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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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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:

COMMENTS

(submitted by the Government of Australia)

Rome, December 1998

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) reproduced in Study LXXII - Doc. 43/Study LXXIID – Doc. 4, the Unidroit Secretariat also received comments from the Government of Australia on the preliminary draft Convention. This paper reproduces these comments set out hereunder.

PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:

COMMENTS

(submitted by the Government of Australia)

Australia acknowledges the work of the Unidroit Governing Council and the Unidroit Study Group in preparing the preliminary draft Convention on International Interests in Mobile Equipment (the draft Convention). Australia recognises that the draft Convention could provide significant advantages to persons with ownership and security interests in mobile equipment. However, Australia also notes that the Convention raises a number of difficult conceptual issues for its domestic laws (particularly in relation to the interaction between domestic securities registration systems and the proposed International Registry system) which would need to be resolved before Australia could consider committing to any final Convention.

Australia's comments on specific Articles of the draft Convention are:

Re Article 6

Article 6 lists Articles that the parties to an international interest cannot agree to derogate from or vary the effect of. Article 9(1) (which lists remedies available in the case of default) is not listed. If the parties vary Article 9(1) by substituting the available remedies with other remedies, Article 9(2)-(6) would be rendered nugatory. However, Article 9(2)-(6) contain important procedural protections, such as exercising remedies in a commercially reasonable manner and giving reasonable written notice to interested persons of a proposed sale or lease, which potentially benefit persons who are not parties to the transaction that gives rise to the international interest.

These procedural protections should be required to be adhered to even if the parties have substituted the available remedies under Article 9(1) (it is possible that not every interested party will be involved in the agreement to substitute the remedies, for example a person entitled to the benefit of an international interest that is registered after that of the chargee). One way this could be achieved would be for Article 9(1) to provide:

> "In the event of default in the performance of a secured obligation, the chargee may exercise any remedy provided for in the security agreement, and any of the following remedies that the security agreement does not derogate from or vary the effect of:
>
> (a) take possession or control of any object charged to it;
>
> (b) sell or grant a lease of any such object;
>
> (c) collect or receive any income or profits arising from the management or use of any such object;
>
> (d) apply for a court order authorising or directing any of the above acts."

Article 9(1) could then be listed in Article 6 as an Article that cannot be derogated from or varied.

Re Article 7

Commentaries on Protocols concluded after the conclusion of the Convention should not be available to assist in the interpretation of the Convention.

Re Article 8(b)

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***tration process should include an inquiry into the power of an obligor to enter into an agreement, so that the International Registry provides a potential security holder with some certainty that there is not a prior security interest. Further, the efficacy of the priority rules in Chapter VIII could be undermined by the registration of an interest that is not in fact within the definition of "registered interest" due to a lack of power in the chargor to enter into the agreement (which would therefore not be an "international interest" for the purposes of Article 8).

The draft Convention should also make clear what "power" to enter into an agreement means. For example, does it relate only to legal title, or could it also require compliance with contractual obligations, statutory procedures etc?

Re Article 9(1)

Refer to the comment on Article 6, above.

Re Article 9(3)

Article 9(3) provides that a chargee proposing to sell or grant a lease of an object otherwise than pursuant to a court order shall give "reasonable" prior notice in writing to interested persons. Australia believes that consideration should be given to specifying a minimum time limit (or time limits) for the giving of notice. This would provide certainty to chargees wishing to proceed with a sale or lease without the risk of challenge to the procedure they have followed

(and, in particular, certainty that the period of notice they have provided complies with the requirements of the draft Convention) and will also provide certainty to obligors and other interested parties.

Re Article 9(6)

Article 9(6) defines "interested person" to include any person entitled to the benefit of any international interest that is registered after that of the chargee. Article 9(3) provides that a chargee is required to give notice of a sale or lease to interested persons. It is not clear whether an interested person whose interest is registered one day prior to the proposed sale or lease would be entitled to "reasonable notice". If so, this could lead to significant delays in proceeding with a proposed sale or lease if interested parties register their interests after the chargee has decided to sell or lease the object and has given notice to interest holders whose interests were registered at that time. One option would be to enable a notice of intending sale or lease to be registered on the International Registry, and for that notice to be deemed to provide notice to interested persons whose interests are registered on the International Registry after the notice of intending sale or lease is posted.

Re Article 12

The concept of "substantial" default is potentially uncertain. This is a term not known in Australian contract or securities law, although contract law does recognise certain defaults which, in some circumstances, could give rise to the remedies listed in Article 9(1). Given the serious consequences that could flow from the occurrence of a "substantial" default, it would be preferable for the draft Convention to provide more guidance on what type of default would be regarded as "substantial", and for the draft Convention to provide that, subject to Article 12(1), a Protocol may provide what kinds of default would give rise to the rights and remedies specified in Articles 9 and 11.

Re Article 14

It is not clear whether the "mandatory provisions" are the Articles listed in Article 6. This should be clarified.

Re Article 15

Article 15 requires Contracting States to ensure that an obligee who produces *prima facie* evidence of default by the obligor may obtain interim judicial relief in the form of one or more of the orders listed. The orders listed include an order for the sale or lease of the object. Orders of this nature should not be made merely on the basis of *prima facie* evidence, and arguably should not be made at an interim stage in proceedings. The question whether to grant interim relief should be left to the discretion of the relevant court or administrative tribunal, and that court or tribunal should be entitled to consider a range of factors (including balance of convenience factors) in addition to whether the obligee has adduced a *prima facie* case.

Re Chapter IV/Chapter V

The registration process should include an inquiry into whether the security agreement conforms to the requirements of the Convention, and into the power of an obligor to enter into

an agreement, so that the International Registry provides a potential security holder with some certainty that there is not a prior security interest.

Re Article 16

In the light of the possible application of the draft Convention to sales (Article 41), consideration should be given to Article 16 providing for the possibility of the International Registry recording ownership or transfer of ownership of international interests in objects.

Re Article 18

Even if the draft Convention is not amended to provide for the International Registry to include an inquiry to ascertain the power of the obligor to enter into an agreement, the requirements for registration on the International Registry should include a requirement that the applicant provide proof to the satisfaction of the Registry that the instrument is an international interest and that the chargor, conditional seller or lessor has the power to enter into the agreement.

Re Article 20

Article 20 should impose an obligation on the International Registry to ensure that the registration of international interests occurs in order of receipt of the application (see Article 28(2)(b)).

Article 20 also has the effect that the risk arising from delay between receipt by the Registry of a registration application and entry of the information onto the data base will be borne by the person submitting the application. If these delays are minimal (no more than a few hours), the risks are unlikely to be high. However, if the delays are likely to be more significant (this is especially possible if the role of the Registry is to be expanded as suggested in our comments above), we suggest that immediately upon receipt of an application for registration of an interest, the data base be amended to show that a registration application has been received in relation to the international interest (provisional registration). If the provisional registration is ultimately accepted and the interest is registered, the time of registration of the interest for the purpose of the priority rules should be deemed to be the time of the provisional registration.

Re Article 25

Subject to our comments on Article 16 (above), a certificate issued by the International Registry should only make statements about facts known to the Registry, such as the date and time of registration. It should not make statements about the underlying validity of the security interest.

Re Article 26(1)

Given the importance to an obligor of obtaining removal of a registration relating to an interest once its obligations have been fulfilled, Article 26(1) should place a positive obligation on the obligee/holder of the registered interest to do everything within their power to remove the registration relating to the interest (presumably only the International Registry would be authorised to remove an interest from the Registry).

Re Article 28

The draft Convention should clarify how registration of a prospective international interest will affect the priority rules. For example, it is not clear whether a registered prospective international interest would have priority over a subsequently registered international interest.

The holder of an international interest that has obtained or registered that interest through fraudulent means should not be entitled to priority over interests that have not been obtained or registered through fraudulent means.

Re Article 33 (c)

This Article provides that actual knowledge of any other person's superior right to payment may excuse an obligor from performing obligations for the benefit of an assignee of the relevant international interest. This should be restricted to actual or constructive knowledge arising by virtue of the registration of the assignment on the International Registry.