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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):

ADDENDUM

(Comments of the European Bank for Reconstruction and Development)

Rome, February 1993



## INITIAL COMMENTS

on the Report of the Unidroit restricted  
exploratory Working Group (Study LXXII - Doc. 5)  
by Messrs John SIMPSON and Jan-Hendrik RÖVER  
of the European Bank for Reconstruction and Development

We are supportive of the initiative of Unidroit in the field of secured transactions and have read the report of its Working Group (Study LXXII - Doc. 5) with great interest. We set out some initial comments on this report in the hope that these may be a useful contribution to the discussions concerning a Convention on security interests in mobile equipment.

1. - Two different routes are envisaged: "an entirely new international security interest" (Study LXXII - Doc. 5, para. 8) or recognition of the validity of a security interest validly created under the laws of another State. Although the alternative of falling back on mutual recognition between Contracting States is more advanced compared with the actual state of the conflict of laws of security interests, it is likely to encounter many practical difficulties. In particular the relevant remedies in relation to a security interest are most often required (a) urgently and (b) at the place where the secured asset is physically situated. Given the diversity of security interests and related rules and procedures that exist, it is difficult to see how the courts in one Contracting State can be relied on to provide proper remedies in relation to a security interest under the laws of another Contracting State. The recognition of foreign security interests must probably be combined with a domestication of foreign security interests on the basis of the principle of equivalence, as the common rule of conflict of laws of security interests provides. This domestication can prove impossible, as a legal system does not know equivalent devices for a foreign interest. We would therefore encourage the development of an entirely new international security interest as envisaged in paragraph 8, although we recognise that this is an ambitious goal.

2. - The Convention would apply to equipment " ...of a kind normally moving from one State to another in the ordinary course of business" (Study LXXII - Doc. 5, para. 7) and "would not apply to purely domestic situations" (Study LXXII - Doc. 5, para. 11). This raises a number of issues:

(i) The definition of the "internationality" of the equipment to which the Convention applies is important and should, in our view, be at least partially addressed by the Study Group. There is a category of equipment which may move across State frontiers only infrequently, or for which it may not be possible to say with certainty that it will not. It would be an

advantage for debtors to be able to move equipment to other States whenever the need arises and without any restriction from lending banks (which might apply if financed domestically) and it would be an advantage for banks to know that their security remains good even if the equipment moves to another State. We would therefore encourage a wide definition for internationality which includes cases of potential internationality.

(ii) Would a security interest under the Convention apply alongside a domestic security interest or in lieu where the internationality test is satisfied? Our instinct drives us towards preferring a single security interest which would apply in lieu of domestic security interests. Otherwise there is considerable additional complexity in having to create two different security interests in the same equipment, one to cover the equipment when it is in its home jurisdiction, the other when it is outside.

(iii) If the solution proposed in (ii) is adopted then the Convention will apply in purely domestic situations where the equipment is situated in the home jurisdiction at the time of enforcement.

3. - We note the reference to the possible extension of the Convention to other movables (Study LXXII - Doc. 5, footnote 1 to para. 7). Many of the problems in national laws of security arise from the fragmented nature of the law and from the multiplicity of different types of security for which there can be little logical justification. If the Convention can establish a single type of security interest which would be capable of being applied to all types of movable property (even if initially the Convention is more limited in scope) this might help to avoid a further spawning of security interests at the international level.

4. - If Unidroit envisages the development of an entirely new international security interest (as we encourage), two basic concepts could prove to be of help for the drafting of the Convention.

(i) The parties to an agreement can describe the property which is subject to a security interest in two substantially different ways. A security interest can apply either to one or more specific assets (this security interest can be called a specific security interest) or to one or more classes of asset, for example, a library, a fleet of vehicles (this security interest can be called a class security interest). The class of security interest is not recognised in many jurisdictions but it is of great practical importance in that it permits a flexible definition of the secured assets as all those falling within the class at a particular time.

(ii) A distinction on the side of the secured debt which is secured by a charge mirrors the differentiation which has been drawn for the property subject to a security interest: the secured debt can be described by the parties as an individual debt, several specific debts, a category of debts

(for example, all advances under a revolving credit agreement), or several categories of debt.

5. - Security interests have the very basic aim to encourage sound financing of credit. All legislation on secured transactions has to face the problem of the right balance between creditor and debtor. For example, a law on secured transactions may seek to prevent the overcharging of the assets of a debtor. We realise that different national systems recognise different standards for the protection of debtors. Therefore, it will be politically difficult for a Convention itself to prescribe a standard of protection. But it will at least be necessary to ensure that differing national standards of debtor protection do not cause undue distortion in the application of the Convention.

6. - The need for a Convention on security interests underlines the need for further unification of national laws on secured transactions. A realistic way to reduce the huge diversity of national laws on secured transactions is a common basis of rules in this field of law. Unification of national laws should therefore be further encouraged. If such a law is based on the concept of a single type of security interest, which embraces all types of movable property, mutual recognition of security interests is facilitated.

7. - The Unidroit Secretariat will be aware of the arguments in favour of a uniform security interest for international cases which have been put forward by Professor Ulrich Drobnig in his "Study on security interests" (Yearbook of the United Nations Commission on International Trade Law, 1977, Volume VIII, p. 210). They suggest that the definition of internationality and the parallel existence of an international and a national security are matters which have to be carefully looked into.