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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

# INTERNATIONAL REGULATION OF ASPECTS OF SECURITY INTERESTS IN MOBILE EQUIPMENT:

# QUESTIONNAIRE

Rome, December 1989

## BACKGROUND

At its April 1989 meeting, the Governing Council of Unidroit decided to include in its new Work Programme an examination of the feasibility of an International Convention on Security Interests in Mobile Equipment. The decision to proceed with this project was based in part on the report prepared for the Governing Council by Professor Ronald C.C. Cuming entitled "International Regulation of Aspects of Security Interests in Mobile Equipment". A copy of this report accompanies this questionnaire. Professor Cuming came to the conclusion that five assumptions should be tested before proceeding with the preparation of such a convention. These assumptions are:

(i) that valuable mobile equipment subject to security interests is moved across national frontiers;

(ii) that, for the most part, the laws, including conflict of laws rules, of most nations that deal with security interests in movables are inadequate in that they do not provide sufficient flexibility, predictability or fairness between the foreign security interests and domestic interests in mobile equipment;

(iii) that because of the difficulties encountered, financing organisations are less willing to provide financing for high cost mobile equipment than would be the case if the incidence and severity of such difficulties were reduced as a result of the implementation of new, internationally accepted rules dealing with international aspects of security interests in mobile equipment;

(iv) that the problems of providing the necessary flexibility, fairness and balance can be adequately addressed through a Unidroit Convention;

(v) that there is support among international experts in this area of the law for an undertaking on the part of Unidroit designed to lead ultimately to a draft convention on certain international aspects of security interests in mobile equipment.

Professor Cuming addressed some of these assumptions in his report. He concluded that the laws of most nations that deal with security interests in movables do not provide sufficient flexibility, predictability or fairness between foreign security interests and domestic interests in mobile equipment. Professor Cuming concluded that the types of legal problem arising in the context of the international recognition of security interests in mobile equipment can be adequately addressed through an international convention that contains a mix of choice of law and substantive rules the implementation of which would not require sweeping changes in the municipal law of most States. European and North American experts in international commercial law, whose opinions were canvassed as part of the study carried out by Professor Cuming, were in general agreement with Professor Cuming that efforts to secure international regulation of this area of the law are warranted.

Time and circumstances did not permit Professor Cuming to address adequately those assumptions that can be tested only through empirical investigation. In particular, Professor Cuming was not able to test assumptions (i) and (iii) set out above.

At its April 1989 meeting, the Governing Council instructed the Secretary-General to prepare, in conjunction with Professor Cuming, a questionnaire to be sent to business and financial circles designed to elicit the empirical information that is required before a final decision is made as to whether or not Unidroit should proceed further with work directed toward the preparation of a draft convention. In fulfilment of this mandate, the following questionnaire has been prepared.

In his report to the Governing Council Professor Cuming set out some conclusions that he had arrived at after examining the treatment of security interests in movable equipment under current legal regimes and after considering the various approaches that might be taken to remedy current inadequacies in the law regulating security interests in mobile equipment. These conclusions can be very briefly summarised as follows:

(i) The *lex situs (lex rei sitae)* choice of law rule that is currently used by most European legal systems to determine the law applicable to the validity and priority status of security interests in movable equipment is entirely inadequate in the context of modern conditions in which such equipment is frequently moved from one State to another. Two extant international conventions, the Geneva Convention on the International Recognition of Rights in Aircraft, 1948 and the Geneva Convention on the Registration of Inland Navigation Vessels, 1965, embody a recognition of this fact and displace the *lex situs (lex rei sitae)* as the law applicable to interests in aircraft and such vessels.

(ii) Experience in jurisdictions in North America indicates that a workable approach is to apply the law of the debtor's principal place of business to the issues of validity of security interests in mobile equipment. Without more, however, a new choice of law rule, whether implemented by change in national conflict of laws rules or by international convention, will not provide a solution to the problems encountered in this area.

(iii) A feature that is fundamental to a workable system of international law for the recognition of security interests in mobile equipment is international acceptance of a generic concept of "security interest". For some States this would involve reconceptualisation of certain types of transaction such as sales of movables under which title is retained by the seller until payment and leases of equipment that functionally are financing devices.

(iv) Another important feature of a workable system of international law for the recognition of security interests in mobile equipment is the common acceptance of a basic set of priority rules that reflect functional considerations, and an appropriate choice of rule or set of international rules applicable to *inter partes* rights and remedies. The system of priority rules would accommodate and set standards for measures, such as registration requirements, that a State might think necessary to protect persons who acquire interests in collateral while it is located in the State.

(v) No attempt would be made to address the status of security interests in bankruptcy proceedings. However, it would be necessary to secure acceptance that title retention sale contracts would be treated in bankruptcy proceedings as creating security interests, the validity of which would be a matter for the law of the debtor's principal place of business and not the forum of the bankruptcy proceedings.

(vi) The requirements of a workable system for the international recognition of security interests in mobile equipment should be embodied in a convention.

The following questions are designed to solicit the reaction of your organisation, or in appropriate situations, your personal reaction, to the central features of the proposal that Unidroit undertake the preparation of a convention on the international recognition of security interests in mobile equipment.

This questionnaire is divided into three parts. Part I deals with commercial matters. Part II deals with legal considerations and the logistic of the proposed project. Part III contains no questions. It is made available to facilitate general comments of respondents concerning any aspect of the matters raised directly or indirectly in the questionnaire.

The laws of States vary one from the other in their treatment of secured financing transactions. This being the case, it has been necessary to employ a generic description and label for the types of interest referred to in this questionnaire. When responding to the questions, please note that the term "security interest" means any non-possessory interest in movable property created by contract in favour of a creditor in order to secure payment of a debt or discharge of some other obligation. It includes an interest arising by virtue of

(a) a contractual transfer of title to the creditor,

(b) the contractual creation of a charge or hypothec in favour of the creditor,

(c) a contractual reservation of title or ownership by the seller of movables,

(d) a hire-purchase contract under which the seller "leases" the movables to a "lessee" who intends to purchase it,

(e) a lease of movables under which the "lessee" acquires a preponderance of the commercial advantages associated with ownership.

The term does not include liens, charges, general privileges or other interests that arise by operation of law in favour of repairers, governmental agencies or creditors.

## QUESTIONNAIRE

Please describe the type of business organisation to which your responses pertain:

(a) - seller of movables
(b) - buyer of movables
(c) - lender
(d) - other (please describe) _____

_____

_____

_____

In the context of business activity in which your organisation is engaged or with which you are familiar, the practice of taking security interests in movable property that is or is likely to be moved across national frontiers:

(a) - never occurs
(b) - is uncommon
(c) - occurs frequently

[Note: If you have responded by marking (b) or (c), please proceed to Part I. If you have responded by marking (a), please go to Parts II and III and ignore questions in Part I ]

## PART I

1. Please indicate the kinds of movable property in which security interests are taken:

(a) - trucks (lorries)

(b) - automobiles

(c) - other types of motor vehicle (please specify) _____

_____

_____

(d) - construction equipment other than motor vehicles

(e) - oil drilling equipment

(f) - ships, vessels or other floating equipment

(g) - aircraft

(h) - others (please specify) _____

_____

_____

2. Please indicate the type(s) of debtor involved:

(a) - foreign buyers that take the movables back to their domiciles

(b) - domestic buyers that use the movables principally within the State where the movables are bought and that infrequently use the movables in other States

(c) - domestic buyers that frequently use the movables in State other than their domiciles

(d) - domestic or foreign borrowers carrying on business in more than one State that give security interests in movables to secure short- or long-term debt

(e) - others (please specify) _____

_____

_____

3. Please indicate the principal reason(s) for taking security:

(a) - to permit seizure of the movables on default by the buyers in paying the purchase price or by borrowers in repaying the secured loans

(b) - to permit recovery of the movables should the buyers or debtors become insolvent or bankrupt

(c) - to permit recovery of the movables should they be seized by execution creditors of the debtors

(d) - to permit recovery of the movables should the buyers or borrowers sell the movables to other persons in violation of the terms of the security agreement

(e) - to permit recovery of the movables should the buyers or borrowers give competing security interests in the movables to other persons in violation of the terms of the security agreement

(f) - others (please describe) _____

_____

_____

4. In your experience, secured creditors' rights provided in security agreements to seize or recover movables are:

(a) - never recognised by the law of other States to which the movables have been taken

(b) - only occasionally recognised by the law of other States to which the movables have been taken

(c) - frequently recognised by the law of other States to which the movables have been taken

(d) - are recognised by the law of other States only when competing rights in the movables have not been created in those States.

5. The lack of an international system of law providing that the rights of secured creditors created under the laws of one State will be recognised in other States:

(a) - is of no significance to sellers or buyers of high cost movables

(b) - is of no significance to lending organisations which deal with businesses that acquire movables that are moved from one State to another

(c) - results in sellers refusing to sell on a secured credit basis movables that are of a type that aremoved from one State to another

(d) - results in lenders refusing to lend money on the security of movables that are of a type that are moved from one State to another

(e) - is a negative factor in decisions on the part of sellers of high cost movables to sell on credit movables that are of a kind that are moved from one State to another

(f) - is a negative factor in decisions on the part of lenders to make loans where the security for the loans consists of movables that are of a kind generally moved from one State to another

(g) - results in higher credit charges for buyers of movables that are of a kind generally moved from one State to another and/or higher loan charges for borrowers which offer such movables as collateral for loans

(h) - has the following effects: (please specify) _____

_____

_____

## PART II

[Note: A respondent may choose one of the specified alternatives or may set out in the space provided his or her own proposals as to how each of the issues should be addressed.]

1. The proposal that Unidroit undertake a project dealing with international recognition of security interests in mobile equipment is:

(a) - an important aspect of the further development of international commercial law and should be pursued in one form or another

(b) - unrealistic given the complexities of this area of the law and should be reconsidered

(c) - _____

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_____

[Note: If you have responded by marking (a), please proceed to the balance of the questions set out below. If you have responded by marking (b), proceed to Part III. The contents of your response to (c) will determine whether or not you proceed to the balance of the questions or to Part III].

2. International recognition of security interests in mobile equipment should be secured through:

(a) - an international convention

(b) - uniform rules designed to be implemented by States

(c) - _____

_____

_____

3. The convention or rules should apply to

(a) - interests that arise through contract only

(b) - interests that arise through contract and through operation of law (e.g. privileges, liens and statutory charges)

(c) - _____

_____

_____

4. An aspect of the project should be to

(a) - develop an entirely new type of secured financing device for use where financing involves collateral in the form of equipment of a kind generally moved from one State to another

(b) - obtain recognition of a generic concept of security interest that encompasses all financing devices used in States that are parties to the convention or that implement the rules whether or not those devices are conceptualised as such under the laws of the State in which they are used. (See definition of "security interest" *supra*)

(c) - exclude from the scope of the convention or rules transactions such as title retention sale contracts and equipment leases that are not treated as security agreements under the law of the State in which they are used

(d) - _____

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5. An aspect of the project should be to

(a) - retain the *lex situs* (*lex rei sitae*) rule for determining the law applicable to the validity of security interests in movables of a kind generally moved from one State to another

(b) - replace the *lex situs* (*lex rei sitae*) rule with a rule under which the law of the debtor's principal place of business determines the validity of security interests in movables of a kind generally moved from one State to another

(c) - replace the *lex situs* (*lex rei sitae*) rule with the following:

_____

_____

_____

6. An aspect of the project should be to

(a) - leave all matters of priority to the applicable law

(b) - develop a set of priority rules to deal with priority disputes involving only secured parties

(c) - develop a set of priority rules to deal with priority disputes involving secured parties and execution creditors

(d) - develop a set of priority rules to deal with priority disputes involving secured parties, execution creditors and buyers

(e) - _____

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_____

7. An aspect of the project should be to

(a) - leave all matters of inter partes rights and remedies upon default to the law applicable to the validity of the security interest involved

(b) - leave all matters of inter partes rights and remedies upon default to the law of the forum

(c) - develop a set of rules to deal with inter partes rights and remedies upon default where a security interest is being enforced in a State other than that of the State the laws of which govern the validity of the security interest being enforced

(d) - retain the distinction between substantive and procedural matters leaving the former to the law that governs the validity of the security agreement and the latter to the law of the forum

(e) - _____

_____

_____

8. The project should

(a) - involve no attempt to affect national bankruptcy law in any way

(b) - seek to ensure only that all transactions that, under the convention or rules, are defined as creating security interests are treated in bankruptcy proceedings as security agreements

(c) - _____

_____

_____

9. Security interests in which (if any) of the following types of movables should be subject to such a system:

(a) - trucks (lorries)

(b) - automobiles

(c) - other types of motor vehicle (please specify) _____

_____

_____

(d) - construction equipment other than motor vehicles

(e) - oil drilling equipment

(f) - ships, vessels or other floating equipment

(g) - others (please specify) _____

_____

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## PART III

Please set out on this sheet any general comments or suggestions that you wish the Governing Council to consider in this study. However, do not feel constrained to limit your comments to those that can be recorded on a single sheet.