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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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ANALYSIS OF THE REPLIES TO THE QUESTIONNAIRE ON AN
INTERNATIONAL REGULATION OF ASPECTS OF
SECURITY INTERESTS IN MOBILE EQUIPMENT

(prepared by the Unidroit Secretariat)

Rome, April 1991

I - BACKGROUND

1. At its April 1989 session, the Unidroit Governing Council decided to include in Unidroit's 1990-1992 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 essentially 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". Professor Cuming came to the conclusion that five assumptions should be tested before proceeding with the preparation of such a convention. These assumptions were:

(i) that valuable mobile equipment subject to security interests was 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 were inadequate in that they did 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 were 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 could be adequately addressed through a Unidroit Convention;

(v) that there was 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 did 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 could be adequately addressed

through an international Convention containing 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 him that efforts to secure international regulation of this area of the law were warranted.

2. Time and circumstances did not permit Professor Cuming to address adequately those assumptions, in particular assumptions (i) and (iii), that could be tested only through empirical investigation. At its April 1989 meeting, the Governing Council instructed the Secretary-General to prepare, in conjunction with Professor Cuming, a questionnaire to be distributed essentially in business and financial circles designed to elicit the empirical information that was required before a final decision was made as to whether or not Unidroit should proceed further with work directed toward the preparation of a draft Convention. A questionnaire (Study LXXII - Doc. 2) was drawn up by Professor Cuming and circulated between February and July 1990 in all Unidroit member States as well as in three non-member States (Brazil, Iceland, and New Zealand) and a selection of international bodies. Professor Cuming's report was sent out with the questionnaire. Approximately one thousand copies of the questionnaire were sent out, typically to major banks and financial institutions, confederations of industry, major industrial concerns and airlines. 93 replies were received, these coming from 29 countries. In addition, five international bodies submitted replies. A list of the respondents is annexed to the present report.

3. It has to be borne in mind that many respondents abstained in respect of either individual questions or entire sections of the questionnaire, normally because of their lack of expertise in these matters. Moreover, many questions elicited more than one affirmative reply. Hence, the number of responses to each question will be found in places to fluctuate noticeably.

II - INTRODUCTION

4. In the compilation of this analysis ⁽¹⁾ the Secretariat has whenever possible sought to identify possible trends among the respondents' preferences based upon their legal families, i.e. common law or civil law.

(1) The Unidroit Secretariat acknowledges its deep debt of gratitude to Ms. Carolyn Karr (J.D. candidate, Stanford Law School) for her invaluable and perspicacious work in the preparation of this analysis during her internship with Unidroit (1990-1991).

and functional categories, i.e. lender, buyer, etc. Not only did this approach yield scant evidence of consistency among the members of these groups; great cleavages emerged also among the perspectives of respondents of the same nationality.

This lack of cohesion among members of the same category may, at first sight, appear to signify a dearth of common theoretical positions, positions toward which doctrinal arguments urging uniformity might be developed and directed. Yet the most important points, namely whether an international accord of some kind should be developed and whether either a generic concept of security interest or an entirely new type of secured financing device should be formulated (both of which would involve significant innovations), received widespread approval from members of all categories. This is a very positive sign because it indicates a willingness, on the part of the vast majority of respondents, to transcend and, where necessary, abandon their particular legal orders' conception of the security interest. Indeed, this common commitment should permit further efforts to be focussed upon developing the technical means of carrying out these universal notions, a difficult task but one far easier than convincing various groups of the importance of assuming an internationalist perspective.

III - RESPONSES TO THE QUESTIONNAIRE

INTRODUCTORY QUESTIONS

"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)"

5. As regards the different categories of respondent, it was noticeable that most of those who replied may broadly be classified as lenders. Indeed, fifty-two of the respondents were lenders as against ten buyers, eight sellers, one foreign trade corporation, two governmental agencies, ten law teachers and twelve practising lawyers.

"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 movables property that is or is likely to be moved across national frontiers:

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

6. Only nine respondents stated that movables with which they were concerned never crossed State lines. For the others, such movables were transported across national boundaries either occasionally (thirty-one respondents) or frequently (thirty-five respondents).

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)"

7. The kinds of property in which security interests were taken were quite consistently divided among the given categories. Several respondents added, generally, any kind of machinery or movables in which security interests could be taken. Others mentioned specific kinds of movables pertinent to their particular enterprises, such as graphic arts equipment and containers.

"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 States 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)"

8. The kinds of debtors involved in the secured transactions at issue were nearly evenly distributed among the possible choices as well, though the largest group comprised domestic buyers that used the movables principally within the State where they were purchased and infrequently transported them elsewhere. The same group contained a slightly larger proportion of common law responses, but other trends along legal family lines failed to emerge.

"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)"

9. The reasons for taking security interests in movables again ranged the gamut of available responses. The most popular reasons for taking a security interest were to permit seizure of the goods should the debtor fail to pay the purchase price or secured loan and to permit recovery of the movables should the debtor become insolvent or bankrupt. The other categories (to permit recovery if the movables are (1) seized by the debtor's execution creditors; (2) sold in violation of the security agreement; or (3) used as security in violation of the security agreement), were, however, given in many instances as well.

"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."

10. Only two respondents stated that secured creditors' rights in movables were never recognised extraterritorially. Most found that such rights were recognised either occasionally or frequently. It is perhaps noteworthy that only one common law respondent chose the "occasional" category and none the "never". Rather, such respondents experienced frequent recognition of secured rights or, at least, recognition in the absence of competing rights created in the State to which the movables have been transported.

"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 are moved 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)"

11. Many respondents considered the lack of an international system of law in this area a negative factor in decisions by lenders to sell on credit or take security interests in movables of a kind generally moved from one State to another and asserted that this resulted in higher credit charges. One respondent (a New Zealand buyer) cited the narrowing of available markets and higher transaction costs. This point was also raised by a U.K. lender.

PART II

"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) - "

12. Support for Unidroit's undertaking of a project dedicated to the international recognition of security interests was nearly unanimous (sixty-eight). Four of the six respondents who deemed the proposition unrealistic were from civil law systems: two Swiss, one German and one Italian. Yet one of these respondents considered the project important in spite of the difficulties. Perhaps significantly, the two common law respondents that did not favour the project fell outside the predominant functional categories (one a consumer credit organisation and the other an organisation of insurers). Numerous respondents mentioned the formidable obstacles that the existing diversity among national orders would present. One (Danmarks Rederiforening) opposed implementation of an international regimen in the area of ships and mobile platforms on the ground that these interests were being addressed by IMO and UNCTAD. One United States respondent doubted the project's feasibility unless its scope were kept quite narrow, primarily because it was exploitation of the differences among legal orders in this field that allowed the creation of various types of complex financing structures.

"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) - "

13. Regarding the means that should be used to secure international recognition of security interests, forty-five respondents favoured an international Convention, while twenty-seven would prefer uniform rules to be implemented by States. All U.S.A. respondents chose the option of an international Convention and all but one U.K. respondent that of uniform rules, but the other States - members of both civil and common law regimens - were split between the two options with three agreeable to either. Only three law teachers selected uniform rules, whereas the other functional categories were more closely divided between the two possibilities. The Swiss Association des Banquiers noted that neither international Conventions nor uniform rules were ever entirely accepted by the States which were important in the field. The Felalease reply added that each State should adapt its bankruptcy and civil procedure rules to any new

concepts embodied in a Convention.

"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) -"

14. The issue of which interests should be protected by the Convention or rules also elicited responses undistinguishable on either the basis of common law versus civil law orientation or functional category. The vast majority of respondents stated that the regimen should apply to interests that arise through both contract and operation of law (forty-five), while only twenty-one would limit it to contractual interests. One respondent proposed that the Convention or rules apply to both contractual interests and those arising from operation of law, but only law pertaining specifically to the movables in question. A French response (Tallon and Audit - law teachers) pointed out that, while there could be no question of drawing up an international regulation of security interests without dealing with all the different types of lien and charge that might have been created over the movables in question, there could be no possibility of a uniform regimen governing liens and charges created over movables coming from another country but that a starting point might be to limit oneself to those liens and charges which extend the creditor's right of retention.

"4. An aspect of the project should be to

(a) - develop an entirely new type of secured financing 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) - ... "

15. Yet despite these disparities among national "brands" of security interest, most respondents supported some sort of universal concept of security interest. Specifically, forty-four favoured the recognition of a generic concept of security interest and fourteen sought the development of an entirely new secured financing device. As noted above, either of these propositions, if implemented, would by definition transcend the limits imposed by municipal regimens. In contrast, a mere five respondents (one common law and the others civil law) would exclude transactions not treated as security interests under the law of the State in which they are used. Again, no pattern of response was perceptible within the categories, though a slightly higher proportion of common law respondents favoured a generic concept of security interest.

"5. As 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
..... "

16. - This was the one question which provoked a noticeable split between common law and civil law respondents. Only two of the fifteen responses favouring retention of the *lex situs* rule were from common law States, whereas twelve of the forty-one favouring taking the debtor's principal place of business were from common law States. Moreover, three of the four sellers responding to this question favoured retention of the *lex situs* rule. Several respondents suggested the law of the State in which the movable was registered (especially in the case of aircraft). Others proposed the secured party's principal place of business, for instance for leasing transactions. Two lawyers practising in Italy would develop a system providing that the secured party's law apply regarding the validity of an interest, but that the debtor's law apply regarding the execution of and priorities in recognition of that interest. One further proposition merits mention: that the parties to a contract select the regimen which

suits them.

"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) - "

17. The two most popular solutions to the problem of priorities were that the issue be left to the applicable law (twenty-three respondents) and that a set of priority rules be developed to deal with disputes involving secured parties, execution creditors and buyers (thirty-six respondents). These responses were distributed without regard to legal family, nationality or functional category. One respondent proposed a plan connecting the applicable law with a central registration system. Specifically, priorities would be established by the applicable law if the security interest had been registered in that State. Another respondent felt that, if issues of priority were left to the applicable law, creditors who had liens by operation of law should be included in the priority rules.

"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) - "

18. Three of the four solutions proposed to the problem of *inter partes* rights received a significant number of endorsements. Seventeen of the twenty-six respondents who supported the development of a set of rules to govern *inter partes* disputes likewise supported the establishment of a set of rules to deal with priority disputes involving secured parties, execution creditors and buyers. Similarly, twelve of the nineteen respondents that favoured leaving all matters of *inter partes* rights to the law applicable to the validity of the security interest involved also favoured leaving all matters of priority to the applicable law. Twenty-one respondents opted for retention of the distinction between substantive and procedural matters as the best solution to the problem of *inter partes* rights.

"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) - "

19. Twenty-four respondents thought that the project should involve no attempt to affect national bankruptcy law, while forty-four felt that it should seek to ensure only that all transactions creating security interests under the proposed Convention or rules were treated in bankruptcy proceedings as security agreements. The latter choice was far more popular among common law participants. Indeed, twelve of the forty-four that selected the second option were from common law regimens and only four of the twenty-four participants that chose the former option were members of the common law legal family. The second option was also more popular among buyers and sellers.

"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 vehicles (please specify)
- (d) - construction equipment other than motor vehicles
- (e) - oil drilling equipment
- (f) - ships, vessels or other floating equipment
- (g) - others (please specify)

19. Security interests in most movables should be subject to the proposed international system, according to nearly all the respondents, although here one has to recall the advice given by the Danmarks Rederiforening (cf. § 12 *supra*) to the effect that ships and mobile platforms should be excluded. Other movables not enumerated in the questionnaire that should, according to some respondents, be covered by the project included aircraft and industrial machinery in general. Two Australian respondents (Prof. David E. Allan and Mr John Wilkin) considered that items for which there already existed an internationally recognised register should not be subject to the proposed system.

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."

20. Many respondents expressed particular ideas which could be helpful at the practical level. For example, Felalease emphasised the need for precise rules regarding the place and elements of registration. Airbus Industrie (France) suggested that the Convention set forth practical steps enabling the recovery of an asset. Della Vedova (Italy) proposed the development of an international certificate of title. Vouilloz (Switzerland) called for a determined or determinable minimum value to be imposed on the subject movables. Svenska Finans (U.K.) mentioned the possibility of restricting asset-specific liens and non-registered liens to a percentage of asset value in the event of a *bona fide* priority lien being recorded on the asset. The U.K. Civil Aviation Authority noted that security interests should not be given priority over government agencies' rights of detention. The Law Reform Commission of Australia drew attention to reforms underway in Australia and in the context of Australia-New

Zealand relations that might prove relevant.

21. Other respondents raised issues of municipal law for consideration. Specifically, the Association Belge des Banques noted the fundamental change to French and Belgian law that would be brought about by recognition of the non-possessory security interest and observed the particularities of the French and Belgian *gage*. The Pinheiro Neto law offices (Brazil) were concerned about the protection of Brazil's internal statutory guidelines. Both Merkantil Bank (Hungary) and Marusic (Yugoslavia) called attention to some of the special problems facing Eastern European States as a result of recent or current government involvement in this area.

22. Finally, Vagts (U.S.A.) noted that the distinction between commercial and consumer transactions was not as clear as it might appear. He also cautioned that means must be devised of precluding possible registration in more than one State.

IV - CONCLUSIONS

23. The responses have demonstrated widespread support for the drawing up of an international Convention or set of uniform rules as a means of recognising security interests in movables at the international level. While there can be no gainsaying the very challenging nature of this goal resulting from the complexity and diversity of municipal law in this area, the respondents' nearly unanimous endorsement of the project itself and their willingness to create new devices or reformulate existing definitions revealed an underlying uniformity of purpose which could ultimately provide the foundation for the development of an international instrument.

APPENDIX

List of the respondents to the Unidroit questionnaire

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