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Unidroit

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

COMMENTS

by Professor C.W. MOONEY, Jr.

concerning the test of internationality to be employed
in the proposed Unidroit Convention on Security Interests
in Mobile Equipment

Rome, February 1994

MEMORANDUM TO: UNIDROIT Secretariat
Rome

FROM: Charles W. Mooney, Jr.
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DATE: February 7, 1994

RE: Comments concerning a test of
internationality in connection with UNIDROIT
study group for uniform rules on security
interests in mobile equipment

Please distribute this memorandum to participants in next week's study group meeting.

1. The International Elements and Location of the Debtor.

There seems to be a general agreement that equipment covered by the convention must be of a "mobile" type. In his memorandum of November 5, 1993 (the "Cuming Memo"), Professor Cuming has provided an excellent analysis of one approach to an additional test (beyond the "mobility" factor) of internationality for the convention's application to issues of priority conflicts and enforcement. The analysis contained in the Cuming Memo raises concerns, however, that attempts to preserve the applicability of the local law of the situs of mobile equipment could be flawed. I am hopeful that the drafting group will not foreclose other approaches so early in the process. My concerns are outlined below.

(i) Complexity. The discussion in the Cuming Memo of the application of the internationality test to conflicting claims to collateral confirms my fears that the additional test will produce enormous complexity.

(ii) Uncertainty. The approach outlined in the Cuming Memo would, of necessity, mean that the parties to a secured transaction could not know at the outset whether the convention would be applicable at some future point in time. Moreover, if an important feature of the convention is to provide a rational, modern system of personal property security in lieu of otherwise applicable regimes that are deficient, reliance on the law of the situs until the equipment is moved to another jurisdiction might be unfortunate.

(iii) Assumptions. I question the assumption that a scope provision that turns on the classification of equipment as

"mobile" necessarily would prove to be politically unacceptable, at least if properly packaged and explained. Although one certainly can imagine that a shipping container might remain in one jurisdiction, such equipment well might be treated as inherently "international" in character. By tying the convention's applicability to whether the owner's principal place of business is located in a contracting state, on the other hand, contracting states effectively enhance the reach of their sovereignty and influence. I also question the implicit assumption that the forum that will decide a question necessarily will be a forum where the equipment is located. On the other hand, I embrace the assumption that the utility of the convention should be tested as of the time when it is widely adopted, not in the early, transition stages.

(iv) Consistency. The UNIDROIT Convention on International Financial Leasing provided an important step toward the modernization of international financing law by abandoning the situs of leased equipment as the factor that determines the applicability of the convention. I am somewhat concerned that the emphasis on situs in the approach that the Cuming Memo outlines could be seen as a step backward.

(v) Nationality of Mobile Equipment. A regime for financing mobile equipment that recognized the owner's location in a contracting state as the principal scope criterion would be consistent with traditional recognition of the status of the "flags" of ships and aircraft. Even a forum in a non-contracting state could be encouraged to look to the convention for the resolution of some conflicting claims. Nevertheless, the principal concern should be the operation of the convention when the forum is a contracting state, which is by far the most likely environment for its application.

2. A Middle Ground Proposal for Application of the Registration and Priority Rules.

I would suggest that the drafting group consider an alternative approach that would extend the reach of the convention and reduce the complexity of the priority rules, while continuing to respect local law in certain "purely domestic" transactions. The following draft article illustrates this approach.

Article _____

1.- Except as otherwise provided in section 2 of this Article, Part [registration and priority rules] applies to a security interest in mobile equipment created by a debtor whose place of business is located in a contracting state.

2.- If a debtor creates a security interest in mobile equipment pursuant to the local law of a contracting state while the mobile equipment is located in that state and that state also is the debtor's place of business, Part [registration and priority rules] does not apply to that security interest until the earlier of (i) registration of the security interest in the [International Registry for Security Interests] and (ii) movement of the mobile equipment to another state.

3.- For purposes of this Article the debtor's place of business shall, if it has more than one place of business, mean the place of business where the debtor maintains its principal executive office.

The approach taken by the foregoing article embraces the following principles.

(i) Acknowledgement of the application of other law before the convention applies. It cannot be doubted that the interest of the debtor in equipment prior to the time that the convention applies may remain subject to conflicting claims that will not be washed clean by the creation of a security interest under the convention. In most cases the secured party will find it necessary to investigate the past location(s) and past ownership of the equipment. Of course, the existence of an international registry may be of great assistance in uncovering earlier-recorded convention security interests and it also would provide assurance that earlier convention security interests that are not recorded would be subordinated.

(ii) Acknowledgement of the role of the forum. We must accept that the convention will be of use in resolving conflicting claims only in cases where the forum, under its rules of private international law, chooses to apply it. In the absence of universal adoption, this necessarily means that some states will choose not to apply it even if it would apply by its own terms. On the other hand, we believe that the convention should be drawn to encourage its application as a matter of private international law in jurisdictions that have not adopted the convention and, in particular, in commercial arbitration settings.

(iii) Respect for local autonomy in domestic transactions and expanded application in international transactions. The article preserves the applicability of local law in situations where the equipment is located in a contracting state that is the debtor's place of business. That is the "purely domestic" transaction that troubled some study group members. It is in the interest of a contracting state, however, that the convention apply to transactions involving debtors having their place of business in that state when either (i) the equipment is located

in or moved to another state or (ii) the debtor and the secured party voluntarily choose to have the convention apply to the transaction.

The draft article addresses condition (i) by providing an exclusion for equipment located in the debtor's place of business. Condition (ii) is addressed by providing that the international registration will invoke the convention, even while the equipment remains in the debtor's place of business. This reflects party autonomy, but only if the parties take the step of giving the world notice that the convention has been invoked. Although this means that it will be necessary to search the international registry in "local" transactions involving mobile equipment, given the other potential for interference with the financier's interests and the hope that the international registry will be easily accessible, this intrusion should not be problematic. On the other hand, this approach has great appeal in situations where the local law of the situs is such that no assurances can be given to the prospective financier that its security interest will be upheld. In those situations, the secured party can be assured of the convention's applicability from day one.

Section 3 of the draft article looks to the principal executive office of the debtor as the test of the debtor's location. Because we necessarily are dealing with equipment that is likely to move from jurisdiction to jurisdiction, a test that would determine the debtor's location in terms of a state's relationship to the agreement or transaction (as in the Financial Leasing Convention, Article 3(2)) would appear to make little sense here.

More generally, the convention should encourage its application as a matter of agreement under local law. Perhaps the convention's preamble or another provision could provide that encouragement.

3. Application of the Convention's Enforcement Rules.

The foregoing approach to the applicability of the convention's registration and priority rules would lessen the need for a different set of rules for the application of the convention to the enforcement of the security interest as between the debtor and the secured party (inter se). Alternatively, perhaps there is little need to deviate from the agreement of the parties concerning the law applicable to enforcement. Perhaps they should be free to choose the convention's rules or the local law of a designated state in matters that do not concern third party claimants.