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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

SUB-COMMITTEE FOR THE PREPARATION OF A FIRST DRAFT

PROPOSALS FOR A FIRST DRAFT

(drawn up by the Chairman and a member of the sub-committee on the basis of the provisional conclusions reached by the sub-committee at its first session):

COMMENTS

(by members of the sub-committee and the study group and the international Organisations and professional associations represented by observers thereon)

Rome, November 1994

INTRODUCTION

1. – Pursuant to the first session of the sub-committee of the Unidroit Study Group for the preparation of a first draft of its proposed uniform rules on certain international aspects of security interests in mobile equipment, a small drafting group met in Paris on 11 July 1994 in order to prepare a set of draft articles designed to reflect the provisional conclusions reached by the sub-committee at its first session. As such the draft articles drawn up by this drafting group, presented as proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment, were only intended to cover those issues already addressed by the sub-committee and will naturally need to be completed as and when the sub-committee makes progress with the other issues still outstanding.

2. – The drafting group's proposals were circulated for comment amongst all members of the sub-committee and the study group as well as among those international Organisations and professional associations represented by observers on the sub-committee and study group. As of 2 November 1994 comments had been received from Professor Karl Kreuzer, *qua* member of the sub-committee, Mr Harumichi Uchida, *qua* member of the study group, and from the Hague Conference on Private International Law and the European Federation of Equipment Leasing Company Associations (Leaseurope). This paper reproduces these comments, set out hereunder.

PROFESSOR KARL KREUZER

Re Article 1 (1):

"This Convention governs the *creation*, recognition . . ."

or

"This Convention governs *international interests* in . . . "

Re Article 1 (2) (a):

"matériel d'équipement mobile . . . à une catégorie de matériel *d'équipement* qui . . ." (1)

Re Article 1 (2) (b):

The two words at the end of the French text "au créancier" are redundant. (2)

Given that sub-paragraphs (d) and (e) are connected to sub-paragraph (b) it would be preferable to have them following on directly from the latter, either as renumbered sub-paragraphs (c) and (d) or as sub-paragraphs (i) and (ii) of sub-paragraph (b).

Re Article 1 (2) (e):

The words "au créancier" in the first line of the French text after the word "propriété" and before the word "est" are not necessary. (3)

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(1) This comment is only relevant to the French text.

(2) *Idem.*

(3) *Idem.*

Re Article 1 (4):

"This Convention does not govern the *creation*, the recognition . . ."

or

"This Convention does not govern *interests* in . . . "

Re Article 2 et seq.*:*

I would suggest reserving Part II for the international register of interests alone and inserting the title "Part III: Creation of International Interests" before Article 3. The proposed "Part *III*" would thus become "Part *IV*".

Re Article 3 (a):

I would suggest replacing the words "on behalf of" by the words "in the name and with the authorisation of" the debtor.

Question: ". . . in writing signed by *the parties*" ?

Re Article 3 (c):

I would propose replacing the word "it" by the words "the international interest".

Re Article 3 (d):

I would again suggest replacing the words "on behalf of" by the words "in the name and with the authorisation of" as in Article 3 (a).

Re Part III:

I would propose that this become a new Part *IV*.

Re Article 4 (1):

"This Part applies to the *creation*, recognition . . ."

or

"This part applies to international interests . . ."

Re Article 4 (2) (a):

"at the time the agreement creating the international interest is made the parties have their places . . ." (involving the replacement of the words "the security agreement or title reservation agreement" by the words "the agreement creating the international interest").

Re Article 4 (2) (b):

". . . will move from one *Contracting* State . . ." (?)

Re Article 4 (2) (c):

If the proceedings referred to in Article 4 (2) (c) are the same as those referred to in Article 5, the terminology should be the same (". . . any proceedings for enforcement .." ?)

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MR HARUMICHI UCHIDA

Rules on enforcement and priorities would be essential to the Convention. Except for such rules discussed below, I believe the proposed provisions of the Convention set forth an appropriate framework under which an international security interest would be able to function.

Since the definition of a "non-domestic" issue provided for in Article 4 is very broad (in particular, Article 4 (2) (c)), the situation in which both parties are from the same State and the security agreement does not contemplate that the equipment will move from the State where it is initially located means that a rule determining the priority between a domestic security interest and an international security interest is essential.

Such a rule should solve priority issues as between a security interest secured at the initial location, a security interest secured at the location of enforcement and an international security interest. The criteria for determining priority based on the timing of filing should also be provided for.

Such rules of priority should further govern priorities as between a security interest (domestic and international), a judgment creditor, an execution creditor and a purchaser. I expect the Sub-committee will propose concise and well-organised priority rules.

Another important rule to be provided is that relating to enforcement. The proceedings or procedures for enforcing a security interest should be set forth in the Convention. However, such proceedings should be accepted by a Contracting State. For such a purpose, rules stipulating the proceedings should consist of those rules which are commonly adopted in Contracting States or, at the minimum, rules which are not inconsistent with fundamental principles of a Contracting State.

I would appreciate it if the Sub-committee would study the rules of enforcement of a security interest in major countries.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (MR M. PELICHET)

To my mind, the first set of draft articles worked out by the Chairman and a member of the sub-committee, albeit apparently reflecting the discussions that took place at the last session, raises major difficulties which merit deep thought. Unfortunately the time-limit that has been set does not leave me enough time to make a detailed examination of the consequences of the rules that are being proposed, but I nevertheless consider it important to let you have my first reactions, which I shall endeavour to develop orally on the occasion of our next meeting. You will not moreover be surprised to note that the brief reflections that follow are along the same lines as the last remarks I made during the February meeting, subsequently summarised in my letter of 22 February (4).

If I understand aright the thinking behind the system to be proposed under the Convention, the parties to a security agreement are to be given a choice (Article 3: "An interest ... *may* be registered ..."):

(1) the parties file the international interest in the register established for this purpose in Part II of the Convention: if this is the case, Part III of the Convention will apply to the rules governing the interest, regardless of the case contemplated (this by operation of Articles 1(2)(b) and (c) and 4(2)(b));

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(4) Note by the Unidroit Secretariat — cf. Study LXXII - Doc. 12, Appendix II.

(2) the parties to the agreement do not file the interest: it would be legitimate to expect the Convention not to apply to the rules governing the interest, even where the latter is an "international" interest. But this is not the case: Article 4 states that Part III of the Convention applies if the issue before the court (what does that mean?) *is a non-domestic issue*; if the issue is a domestic issue (or exclusively a domestic issue of another State?), it is to be presumed that it is the domestic law of that State (with respect to the other State?) which will apply.

This will be a source of uncertainty for both the parties to the agreement and third parties: wherever there has been no filing, no-one will be in a position to know which rules will apply to the interest, since these rules will be dependent upon the movement or otherwise of the mobile equipment. The solution appears to me all the worse since, Part II of the proposed Convention having provided for the creation of an independent international interest, it might be considered reasonable to expect that the Convention would not apply where the parties had decided not to make use of this particular interest.

The term "domestic" is moreover infelicitous in so far as, where a State ratifies the proposed Convention, it introduces the system of the international interest into its internal law and in so far as the cases set out under Article 4(2) which permit the non-application of Part III of the Convention are in fact examples of domestic issues for a State that has ratified the Convention. It would seem that two separate situations have been mixed up and that it will be necessary one day to distinguish one from the other, that is, on the one hand, the sphere of application of the Convention and, on the other hand, the creation and recognition of the international interest.

One final remark in respect of Article 1(1): given that Part II of the proposed Convention is concerned with the *creation* of the international interest, the proposed sphere of application is defined in terms which are overly restrictive, since the Convention does not govern solely the *recognition and effects* of international interests, but also the creation thereof.

EUROPEAN FEDERATION OF EQUIPMENT LEASING COMPANY ASSOCIATIONS (LEASEUROPE) [5]

Re Article 1 (2) (b):

In place of the drafting group's proposal, we would suggest the following text:

"an interest in mobile equipment is an interest arising under a security agreement or a title reservation agreement.

In the application of this Convention, leasing or financial leasing agreements under which mobile equipment is supplied on lease with the lessor remaining the owner shall be considered as conferring upon the latter an interest in the sense of this Convention."

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(5) *Note by the Unidroit Secretariat*:

In submitting its comments Leaseurope noted that these went in the same direction as those it had raised in its letter of 18 May 1994. In this letter it had drawn attention to considerable ambiguities as between the English and the French-language versions of the summary report of the first session of the sub-committee, subsequently rectified by a *corrigendum* to the French version of that report, noting however that even in the English version the lessor's ownership under a finance lease was nowhere specifically mentioned as such. It stressed that the lessor's ownership could not be assimilated to the "interests" contemplated in § 6 (v) of that report, so long as it was not absolutely clear what was the essential difference between such interests and security interests. In this context it noted that the Unidroit Convention on International Financial Leasing referred explicitly to the lessor's real rights in the leased asset. It wished to express the leasing industry's grave concern at not seeing the lessor's ownership recognised and treated as such in the report on the first session of the sub-committee. "In these circumstances", Leaseurope announced that "it favoured the setting up under the proposed Convention of a dual system of registration dealing separately with ownership and with security interests, rather than a single system of registration for both security interests and assimilated interests".

Re Article 1 (2) (c):

The term "enregistrée" in the French text of this clause (corresponding to the term "registered" in the English text) frequently has fiscal connotations. It would accordingly be desirable for the French text to be made more specific, as follows:

"Une garantie internationale est une garantie qui a été inscrite sur un registre, conformément à la présente Convention". (6)

Re Article 1 (2) (e):

This clause makes no reference to financial leasing. Given our proposal that financial leasing should be specifically referred to in Article 1 (2) (b), we would propose that Article 1 (2) (e) should be amended to read as follows:

" a title reservation agreement is an agreement by which mobile equipment is agreed to be sold on terms that ownership does not pass from the seller to the buyer until payment of the sums specified by the agreement".

Re Article 2 (1):

This clause makes no mention of ownership. It should be amended to read as follows:

"An international register shall be established for the purpose of registering interests (security interests, ownership rights and reservation of title clauses) in mobile equipment under this Convention".

Re Article 2 (2):

The French text of this clause is a translation of the English text and is incomprehensible to a French reader. We would therefore suggest it should be amended to read as follows:

"The Governing Council of the International Institute for the Unification of Private Law shall establish a body responsible for determining the place where the International Register is to be located and for its management in accordance with rules to be determined from time to time by such body".

Re Article 3 (c):

The title reservation referred to in the French version of this clause ("reservation de propriété") has no precise meaning in the French language. This term in actual fact corresponds to two different concepts. It would therefore be better to amend this clause so as to read as follows:

"this agreement states money obligations secured by or arising under a security interest, ownership rights (leasing or financial leasing) or a reservation of title clause".

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(6) *Note by the Unidroit Secretariat:*

The Leaseurope proposal would involve the replacement of the word "enregistrée" by the words "inscrite sur un registre", corresponding in English to the words "filed in a register".

Re Article 4 (2) (a):

In place of the drafting group's proposal we would suggest the following text:

"at the time either the security agreement, the agreement providing for reservation of title or the leasing or financial leasing agreement is made the parties have their places of business in different States or".