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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 Professor Charles W. Mooney, Jr. and the Legal Committee of the
Finance & Leasing Association of the United Kingdom)

Rome, November 1994

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INTRODUCTION

Subsequently to the comments to the small drafting group's proposals for a first draft of the proposed Unidroit Convention on International Interests in Mobile Equipment grouped together in paper LXXII-Doc. 14 and Doc. 14 Add. 1, the Unidroit Secretariat received additional comments from Professor Charles W. Mooney, Jr., representative of the Department of State of the United States of America on both the study group and the sub-committee, and from the Legal Committee of the Finance & Leasing Association of the United Kingdom, a member of the European Federation of Finance House Associations (Eurofinas), represented on both the study group and the sub-committee by an observer. This paper reproduces these comments, set out hereunder.



PROFESSOR CHARLES W. MOONEY, JR.

Re Article 1 (1):

By its reference to "recognition and effects", Article 1 (1) may confound an identification of the goods and transactions governed by the Convention with the substantive rules of the Convention. Perhaps it should simply "govern international interests". The later provisions will establish the nature of the regulation.

Re Article 1 (2):

Depending on the substantive provisions that eventually emerge, the inclusion of "true" leases (sub-paragraph (e)) may jeopardise acceptance of the Convention in some States. Also, as sub-paragraphs (b) and (e) are drafted, the interest of a buyer or lessee would appear to be "an interest in mobile equipment" under sub-paragraph (b) inasmuch as that interest would arise under a "title reservation agreement". Instead, should only the sellers' and lessors' interests be the subject of registration?

I shall consider sub-paragraph (c) in connection with Articles 4 and 5.

Re Article 2:

Perhaps the sub-committee should consider whether to provide more alternatives for registration, with an international registry the ultimate goal.

Re Article 3:

Concerning sub-paragraphs (a) and (d), it is curious that a Convention designed for use mainly in the next century would freeze commercial practices by requiring a "writing" to be "signed".

Should sub-paragraph (c) be adjusted to dispel any suggestion that it would be necessary to recite a specific sum as the "state[d] money obligation[]"?

Re Articles 4 and 5:

Part III will govern whatever it provides that it governs. What does the reference to "recognition and effects" in Article 4 (1) add? Should it be revised so that it ". . . applies to international interests . . ."?

By limiting the effects of the Convention to "non-domestic issues", the Convention takes on a very limited appearance. However, as Article 4 (2) is drafted, the applicable criteria have nothing to do with an "issue" and, if they are satisfied, then *any* issue before a court would be a "non-domestic issue". That seems an odd way to express the point. Would the following formulation be clearer?

"This Part applies to international interests in mobile equipment only if:

(a) . . . ;

(b) . . . ; or

(c) . . . "

Reading together the definition of "international interest" in Article 1 (2) (c) with Articles 4 and 5, some may view the Convention's application as too narrow. It abandons the idea that a prospective financier or buyer can search in an international (or other) registry and take some comfort that unregistered interests will be cut off or subordinated to later interests. Because registration is a necessary condition to the applicability of the Convention, there is necessarily no penalty for failure to register. This approach is quite modest, but it nevertheless could be useful to ensure some level of protection for those who choose to register their interests.

Others may view the draft's formulation as too broad. Consider, for example, a secured creditor/lessor whose (principal, I assume) place of business is in New York and who enters into a transaction with an English buyer/lessee concerning equipment that at all times is located in England. That transaction would be governed by the Convention if the interest is registered in the international registry.

Given the modest role that the Convention stakes out, should Article 5 be given more teeth so that when a creditor/lessor chooses to register an interest it will achieve greater comfort? Article 5 provides a substantive rule – a court "shall recognise the validity and effects" of the international interest. Is it contemplated that the Convention will spell out the "effects" of the interest? And what are "proceedings for enforcement"? Would they include seizure by another creditor? The footnote indicates that rules of "national bankruptcy law" would not be affected. Presumably, if the interest were not enforceable against creditors or a liquidator in bankruptcy proceedings under local law, the interest would not be effective under the Convention. Should the Convention's protection of an international interest be so limited? Consider the protection afforded the interest of a lessor under Article 7 (1) (a) of the Unidroit Convention on International Financial Leasing:

"The lessor's real rights in the equipment shall be valid against the lessee's trustee in bankruptcy and creditors, including creditors who have obtained an attachment or execution."

Article 5 also appears to provide a choice of law rule – the Convention is the applicable law governing the validity and effects of an international interest. However, the Convention by its terms would limit this rule to "courts of a Contracting State". If under otherwise applicable rules of private international law a court in a non-Contracting State would apply the Convention to an international interest, should the Convention be so limited? Perhaps the Convention should endeavour 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.



LEGAL COMMITTEE OF THE FINANCE & LEASING ASSOCIATION OF THE UNITED KINGDOM

1. - It was felt that Article 3 (a) did not properly cover the situation in which a third party might create a charge over a chattel to secure the obligations of a principal debtor. It was felt that the definition in Article 1 (2) (b) went some way to meeting the point, but that something more specific was required in Article 3 (a).
2. - It was felt that Article 3 (c) again failed to meet the situation in which a third party security might be created in circumstances in which the money obligations of the debtor were set out in a separate document and not in the document creating the security interest.
3. - It was considered that the draft articles do not specifically exclude aircraft and no-one was certain whether it is now proposed that aircraft and ships should be completely excluded.