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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

RESTRICTED WORKING GROUP RESPONSIBLE FOR  
DETERMINING THE DESIRABILITY AND FEASIBILITY OF  
THE PREPARATION BY UNIDROIT OF A MODEL LAW  
IN THE GENERAL FIELD OF SECURED TRANSACTIONS

*COMMENTS*

on the Unidroit project for drawing up a check list of the issues to be addressed  
in a possible future model law in the general field of secured transactions

by

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We would like to add to Professor Cuming's comments (Study LXXIIA – Doc. 1) by briefly examining the objectives that underlie the Unidroit Model Law project and by summarising some of the basic concepts that determined the form of the EBRD's Model Law on Secured Transactions.

### Objectives of Unidroit Model Law

The objectives of Unidroit in deciding on a project of this nature may include:

- *To influence national laws* – this is particularly relevant at a time when many national laws of secured transactions are in a state of development and when many law reform projects find it difficult to achieve balanced comparative input. The diversity of approach between established national security regimes can be blamed largely on historical accident; a Unidroit model could do much to reduce the diversity being extended to “emerging” countries.
- *Through the influence on national laws to achieve harmonisation* – as financing and trade are becoming increasingly “global” the lack of a common approach between different countries towards secured transactions creates a commercial barrier.
- *Through harmonisation to increase mutual recognition and reciprocal enforcement of security rights* – the concept of a debt is similar in all jurisdictions and there exist well established systems for cross-border recognition and enforcement of rights to recover the debt. Security remains a distinctly national affair and the possibilities of cross-border recognition and enforcement are rare. This increases the complexity of taking security and restricts the value of the security.

### Concepts underlying EBRD Model

1. – The distinguishing feature of a charge or security interest is that it is a right *in rem*. The right *in rem* under a charge is a limited entitlement to realise the charged property in order to satisfy a money obligation.

2. – While recognising the attraction of a “form over substance” approach, we did not consider it the best solution where there exists a wide diversity of legal traditions and varying levels of legal sophistication.

3. – The limitation relating to business activity was only introduced because of the absence of adequate rules for consumer protection which were outside the scope of our brief.

4. – A charge may secure all kinds of debt providing it is capable of expression in money terms.

5. – A charge may cover all types of property, movable or immovable, things or rights, present or future.

6. – Both the charged property and the secured debt may change during the life of the charge provided that they are properly identified (either specifically or generally) at the time the charge is granted. Thus a charge may be granted to secure a constantly changing pool of debt (for example, all monies due under one of a number of bank facilities) over a constantly changing pool of assets (for example, inventory).

7. – There should be only one type of charge irrespective of the type of property charged, the type of debt secured, and the identity of the persons giving and receiving the charge (the unitary concept). This relates to the *substance* of a charge: the right *in rem* under a charge is always, in substance, the same. It does not prevent the *form* of a charge being different according to the circumstances.

8. – The creation of a charge necessitates an agreement between the parties and a means by which third parties may become aware of the charge (for example, by registration or possession).

9. – In the case of a non-possessory charge the chargor remains free to use (and in some cases to sell) the charged property.

10. – The charge must give flexible rights of enforcement which protect the chargor and his other creditors from abuse but also recognise the fundamental purpose of a charge to give an effective alternative means of obtaining payment of a debt when the debtor defaults.