

UNIDROIT 1993
Study LXXII - Doc. 6
(Original: English)

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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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STUDY GROUP FOR THE PREPARATION OF UNIFORM RULES
ON CERTAIN INTERNATIONAL ASPECTS OF
SECURITY INTERESTS IN MOBILE EQUIPMENT

MEMORANDUM

for the attention of the Study Group at its first session

(prepared by the Unidroit Secretariat)

Rome, January 1993

Background to proposal for Unidroit initiative

1. - High-cost equipment frequently moves across international frontiers nowadays. Because of its high value, it can be assumed that it will often be collateral under a security agreement between its owner and one or more banks or financial institutions. The great variety of national approaches to the question of the recognition of foreign security interests in movable property is guaranteed to ensure that such banks and financial institutions will encounter difficulties when issues of recognition and enforcement of their security interests arise in the new situs. As such it is reasonable to assume that this state of affairs will not encourage such banks and financial institutions to extend secured financing facilities on a cross-border basis.

2. - The successful conclusion of the Unidroit Convention on International Financial Leasing in Ottawa in 1988, with in particular its enshrinement of a priority rule regulating the respective rights in the leased equipment of the lessor and the lessee's trustee in bankruptcy and unsecured creditors, persuaded the Government of Canada that there was scope for attempting an international regulation of certain international aspects of security interests in mobile equipment in general. The aforementioned Unidroit Convention was seen as providing a legal structure to facilitate and regulate one form of secured financing for the acquisition of equipment. It was suggested that it could be seen as a first step towards the development of an integrated system for the international recognition and enforcement of security interests in mobile equipment.

Preliminary work

3. - Following the submission of the proposal of the Canadian Authorities to Unidroit's Governing Council in June 1988, a preliminary comparative law report was prepared by Professor R.C.C. Cuming (University of Saskatchewan). In this report (Study LXXII - Doc. 1) Professor Cuming examined the case for Unidroit contemplating action in this area of the law. His conclusions were that the laws of most nations governing security interests in movables did not provide sufficient flexibility, predictability or fairness between foreign security interests and domestic security interests in mobile equipment and 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.

4. - In the time available to him Professor Cuming was unable to test adequately certain assumptions which he considered to be fundamental to the case for Unidroit proceeding with the preparation of such a Convention. These were, first, that valuable mobile equipment subject to security

interests was indeed moved across national frontiers and, secondly, that, because of the difficulties encountered, banks and financial institutions were less willing to provide financing for such 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.

5. - When considering Professor Cuming's report at its April 1989 session, the Unidroit Governing Council accordingly instructed the Secretariat to prepare, in conjunction with Professor Cuming, a questionnaire to be distributed essentially in business and financial circles designed to elicit this sort of empirical information. This questionnaire (Study LXXII - Doc. 2) was circulated between February and July 1990 to a representative cross-section of sellers, buyers, banks and financial institutions and those lawyers typically advising such clients in all Unidroit member States as well as in a certain number of non-member States and amongst interested international Organisations and professional associations.

Convening of Working Group to examine feasibility of Unidroit initiative

6. - While the hundred or so replies to this questionnaire (analysed by the Unidroit Secretariat in Study LXXII - Doc. 3 and by Professor Cuming in Study LXXII - Doc. 4) seemed to confirm the case for Unidroit proceeding with this project, the Unidroit Governing Council at its May 1991 session decided that it would nevertheless be wise first to convene a restricted exploratory working group of experts, to include both representatives of the business world and practising lawyers with expertise in these matters, to report back to it on the utility and feasibility of Unidroit drawing up uniform rules on this subject.

7. - This group, chaired by a member of the Unidroit Governing Council, Professor R.M. Goode (University of Oxford), and assisted by Professor Cuming, met in Rome from 9 to 11 March 1992. It concluded positively as to both the utility and the feasibility of the project, provided it be kept within certain limits. It adopted a number of recommendations as to the shape of Unidroit's future work on this project, concerning in particular the creation of an entirely new international security interest in mobile equipment possessing the essential legal characteristics given by the proposed Convention and publicised by registering within an international registration system.

Convening of study group to draw up uniform rules

8. - In the light of the positive nature of the working group's conclusions, the Unidroit Governing Council at its June 1992 session instructed the President of Unidroit to convene a study group for the

preparation of uniform rules on certain international aspects of security interests in mobile equipment. This group will hold its first session in Rome from 8 to 10 March 1993.

Terms of reference of study group

9. - While the terms of reference of the study group will in principle be those proposed by the restricted exploratory working group in its report, the fact that there had been pressure from some quarters both before, during and after the meeting of the restricted exploratory working group for the scope of the proposed exercise to be broadened led the Governing Council to instruct the study group to feel free to make any proposals it might find appropriate to the Governing Council regarding its terms of reference.

Comments from respondents to Unidroit questionnaire

10. - With a view to the first session of the study group, Unidroit invited its member Governments, the interested international Organisations and professional associations and those who had responded to its questionnaire on this subject to submit any comments and proposals they cared to make on the proposed project. In the event only a small number of the respondents to the questionnaire made any specific comments.

11. - Dr A. Maier, replying on behalf of *Deutsche Aerospace*, noted first that, in the absence of any specific criterion for the determination of what was meant by the term "mobile equipment", it was not yet possible to ascertain the scope of the proposed uniform rules, beyond that is the specific indication that aircraft and satellites were intended to be included. He took the view, secondly, that it was not realistic to seek to create from scratch an internationally registered and recognised "international security interest" with its legal characteristics still undefined without reference to existing municipal law, in that there was no legal institution that was entirely independent of municipal law, and accordingly suggested that one should first seek to identify the points which the existing laws had in common. He proposed that guidance should be sought in the experience to be derived from other branches of law, as also in the international Conventions dealing with intellectual property rights.

12. - Ms G.M.E. White, Secretary and Legal Adviser to the Civil Aviation Authority of the United Kingdom, indicated that, the C.A.A.'s main concern being to ensure that statutory liens should not be affected by the proposed uniform rules, she was pleased to see from the report of the restricted exploratory working group that that group had recommended that such security interests should indeed remain unaffected by the uniform rules.

13. - The French Finance Houses Association indicated that its members would not wish to see the lessor's ownership rights under a finance lease being assimilated to a security interest under the proposed uniform rules.

Related initiatives and proposed initiatives

14. - In view of the potential importance of security in financing transactions in Eastern and Central Europe, the *European Bank for Reconstruction and Development* has prepared a discussion paper on secured transactions which outlines the possible structure of a model law on this subject for Central and Eastern European countries, including the countries of the former Soviet Union. It is the E.B.R.D.'s intention to produce a skeleton draft of its proposed model law in advance of the Round Table it has scheduled for 24 April 1993. Professor Cuming has become a member of the Advisory Board for the E.B.R.D. project.

15. - In the October 1992 issue of the "Asset Finance and Leasing Digest", Mr Howard Rosen, a practising lawyer, called for the creation of a European register for railway rolling stock. The purpose of this register would be to enable "a prospective purchaser to check definitively if the asset belongs to someone other than the prospective seller, or whether there are other liens on the asset" and thereby to enhance the security of those contemplating granting finance to railway operators. The mobile nature of rolling stock - "on the continent of Europe, wagons and coaches are constantly crossing borders" - calls, in Mr Rosen's opinion, for an international solution. An alternative solution to the European registry of the kind advocated by Mr Rosen would, he suggests, be "an international treaty prescribing local recognition of a registered interest in another treaty country." However, he claims that the European registry would be "clearly the more attractive [and] the more practical option for funders," in that "it need not be run by State bureaucracies as long as it is under the wing of an acknowledged international institution which local law will be prepared to recognise". Mr Rosen indicates in his article that the Commission of the European Communities "has already indicated that if private funders called for a European wide registration system for rolling stock, it would look favourably on providing a legal framework for such a facility."

16. - The Unidroit Secretariat has subsequently contacted Mr Rosen. By letter dated 16 December 1992, it suggested that the two approaches to the problem cited by Mr Rosen in his article - namely, on the one hand, an international treaty prescribing local recognition of a registered interest in all Contracting States and, on the other hand, an international registry enabling a prospective purchaser to carry out a check on title to the asset - need not necessarily be seen just as alternatives but could be combined, as was exemplified by the proposed Unidroit international security interest system. Such an option should be that much more realistic, it was argued, in view of the rapid innovations being made in the field of information

technology. Far from looking towards a system to "be run by State bureaucracies", the Unidroit Secretariat indicated in its letter that the feasibility of the sort of international registration system it had in mind would necessarily depend on the commitment of States to its institution being kept to a bare minimum. The Unidroit Secretariat further suggested that it would be unfortunate were the creative energies that it was in the process of galvanising for the purpose of creating a new international security interest system for all classes of internationally mobile equipment to be dissipated by the launching of a parallel initiative limited to rolling stock. It proposed instead that a common solution should first be sought for all internationally mobile equipment, subject to it being found that such a solution would not work for this or that class of equipment. It pointed to the evident negative results on legal certainty that might be expected to result from having a multiplicity of separate international systems for different types of internationally mobile equipment.