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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

(First session: Rome, 8 - 10 March 1993)

Summary report

(prepared by the Unidroit Secretariat)

Rome, June 1993

1. - The Study Group for the preparation of uniform rules on certain international aspects of security interests in mobile equipment, set up pursuant to a decision taken by the Unidroit Governing Council at its 71st session (Genoa, June 1992), met in Rome at the seat of Unidroit from 8 to 10 March 1993. The session was opened at 10 a.m. on 8 March by Mr R. MONACO, President of Unidroit. Mr R.M. GOODE, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, was elected Chairman of the Study Group on a proposal by Mr Monaco.

2. - The meeting was also attended by the following experts and representatives of intergovernmental and international non-governmental Organisations.

Members of the Study Group

Mr R.C.C. Cuming, Professor of Law in the University of Saskatchewan

Mr G. Ferrarini, Professor of Banking Law in the University of Siena

Mr P. Girardi, Legal Counsel/External Relations, Alitalia - Linee Aeree Italiane S.p.A.

Mr V. Kouvshinov, First Deputy Chief, Main Treaty and Legal Department, Ministry of Foreign Economic Relations of the Russian Federation

Mr K. F. Kreuzer, Professor of Law in the University of Würzburg

Mr S.J. McGairl, Partner, Freshfields, London

Ms S. Martin-Le Corre, Maître de Conférences in the University of Paris IX (Paris-Dauphine)

Mr C.W. Mooney, Jr., Professor of Law in the University of Pennsylvania, representing the Department of State of the United States of America

Mr G.K. Olufon, Attorney, former Legal Adviser and General Manager, Continental Merchant Bank Nigeria Ltd., Lagos

Mr K.M. Smyth, Partner, Lavery, De Billy, Montreal

Mr H. Synvet, Professor of Law in the University of Paris II (Panthéon - Assas)

Mr H. Uchida, Partner, Mori Sogo Law Offices, Tokyo

Mr T.J. Whalen, Partner, Condon & Forsyth, Washington, D.C.,
representing the Department of State of the United
States of America

Observers

INTERGOVERNMENTAL ORGANISATIONS

Bank for International Settlements

Mr P. Panchaud, Legal Service

Central Office for International Carriage by Rail

Mr G. Mutz, Legal Counsellor

Commission of the European Communities

Ms M. Dusseaux, Principal Administrator, Directorate-General XVAI
(Financial Institutions and Company Law)

European Bank for Reconstruction and Development

Mr J.-H. Röver, Project Adviser in the Office of the General Counsel

Hague Conference on Private International Law

Mr M. Pelichet, Deputy Secretary-General

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

Banking Federation of the European Community

Ms O. Hoyek, Legal Service, Italian Banking Association

European Company for the Financing of Railroad Rolling Stock (Eurofima)

Ms G. Fraschina, Legal Adviser

Institute of International Container Lessors

Mr E.A. Woolley, Secretary and General Counsel

International Bar Association

Ms L. Curran, Member, Sub-committee of the Banking Law Committee of
the Section on Business Law on Taking Security in
International Transactions

Mr M. Gioscia, Co-Chairman, Banking Law Committee of the Section on
Business Law

International Law Association

Mr G. Guerreri, Secretary, Italian Branch

International Maritime Committee

Mr R. Herber, Professor of Commercial Law, University of Hamburg

3. - The Study Group was seized of the following materials:

(1) Restricted Exploratory Working Group to examine the feasibility of drawing up uniform rules on certain international aspects of security interests in mobile equipment: report (adopted by the Working Group on 11 March 1992) (Study LXXII - Doc. 5);

(2) Memorandum prepared by the Unidroit Secretariat for the attention of the Study Group for the preparation of uniform rules on certain international aspects of security interests in mobile equipment at its first session (Study LXXII - Doc. 6);

(3) Memorandum (for the attention of the Study Group at its first session): addendum (comments of the German Federal Ministry of Justice) (Study LXXII - Doc. 6 Add.);

(4) Memorandum (for the attention of the Study Group at its first session): addendum (comments of the European Bank for Reconstruction and Development) (Study LXXII - Doc. 6 Add. 2);

(5) Correspondence between the Unidroit Secretariat and Mr Howard Rosen regarding the latter's article "Staying on the right track" (Asset Finance & Leasing Digest, October 1992) (Misc. 1);

(6) Discussion paper for a model law on secured transactions prepared by Messrs John Simpson and Jan-Hendrik Röver of the European Bank for Reconstruction and Development (Misc. 2);

(7) Texts of international instruments and of a proposed new international instrument regulating the recognition and priority of security interests in ships and inland navigation vessels and appurtenances thereto (Misc. 3);

(8) Text of the Convention on the International Recognition of Rights in Aircraft (Geneva, 19 June 1948) (Misc. 4);

(9) Some preliminary observations on the process of developing a Convention on international security interests by Professor R.C.C. Cuming (Misc. 5);

(10) Comments submitted by Mr Heinrich Johannes Sommer, Chairman of the European Federation of Finance House Associations (Eurofinas), in his capacity as a Corresponding Collaborator of Unidroit (Misc. 6).

4. - The Study Group approved the draft agenda after adding a new item to allow for consideration of the model law on secured transactions for the countries of Central and Eastern Europe, including the former Soviet Union, under preparation by the European Bank for Reconstruction and Development. The agenda, as thus approved, is set out in an appendix to this report.

5. - The Study Group essentially used its first session to conduct an exploration of the horizons of the subject in the light of the recommendations made by the Restricted Exploratory Working Group in its report (Study LXXII - Doc. 5).

6. - As regards the type of instrument to be prepared, there was a general preference for a freestanding entirely new international regimen built around an international security interest and backed by an international public notice system, as opposed to a recognition system whereby Contracting States would simply be required to recognise a security interest, as defined by the Convention, created under the law of another Contracting State. Whilst it was acknowledged that to go down the first route was ambitious, it was feared that to go down the second might be impossible where it was not extremely difficult.

7. - As regards the type of goods to be covered by the prospective Convention, the Study Group was agreed that it should be limited to equipment held by the debtor for business use which was of a kind normally moving from one State to another in the ordinary course of business. This concept was designed to exclude consumer goods and inventory, security interests in inventory tending to be very transitory in character. The Study Group considered the question of whether the sphere of application of the prospective Convention should extend to intangibles and, in particular, documentary intangibles equated with goods, such as documents of title and negotiable instruments. It was agreed that an extension to intangibles in so far as they arose as proceeds of physical equipment could not be excluded.

The observer representing the International Maritime Committee pressed for the exclusion of ships. It was recalled that the Restricted Exploratory Working Group had concluded that "a strong argument for excluding ships might lie in the fact that there were existing Conventions and a proposed new Convention regulating the recognition and priority of security interests in ships and inland navigation vessels and appurtenances thereto". The Study Group decided to defer consideration of the matter until such time as it had a clearer idea of the kind of rules that were emerging.

8. - As regards the nature of the international security interest to be created by the Convention, the Study Group was agreed that it should be defined functionally, that is by looking at the intention and economic effect of the transaction rather than at its particular legal form. It was agreed that in this way it would be possible to encompass reservation of

title under sale agreements. On the other hand, true leases, as opposed to leases by way of security, would be excluded. The question of finance leases was one that it was judged better to defer until such time as the Study Group had a clearer idea of the nature of the substantive rules to be incorporated in the Convention so as to see whether these might create problems for finance leases as indeed for other particular classes of transaction that might otherwise be caught by the Convention.

The sphere of application of the prospective Convention would be restricted to security created by agreement as opposed to security, such as statutory and maritime liens, created by law, although it was not the intention to exclude all consideration of non-consensual security interests to the extent that a given law might graft additional rights onto the security interests created by the parties' agreement (cf. the French *gage sur véhicule automobile*) and to the extent that it might also be necessary to take account in the Convention of some aspects of the relationship between non-consensual security interests and a Convention security interest, if only to specify which law should govern such questions.

The sphere of application of the Convention would moreover be confined to non-possessory security interests, although this would clearly not exclude the priority rules to be established by the Convention regulating a dispute between an international security interest and a possessory security interest asserted by a third party.

Other issues relating to the nature of the international security interest debated by the Study Group concerned whether it should be limited to a specific asset or should rather be capable of extending to a general class of assets, whether it should apply to the granting of new credit once the international security interest has been created and whether there should be restrictions on the type of indebtedness that could be secured by the international security interest.

9. - As regards the Convention's geographic sphere of application, there was broad agreement that the basic criterion for the applicability of the Convention should be the fact that the equipment was of a kind normally moving from one State to another in the ordinary course of business but that the application of its substantive rules should only be triggered by the equipment actually moving across international frontiers and a dispute then arising in the new jurisdiction concerning an interest in the equipment created in that jurisdiction. While the majority of the Study Group took the view that the international regimen should not apply to purely domestic situations, there was also some expression of the view that even a domestic priority issue should be decided under the Convention once an international security interest had been created.

10. - As regards the mode of creation of the international security interest, the Study Group was agreed that five elements were required, to wit an agreement for security, made in writing, signed by or on behalf of

the debtor, containing a description of the asset given in security as well as registration.

11. - While there was some support for the idea of it being possible for the international security interest to be perfected by possession, possession was recognised as being of relatively limited use in the case of mobile equipment and it was accordingly acknowledged that perfection would in most cases have to be by registration. The Study Group expressed support for a centralised international registry with possible regional extensions. The evidence placed before the Study Group indicated that the technology necessary for such an international registry already existed. It was, in particular, explained that British Columbia operated a computerised registry which could be accessed from all over Canada and, with the necessary telecommunications, from anywhere in the world. At the press of a computer button a financing statement would appear on the screen enabling immediate registration of a security interest. Equally at the press of a button a third party contemplating granting credit could immediately check on the debtor's position with regard to the particular collateral. It was explained that there were two possible methods of registration, either registration against the serial number of the collateral and the debtor's name or registration simply against the debtor's name. The determining factor as to which of these two methods was selected in a given case was the degree of risk involved, as also the availability or otherwise of a reliable serial number identifying the particular type of equipment.

12. - With a view to ascertaining the feasibility of taking the vehicle identification number, employed in Canada for this purpose, as the relevant serial number for registration, the Secretariat was invited by the Study Group to conduct an enquiry into the availability of adequate identification numbers for the type of equipment that was intended to be encompassed by the prospective Convention, for example, containers, rolling stock, oil drilling rigs, construction equipment and lorries.

13. - The priority rules to be embodied in the Convention would regulate the relationship between the international security interest and competing *in rem* interests held by such parties as an execution creditor and the debtor's trustee in bankruptcy. The Study Group was, however, unanimous in its agreement that the Convention should in no way seek to displace national bankruptcy rules but should rather simply seek to ensure the survival of the international security interest in bankruptcy proceedings.

Aware as it was of the fact that the effectiveness of a security interest depended in the last analysis on bankruptcy law, the Study Group broached the idea of adding in an Appendix to the prospective Convention a non-exhaustive list of national security interests that were to be considered the nearest equivalent of the international security interest for bankruptcy law purposes.

Even though the Convention was not to apply to non-consensual security interests, it was recognised that the question of priorities as between the international security interest and non-consensual security interests might have to be addressed.

14. - The observer representing the European Bank for Reconstruction and Development informed the Study Group of its parallel project to develop a model law for secured transactions in its countries of operations, to wit Central and Eastern Europe, including the Commonwealth of Independent States. This model law, supported by a commentary, was due to be completed by July 1993. Professor R.C.C. Cuming, the progenitor of Unidroit's project in this area of the law, had been appointed to the E.B.R.D. Advisory Board for this project. The aim of the E.B.R.D. project was to provide that element of legal certainty for prospective creditors necessary to finance whole economies. The E.B.R.D. model law was designed to be amenable to amendments to fit the particular needs of a given country.

15. - In the light of its consideration of the E.B.R.D. project, the Study Group examined whether there might be scope for Unidroit to contemplate the preparation of a model law on secured transactions in general, to be developed over the long term, that could take on board the experience of the countries adopting the E.B.R.D. model law. It was true that the main reason behind Unidroit's decision to limit its current project to security interests in *mobile* equipment was to avoid the difficulties inherent in taking on board a broader project which had led to the abandonment of previous more ambitious projects. Nevertheless the E.B.R.D. project was not the only one of its kind: thought was currently being given in the International Monetary Fund to the preparation of a similar model law for one or more countries of Latin America and a revision of Article 9 of the Uniform Commercial Code was under way for the States of the United States of America. Whilst it would clearly not be the intention thereby to interfere with Unidroit's project for the preparation of a Convention on security interests in mobile equipment, this trend seemed to argue for an overall co-ordination of these various initiatives with a view to ensuring as much uniformity as possible in the concepts employed. The Study Group accordingly proposed that the Governing Council should consider authorising the Secretariat, in concert with the other interested Organisations, to look into the feasibility of the preparation of a model law on secured transactions in general, to be prepared in parallel with the proposed Convention on security interests in mobile equipment. It was suggested that Unidroit's special range of expertise in this area of the law, built up over the preparation of the Unidroit Conventions on International Financial Leasing and International Factoring, made it a particularly appropriate forum to serve as a clearing house or focal point for the various efforts in this area of the law currently being made or being considered around the world.

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

(Rome, 8 - 10 March 1993)

AGENDA

1. - Election of the Chairman.
2. - Approval of the draft agenda.
3. - Preparation of uniform rules on certain international aspects of security interests in mobile equipment in the light of:
 - (a) Restricted Exploratory Working Group to examine the feasibility of drawing up uniform rules on certain international aspects of security interests in mobile equipment: report (adopted by the Working Group on 11 March 1992) (Study LXXII - Doc. 5);
 - (b) Memorandum prepared by the Unidroit Secretariat for the attention of the Study Group for the preparation of uniform rules on certain international aspects of security interests in mobile equipment at its first session (Study LXXII - Doc. 6).
4. - Consideration of the projected model law on secured transactions for the countries of Central and Eastern Europe, including the former Soviet Union, under preparation by the European Bank for Reconstruction and Development.
5. - Any other business.