result those who might otherwise have financed by way of conditional sale or loan on security were deterred from doing so. The Working Group concluded that the formulation of an international Convention governing security interests in mobile equipment would be an important contribution to the further development of international commercial law.

Feasibility of the project

6. - The Working Group considered that the project was not only useful but also feasible within the limits indicated hereinafter. It was aware of earlier projects which had failed to come to fruition because they were found to be too ambitious. It believed that this project was realistic, both because it was more modest in scope and because of technological advances. A Convention of the kind contemplated was becoming increasingly needed because of the volume and high value of mobile equipment (in the sense described below) now being financed.

Scope of the proposed Convention

7. - In the view of the Working Group, the proposed Convention should be confined to mobile equipment, that is equipment held by the debtor for business use (as opposed to consumer goods) which was of a kind normally moving from one State to another in the ordinary course of business.⁽¹⁾ The Working Group considered that for the security interest to be within the scope of the Convention the equipment should be identifiable from the terms of the security agreement as being of a kind governed by the Convention.

The Working Group considered the question whether there were specific types of equipment to which the Convention should not apply, in particular ships and aircraft. In the case of ships, the Working Group felt that a strong argument for excluding ships might lie in the fact that there were existing Conventions⁽²⁾ and a proposed new Convention⁽³⁾ regulating the recognition and priority of security interests in ships and inland navigation vessels and appurtenances thereto. There was in addition a CMI draft regulating these questions in relation to objects assimilated to ships. In that connection it would be necessary to consider not only ships to which the aforementioned Conventions were applicable but also those not affected by these Conventions but governed by equivalent national legislation and ships not affected either by these Conventions or by national legislation.

(1) The Working Group also briefly considered the position of inventory and items normally moving from State to State pursuant to security transactions and felt that the extension of the Convention to cover such items was a matter that should be examined in due course.

(2) International Convention for the unification of certain rules relating to maritime liens and mortgages (Brussels, 10 April 1926);

International Convention for the unification of certain rules relating to maritime liens and mortgages (Brussels, 27 May 1967);

Convention on the Registration of Inland Navigation Vessels (Geneva, 25 January 1965).

(3) Draft articles for an IMO/UNCTAD Convention on maritime liens and mortgages (IMO LEG/MLM /27).

As regards aircraft, the Working Group concluded that they should be within the scope of the Convention provided that it was not incompatible with the existing system of nationality registration of aircraft. There was a Convention ⁽⁴⁾ which contained rules for the recognition and priority of security interests in aircraft but it was generally recognised that it was in some respects outdated, particularly in its treatment of the financing of aircraft engines separately from the airframe. A significant number of major States were noted not to have ratified this Convention.

The Working Group took note of the paper before it by Mr Paul B. LARSEN on creditors' security interests in satellites and saw no reason to exclude satellites from the Convention.

In considering the type of security interest that should fall within the scope of the proposed Convention, the Working Group reached the following conclusions:

(1) "Security interest" should be defined in functional terms, thus avoiding the problems created by differences in the concept of the security interest in the different legal systems and should thus encompass, for example, reservation of title under sale agreements as well as security by way of mortgage or charge.

(2) The Convention should be confined to non-possessory security interests, that is security interests in mobile equipment of which the debtor was left in physical possession.

However, the Working Group envisaged the priority rules to be established by the Convention as encompassing a dispute between a consensual security interest covered by the Convention and a possessory security interest asserted by a third party.

(3) Non-consensual security interests (such as statutory liens, maritime liens and other security interests created by law) should be excluded, first, because such security interests did not lend themselves to registration and, secondly, because of the strong public policy interest of States in supporting the priority of such security interests.

A new international security interest in mobile equipment

8. - Although the Working Group did not consider it essential to the success of a Convention on security interests in mobile equipment, it favoured an entirely new international security interest in mobile equipment possessing the essential legal characteristics given by the Convention itself and publicised by registering within an international registration system.

(4) Convention on the International Recognition of Rights in Aircraft (Geneva, 19 June 1948).

The international security interest so created would under the Convention be required to be recognised in any Contracting State.

The feasibility of an international registration system would of course depend *inter alia* on the nature and quantity of the information to be filed and the mode of entry and search and these were matters to which it was envisaged that any study group that the Governing Council might decide to establish would have to address itself.

The international security interest would possess the following legal characteristics:

- (1) it would be a right *in rem*;
- (2) it would give a right to follow the equipment into the hands of third parties, subject to any applicable priority rule;
- (3) it would give the secured party a right to payment from the proceeds of sale or other disposition of the equipment in preference to other creditors, subject to any applicable priority rule.

An alternative to the international security interest

9. - If the proposed international security interest system proved not to be feasible, the Working Group would envisage a provision in the Convention to the effect that a security interest validly created under the law of the State of nationality registration of the equipment or, if none, under the law of the State of the debtor's sole or principal place of business should be recognised in any other State where both States were Contracting States. A security interest in this context meant a right in the equipment which was characterised by the Convention, rather than by the law of the State in question, as a security interest.

International public notice system

10. - Whether or not an international security interest were to be created, the Working Group was of the view that consideration should be given to the establishment of an international public notice system, whether in the form of registration or otherwise.

Test of internationality

11. - The Convention would not apply to purely domestic situations. The Working Group recognised that the determination of the criteria of internationality would require careful consideration and that this was not a task to which it felt it should address itself.

Substantive issues to be addressed in the Convention

12. - As envisaged by the Working Group, the Convention would address the following issues:

(1) Recognition in a Contracting State of a security interest in mobile equipment within the scope of the Convention;

(2) Provision of rights of possession and sale (except in so far as excluded or modified by the security agreement);

(3) Priority rules dealing with the priority of the security interest vis-à-vis:

(a) any holder of another possessory or non-possessory right in rem other than a non-consensual interest;

(b) an attachment or execution creditor;

(c) the debtor's trustee in bankruptcy (but without prejudice to rules of bankruptcy affecting preferences and the like);

(4) The impact on priorities of failure to comply with any public notice requirements prescribed by the Convention.

13. - The Working Group considered that the rights of the parties to the security agreement could be left to be dealt with by that agreement as controlled by the law applicable under the rules of private international law of the forum.

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(Rome, 9 - 11 March 1992)

DRAFT AGENDA

1. - Election of the Chairman.
2. - Approval of the draft agenda.
3. - Examination of the feasibility of drawing up uniform rules on certain international aspects of security interests in mobile equipment in the light of:
 - (a) International regulation of aspects of security interests in mobile equipment: study prepared by Professor Ronald C.C. Cuming (College of Law, University of Saskatchewan) (Study LXXII - Doc. 1);
 - (b) Analysis of the replies to the questionnaire on an international regulation of aspects of security interests in mobile equipment (Study LXXII - Doc. 3).
4. - Any other business.