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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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):

ADDENDUM

(Comments of the German Federal Ministry of Justice)

Rome, January 1993

Preface

1. - As reported in Study LXXII - Doc. 6 (cf. § 10), with a view to the first session of the study group, Unidroit, on 1 September 1992, invited its member Governments by Note Verbale to submit any comments and proposals they might care to make on its security interests project. This addendum incorporates the reactions of the German Federal Ministry of Justice to the report of the restricted exploratory working group. The Federal Ministry of Justice, in communicating its comments pointed out that they had not however been co-ordinated with the Ministries of Justice of the *Länder*, nor with any other Federal Ministry nor indeed with the interested professional associations and were accordingly not to be read as representing the official position of the Federal Republic.

Comments of the Federal Ministry of Justice

2. - There was general interest from a German point of view in the Unidroit project: such a Convention seemed useful especially in so far as it would embrace non-possessory German security interests (reservation of title, security transfer of ownership) which were often not recognised in a foreign jurisdiction because of the fact that there was no public notice. A preliminary reading of the report of the working group, however cursory for reasons of time, nevertheless showed that for the creation of uniform rules certain misgivings would first need to be dispelled and certain points would need to be clarified. From a German point of view a certain number of considerations arose in this context.

3. - The first of these considerations was that under German law (§ 936 of the German Civil Code) it was possible for security interests in personal property to be extinguished if the person to whom the property had been transferred believed in good faith that it was not subject to security interests. The possibility under German law for such a transferee in good faith to take free of such security interests should not be prejudiced by a Unidroit Convention of the kind proposed. In this connection reference might be made to the fact that the Unidroit Convention on International Financial Leasing expressly leaves open the question of whether a transferee in good faith of a leased asset subject to the lessor's real rights may take free of such rights. It became obvious during the preparatory work on this Convention that the legal principle according to which a transferee in good faith takes free of real rights in the property transferred was not going to be readily given up by those States for the legal systems of which this principle was fundamental. The same position may be expected to be adopted in respect of this new project.

4. - The second consideration relates to the question of which classes of mobile equipment are to be encompassed by the proposed Convention.

First of all, should it be decided to restrict the sphere of application of the proposed Convention to only those classes of equipment that are used for commercial purposes, this then raises the difficult question of distinguishing between a commercial and a non-commercial user.

Secondly, the classes of equipment to be covered by the Convention should in any case be defined in the Convention itself. It would seem questionable to leave this matter to be decided by the parties to the security agreement themselves.

Thirdly, the Federal Ministry of Justice agreed with what was stated in the report of the restricted exploratory working group regarding the proposal to exclude registered ships from the sphere of application of the proposed Convention. In view of both the existing international Conventions for the unification of certain rules relating to maritime liens and mortgages and the additional prospective Convention on this subject, there did not seem to be any need for any further international regulation in this field. As regards rights in aircraft, it would be necessary from a German point of view to check carefully as to what extent the Convention on the International Recognition of Rights in Aircraft of 19 June 1948 was inadequate and could be considered to be out-of-date. In any case it was recommended that the International Civil Aviation Organization (ICAO) should be informed of the proposed uniform rules relating to security interests in mobile equipment and should be invited to make known its position in their regard.

5. - A further point requiring clarification was that of the relationship between the priority rules for security interests in mobile equipment to be laid down in the proposed Convention in the event of the debtor's insolvency and the relevant rules of municipal law governing insolvency. It would in any case be necessary to avoid any risk of discrimination in the treatment of domestic and foreign security interests in the case of the debtor's insolvency. The relevant rules of municipal law governing the settlement of creditors' claims in the event of insolvency should not be affected by the proposed Convention. In view of this need to take account of the rules of insolvency law, it would therefore seem desirable to give closer consideration to the alternative solution proposed in paragraph 9 of the report of the restricted exploratory working group, that is the creation of a system for the international recognition of domestic security interests the effect of which would be to ensure that security interests were treated according to the law of the State of registration or, if none, the law of the State of the debtor's principal place of business. This would serve to guarantee a high degree of legal certainty for secured creditors. The latter would thereby already at the time of the conclusion of the contract be able to arrange matters in such a way as to accommodate the peculiarities of the law of the relevant State of registration. Such a solution would also ensure equal treatment of foreign and domestic security interests.

6. - As regards the proposal to set up an international public notice system, care would need to be taken to limit the threat of additional bureaucracy and to contain administrative costs. The more classes of equipment one tries to encompass in the proposed system - and especially if one decides to include motor vehicles used exclusively for the international carriage of goods - the greater the risk of pushing up the administrative costs inherent in the giving of public notice for security interests to an extent where doubts might begin to arise as to whether the cost could any longer be justified in relation to the benefits being sought after.