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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 the Banking Federation of the European Union and the Italian Banking Association)

Rome, December 1994

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, 2 and 3, the Unidroit Secretariat received additional comments from the Banking Federation of the European Union, represented on the study group, and from the Italian Banking Association, a representative of which sits on the study group as the representative of the Banking Federation of the European Union. This paper reproduces these comments, set out hereunder.

BANKING FEDERATION OF THE EUROPEAN UNION

At this stage, we would limit our comments to saying that international recognition of security interests in mobile equipment is, in principle, welcomed since, to date, it has been virtually impossible to create non-possessory security interests, which apply worldwide, with regard to such equipment.

It is proposed in the draft that an international system of registration be introduced. Although such a system would have the advantage of ensuring a high level of legal certainty, it would have the disadvantage that a registration procedure of this type would be extremely costly, time-consuming and laborious. It must therefore be questioned whether it can be justified when compared with the potential benefits envisaged. Since the costs of securing a loan must, as a rule, be borne by the customer, the price for loans secured by foreign collateral would clearly increase.

We therefore feel that it would be preferable to ensure the international effectiveness of security interests through a system of mutual recognition.

ITALIAN BANKING ASSOCIATION

As regards the sphere of application of the proposed Convention, it should be noted that:

1. – The proposed Convention is confined to non-possessory security interests created by agreement (Art. 1(2)). Such security agreements are not allowed by the Italian law governing consensual security interests over goods; the Civil Code defines the pledge as a traditional possessory security interest (Art. 2786). It has therefore been necessary to pass a new statute concerning specific economic sectors and recognising the validity of a non-possessory security interest.

2. – It is not clear whether the proposed Convention is intended to cover the "floating charge" (Arts. 1(4) and 3(b)); this would raise many questions of compatibility with the Italian Civil Code, which does not regulate the floating charge.

3. – The simple assimilation of the lease concept to title reservation agreements put forward by the proposed Convention (Art. 1(2)(c)) seems to emphasise the view that leasing transactions – as well as retention of title under a conditional sale – must be intended to serve the function of security.

In Italy the opposite idea has prevailed, that is, that the lease is to be regarded – in its traditional form – as a financing transaction. In the light of this no analogy with retention of title is admissible.

Therefore the proposed Convention should be limited to regulating the lease by way of security.