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DRAFTING COMMITTEE

PROPOSAL

(submitted by the Secretary-General of Unidroit)

QUESTIONS REGARDING THE CONVENTION'S SPHERE OF APPLICATION
AND THE ROLE OF NON-UNIFORM LAW DESIGNATED BY RULES OF
PRIVATE INTERNATIONAL LAW

A. References to “applicable law” in the Draft Convention

Provision	Issue	Possible meaning of “applicable law” / issue (by virtue of Private International Law) properly dealt with by	Specific reference to “applicable law” <u>needed?</u> / useful?
Art. 1	definition “applicable law”		Yes, if Art. 7(2) CISG not followed
Art. 2(3)	characterisation, not in the sense of PIL, but for substantive purpose	appl. subst. contract law or appl. subst. property law or appl. subst. procedural law or appl. subst. insolvency law	no (especially not if provisions like Art. 4 CISG were to be inserted), but useful
Art. 7(2 new)	general provision regarding sphere of application of Convention and domain of PIL → applicable non-uniform domestic law	Convention	yes, but to be discussed where most appropriate
Art. 14	specific provision regarding sphere of application of Convention and non-uniform domestic law	appl. subst. contract law or appl. subst. property law or appl. subst. procedural law	no, but useful
Art. 15(3)	specific provision regarding availability of interim judicial relief	procedural law of the forum seized or appl. contract law or appl. property law	no, but useful
Art. 29(3)	specific provision regarding validity of interest against trustee in bankruptcy	<i>lex concursus</i> or <i>lex situs</i>	no, but useful
Art. 31(1)(b)	assignability of rights associated with international interest	law governing assignment + law governing the associated rights	no, but useful
Art. 37(2)	Validity of interest’s assignment as against trustee in bankruptcy	<i>lex concursus</i> or <i>lex situs</i>	no, but useful
Art. 38(1)	rights in favour of person by operation of principles of legal subrogation	law governing subrogation and status of subrogated party (e.g. <i>lex situs</i> , law governing insurance contract etc.)	no, but useful

B. Provisions not referring to the “applicable law” but presupposing that, for the purpose of interpreting one or more of their substantive concepts, the applicable law has been determined by virtue of PIL:

Articles 2(b) and (c)

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8(b)

9(1)

10(4)

26(1) and (2)

27(1)

28(3)(a) and (4)

31(2)(a) and (4)

33(1)(a) and (2)

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Those concepts are dealt with in domestic rules belonging to: general principles, contract law, property law, private international law, administrative law, agency, company law, law of trusts, torts, damages.

C. Model CISG

Art. 4 (Chapter I, Sphere of Application)

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such contract. In particular, except as otherwise expressly provided for in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

Art. 7(2) (Chapter II, General Provisions)

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

D. Other (draft) Conventions

No recent Convention contains a provision like Article 4 CISG.

Most recent (draft) conventions follow the example of Article 7(2) CISG:

- Unidroit Agency Convention Art. 6(2)
- Unidroit Factoring Convention Art. 4(2)
- Unidroit Leasing Convention Art. 6(2)
- Draft UNCITRAL Receivables Financing Convention Art. 8(2), (3).

E. Alternatives for draft Convention on Mobile Equipment

1. Leave it as it is

- advantage: concise text
- disadvantages: (1) unfamiliar phrasing
(2) unintended inferences possible (in some provisions reference to PIL → appl. law made, in others not)

2. Adopt model CISG completely

- advantage: familiarity, clarity
- disadvantages: (1) specific reasons for Article 4 CISG here not existent
(2) both listing of matters governed and matters not governed would be considerably longer here

3. Adopt model CISG Art. 7(2) only

Whereas Article 4 CISG deals with the Convention's "outer limits", Article 7(2) CISG addresses the so-called "inner gaps".

All questions concerning matters beyond the former and many regarding the latter make reference to the domestic law by virtue of the rules of PIL necessary.

The draft Convention on Mobile Equipment, too, has (not expressly stated) outer limits and (probably) inner gaps.

Therefore, one should secure for the present draft Convention at least the entire content of Article 7(2).

Whether one should, for the sake of uniformity of language, also partially address the "outer limits" appears to be a question rather of style and taste.

F. Drafting Proposal

Article 1
Definitions

[delete “applicable law”]

Article 2
Sphere of Application

1. – This Convention provides for the constitution and effects of an international interest in mobile equipment and associated rights.

2. – For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under article 8, in a uniquely identifiable object of a category of such objects designated in a Protocol:

- (a) granted by the chargor under a security agreement;
- (b) vested in a person who is the conditional seller under a title reservation agreement;
or
- (c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. – Whether an interest to which the preceding paragraph applies falls within sub-paragraph (a), (b) or (c) of that paragraph is to be determined by the law governing the agreement.

4. – This Convention governs only

- (a) the constitution of an international interest, its effects, its assignment and rights of subrogation;
- (b) matters related to the international registration system and the modalities of registration;
- (c) questions of jurisdiction

as provided for in Articles 2 to 43.

Article 3
Interpretation and Applicable Law

1. – In the interpretation of this Convention, regard is to be had to its purposes as set forth in the Preamble, to its international character and to the need to promote uniformity and predictability in its application.

2. – Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3. – References to the applicable law are to the law applicable by virtue of the rules of private international law of the forum State.

4. – Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit,

the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule the law of the territorial unit with which the case is most closely connected shall apply.

Article 4
[presently Article 3]

Article 5
[presently Article 4]

Article 6
[presently Article 5]

Article 7
[presently Article 6]

[ex Article 7
= Article 3(1) and (2) new]

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