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Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF  
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:  
SUB-COMMITTEE FOR THE PREPARATION OF A FIRST DRAFT

(Third session: Rome, 11 - 13 October 1995)

Summary report

(prepared by the Unidroit Secretariat)

Rome, November 1995



1. - The Sub-committee of the Study Group for the preparation of uniform rules on international interests in mobile equipment responsible for the preparation of a first draft held its third and final session in Rome at the seat of Unidroit from 11 to 13 October 1995. The session was opened at 10 a.m. on 11 October by Mr M. Evans, Secretary-General of Unidroit. Mr R.M. Goode, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, was in the chair.

2. - The session was attended by the following experts and representatives of intergovernmental and international non-governmental Organisations:

#### Members of the sub-committee

Mr R.C.C. Cumming	Professor of Law in the University of Saskatchewan
Mr V.A. Kouvshinov	Consultant, Economic Policy Committee, State Duma of the Federal Assembly of the Russian Federation
Mr K.F. Kreuzer	Professor of Law in the University of Würzburg
Mr C.W. Mooney, Jr.	Professor of Law in the University of Pennsylvania, representing the Department of State of the United States of America
Mr H. Synvet	Professor of Law in the University of Paris II (Panthéon - Assas)
Mr T.J. Whalen	Partner, Condon & Forsyth, Washington, D.C., representing the Department of State of the United States of America

#### Observers

##### INTERGOVERNMENTAL ORGANISATION

Hague Conference on Private International Law	Mr M. Pelichet, Deputy Secretary-General
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##### INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

European Federation of Equipment Leasing Company Associations (Leaseurope)	Mr R. Clarizia, Professor of Law, University of Urbino; Consultant to the Italian Leasing Association (Assilea)
European Federation of Finance House Associations (Eurofinas)	Mr R. Clarizia, Professor of Law, University of Urbino; Consultant to the Italian Leasing Association (Assilea)
International Bar Association	Ms L. Curran, Vice-Chairperson, Sub-committee of the Banking Law Committee of the Section on Business Law on the Taking of Security in International Transactions
International Maritime Committee	Mr R. Herber, Professor of Commercial Law, University of Hamburg

In view of the continuing special interest taken by the aviation industry in this area of the Institute's activity, as reflected *inter alia* in the Memorandum prepared jointly, at the request of the Sub-committee, by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 16), Mr J. Wool, Attorney with Norton Rose in Paris (on secondment from Perkins Coie in London) and Affiliate Professor of Law in the University of Washington, was again invited to attend the session as a special guest with a view, in particular, to bringing the views of the Aviation Working Group to the attention of the Sub-committee.

3. - The Sub-committee was seised of the following materials:

- (1) Study Group for the preparation of uniform rules on international interests in mobile equipment: Sub-committee for the preparation of a first draft: summary report (prepared by the Unidroit Secretariat) (Study LXXII - Doc. 15);
- (2) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 16);
- (3) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by Mr V.A. Kouvshinov and Mr T.J. Whalen) (Study LXXII - Doc. 17);
- (4) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by Professor R. Herber) (Study LXXII - Doc. 17 Add.);
- (5) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by the European Federation of Equipment Leasing Company Associations (Leaseurope)) (Study LXXII - Doc. 17 Add. 2);
- (6) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by Mr Giuseppe Guerrieri) (Study LXXII - Doc. 17 Add. 3);
- (7) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by the Italian Banking Association) (Study LXXII - Doc. 17 Add. 4);
- (8) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session) (Study LXXII - Doc. 18);
- (9) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by Professor R.C.C. Cuming) (Study LXXII - Doc. 19);
- (10) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by Mr V.A. Kouvshinov, Professor C. W. Mooney, Jr., Mr T. J. Whalen and Mr G. K. Olufon) (Study LXXII - Doc. 19 Add.);
- (11) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by the Italian Banking Association) (Study LXXII - Doc. 19 Add. 2);

- (12) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by Professor R. Clarizia (Leaseurope)) (Study LXXII - Doc. 19 Add. 3);
- (13) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by Airbus Industrie / The Boeing Company on behalf of an aviation working group) (Study LXXII - Doc. 19 Add. 4);
- (14) Hypothetical scenarios designed to test the applicability of the revised proposals to given factual situations (suggested by Mr T.J. Whalen) (Study LXXII - Doc. 20);
- (15) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by the Equipment Leasing Association of America) (Misc. 1) (English only);
- (16) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session): comments (by Aeroflot-Russian International Airlines) (Misc. 2) (English only);
- (17) Extract from a work in progress by Professor C.W. Mooney, Jr. on "Exporting Article 9 of the Uniform Commercial Code in an international Convention: the local law conundrum and possible solutions thereto" (Misc. 3);
- (18) Agreement relating to Community Patents done at Luxembourg on 15 December 1989 by the Members of the European Economic Community (Misc. 4) (English only);
- (19) Council Regulation No 40/94 on the Community Trade Mark adopted by the Council of the European Union on 20 December 1993 (Misc. 5) (English only).

4. - The Sub-committee approved the agenda which is set out in Appendix I to this report.

5. - Appendix II sets out the comments of Mr H. Rosen on the Drafting Group's revised proposals for a first set of draft articles which were received after the Sub-committee's meeting.

6. - In opening the meeting, *the Secretary-General of Unidroit* recalled that, since the previous session of the Sub-committee, the Drafting Group had met in Oxford in June 1995 to give effect to the provisional conclusions reached by the Sub-committee at that session and Airbus Industrie and The Boeing Company had in May 1995 submitted a most important Memorandum on behalf of an aviation working group. Both the Drafting Group's revised proposals for a first set of draft articles of a future Unidroit Convention and the Airbus/Boeing memorandum had subsequently been circulated for comment not only amongst all members of the Sub-committee and those international Organisations and professional associations represented thereon by observers but also amongst all members of the Study Group and the

international Organisations and professional associations likewise represented thereon. The resulting comments had been brought to the attention of the Sub-committee at this session.

He stressed how crucial it would be for progress to be made on a number of fronts at this session: apart from the basic provisions proposed by the Drafting Group, there was the question of the international registry and the form it should take, that is whether it should be an asset registry or a debtor registry, and the criteria of internationality, if any, that should determine the proposed Convention's application. It was essential, in his view, for the future international instrument to be acceptable to as broad a spectrum of States as possible, taking account of the often widely differing legal traditions and levels of economic development of States. Unidroit was furthermore particularly aware of the need to respond to the special concerns of business practice in this field and was accordingly particularly grateful for the input of Airbus Industrie and the Boeing Company on behalf of aircraft interests and the International Maritime Committee on behalf of shipping interests. A whole range of additional industry groups, including the railway and container industries, were moreover represented on the Study Group.

7. - In introducing the business of the session, *the Chairman* indicated that this would principally be to review the revised proposals for a first set of draft articles (Study LXXII - Doc. 18) drawn up by the Drafting Group in the light of the comments to which the Secretary-General had referred. He explained that the Drafting Group had worked within the framework set by the provisional conclusions reached by the Sub-committee at its previous session with the result that there were a number of matters that remained to be fleshed out, including the international registry and in particular the precise nature of the international registration system.

He indicated that this would be the last session of the Sub-committee and that the text to emerge from its deliberations would be forwarded to the full Study Group. Pending the reconvening of the latter he proposed that the Secretariat should be authorised to set up a group of technical experts to work out the details of the registration system to be created under the proposed Convention. He suggested that this group might be able to draw on some preliminary work on registration being done by the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL).

He suggested that there were a number of key issues of principle to be established in respect of the sphere of application of the proposed Convention. These issues fell into six main groups which were as follows:

(i) *The types of equipment to be covered*

First, this raised the question of whether the Convention should embody an exhaustive list of equipment or whether it should in some way allow for additions. Secondly, there was the question of whether it should be made clear that the equipment must be mobile (cf. Study LXXII - Doc. 19 Add. pp. 2 - 3). Thirdly, there was the question whether the Convention should be restricted to high-value equipment as had been proposed by the Drafting Group, which had excluded items like lorries and vans.

(ii) *The types of interest to be covered*

First, this raised the question whether, generally or specifically for aircraft, all transfers of equipment, whether they were security interests, title retention interests or any other interests, should be covered. This would substantially expand the scope of the Convention to cover effectively all sales, whether or not they were sales under a reservation of title. Linked to this was the concern that had again been expressed by the European Federation of Equipment Leasing Company Associations (Leaseurope) regarding leases being treated as retention of title agreements. They took the view that the lessor was simply the owner of the equipment and were not therefore happy to see leasing bracketed with retention of title. He pointed out that, if it were to be decided that the Convention should apply to property interests generally, as had been proposed by the Aviation Working Group, it might be possible to move away from any distinctive treatment of retention of title. Should the Sub-committee not be prepared to go that far, it would be important to find some way of accommodating the sensitivities of lessors. Finally, there was the question - which specifically arose in the context of aircraft but might be of more general application - whether the interests to be covered by the Convention should be extended to cover assignments of leases and the grant of sub-leases.

(iii) *Proceeds*

Whilst it had already been decided not to cover proceeds at large, the question still remained whether insurance proceeds should be covered.

(iv) *Element of internationality*

Hitherto the Sub-committee had taken the view that the sole requirement of internationality was that the equipment was mobile. The question had however been raised whether it was satisfactory that the Convention rules as to creation, enforcement, perfection and priorities should apply in respect of an interest in mobile equipment where all the other elements of the situation were domestic, that is, the secured party, debtor and third party were all situated in State X and there was no way the equipment, albeit mobile, was ever going to leave State X. In order to provide the Sub-committee with guidance on this issue, Mr T.J. Whalen and Mr C.W. Mooney Jr. had proposed a series of hypotheticals designed to test where the Sub-committee wished to come out on this question (cf. Study LXXII - Doc. 20 and Misc. 3).

(v) *Connecting factor with a Contracting State*

(vi) *Aviation Working Group's recommendations for a system of core and optional provisions*

The general idea was that, whilst it was intended that the core provisions would broadly operate in the same manner as the rules hitherto worked out by the Sub-committee, States would, under the optional provisions, have the additional possibility of opting into certain provisions giving effect to party autonomy regarding choice of law clauses and the secured creditor / lessor's rights in the event of the debtor/lessee's insolvency.

8. - The Sub-committee was agreed that, wherever possible, neutral terminology should be employed so as to avoid the use of terms having distinctive meanings under national law. In particular, it was agreed that an effort should be made to find a new term for "interest". It was

also agreed to find a new term for "equipment" because of the special meaning that term had in certain jurisdictions. One suggestion was that it might in the first instance be replaced by the term "property other than land" and that this phrase might thereafter be abbreviated to "property".

9. - *Regarding the alternative formulae for Article 1(2) proposed by the Drafting Group*, the Sub-committee was unanimous in its preference for the closed-list formula, reflected in the first alternative, subject however, to the possibility of other types of equipment being able to be added, should this be felt to be desirable. It was agreed that it would be necessary to devise a flexible technique permitting a power of delegation to amend the list of equipment to be covered. Inspiration might usefully be sought in those international instruments (such as the International Convention on Civil Liability for Oil Pollution Damage adopted in Brussels in 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage adopted in Brussels in 1971, both amended in London in 1984) which already carried rapid amendment procedures, the effect of which broadly speaking was, at the request of a fairly small number of Contracting States, to permit the convening of an *ad hoc* committee authorised to agree on certain amendments to the particular Convention which would then enter into force for all Contracting States within a fairly short period of time unless one of the Parties was opposed thereto.

The Sub-committee further agreed to consider possible techniques for limiting the application of the proposed Convention to big - ticket items, at least in some cases. This might be done, for instance, by the specification of dimensions, in the case of containers, and by the specification of weight, in the case of vehicles. Should it be decided to incorporate elements of this kind in the sphere of application provisions of the Convention, it could then be made a registration requirement that the registration notice should include specification of the dimensions or weight of the equipment, as the case might be, so that the registry would be able to check whether the equipment appeared to be covered by the Convention.

In order to confirm the desirability of covering railway rolling stock, it was agreed that the European Company for the Financing of Railroad Rolling Stock (Eurofima), which enjoyed observer status on the Study Group, should be sounded. It was recalled that at the European level a Convention was already in place which recognised a special security interest in favour of Eurofima.

10. - *Regarding the Drafting Group's revised proposals for Article 1 (3)*, the Sub-committee first considered the proposal of the Aviation Working Group to cover all forms of transfer, whether or not taking the form of a title reservation, a lease or a security interest. This proposal did not envisage title registration: it was merely intended to provide for the registration of a transfer, without any necessary indication of title. The Sub-committee agreed to recommend in principle to the Study Group that this line should be pursued as regards aircraft and aircraft engines, although it had not itself drafted any rules on this point on the ground that it was considered to fall outside the Sub-committee's remit from the Study Group, but indicated that it would be reluctant to move beyond the security interest / title reservation regimen for other mobile equipment sectors in the absence of specific pressure to follow the route that had been proposed for aircraft and aircraft engines from the different sectors concerned.



The Sub-committee agreed to request the Drafting Group to find language to reflect the fact that an interest did not "arise under" a title reservation agreement in that such an interest was already in existence before the agreement was made (cf. Study LXXII - Doc. 19).

It was further agreed that leasing should be clearly distinguished under the proposed Convention from title reservation. It was necessary to make it clear that leasing was not regarded as a form of title reservation in so far as it did not involve disposal of the asset. The idea was that language should be found whereby leasing might be identified in the text as constituting a distinct group of its own. However, once so identified, it should thereafter be possible to employ one term to encompass both leasing and title reservation for the purposes of the Convention.

The Sub-committee also agreed that consideration should be given to the idea of excluding purely short-term leases, that is leases not exceeding, say, three years, from the ambit of the proposed Convention.

It was agreed that these amendments would necessitate a number of consequential amendments to Article 1(4) and (5).

11. - *Regarding the Drafting Group's proposals for Article 1(6)*, the Sub-committee decided to delete the reference to insurance proceeds. The substantive sphere of application of the proposed Convention would accordingly be confined to "equipment" with insurance proceeds being left to be dealt with later in the substantive rules.

12. - It was provisionally agreed by the Sub-committee that sub-paragraphs (a), (b) and (c) of Article 3 (1) as proposed by the Drafting Group should be converted from conditions for the creation of an international interest for the purposes of the proposed Convention into additional conditions for the application of the same. This would mean moving the provisions in question up into Chapter I and that there would no longer be any need in the Convention to refer to the creation of an international interest. The effect of this amendment would be that the Convention would only apply to interests conforming to the requirements of Article 3 (1) but that, once there was an interest conforming thereto, the Convention would produce the effects provided under subsequent articles.

In connection with this amendment it was further agreed that the secured party should only be allowed to file an interest in the international register with the debtor's prior written consent (cf. § 22 *infra* re Article 8 (1) and (2) of the Drafting Group's revised proposals).

The Sub-committee was agreed that the provisions of Chapter IV as to the effects of an international interest *inter partes* should apply only if the parties had so agreed in writing. This would mean that the parties would have to opt into, as opposed to being required to opt out of, Chapter IV. This would be so whether they had their places of business in the same State or in different States.

It was agreed that, as between the secured party and the debtor's trustee in bankruptcy and unsecured creditors, the international interest would be effective if it had either been filed in the international register prior to the bankruptcy or attachment or been perfected in accordance with the perfection requirements, if any, of the applicable law as determined by the rules of private international law of the bankruptcy or attachment forum. It was noted that this rule would need to be reflected in Article 13 (2) as proposed by the Drafting Group. It was also

noted that consequential amendments would be necessary in Article 2 (1) and that Article 3 would disappear altogether.

13. - One member of the Sub-committee, however, again reserved his position on the question as to whether, in the light of the remedies provisions to be provided in the Convention, an additional criterion for the valid creation of a Convention interest would not be necessary, to wit the parties' express agreement to the creation of such an interest (cf. Study LXXII - Doc. 18, § 9). Having heard how the inclusion of such an additional criterion for the creation of an international interest would be inconsistent with the need under the proposed Convention to protect third parties, he suggested that consideration be given to a compromise solution which to his mind would not alter the substance of the Sub-committee's provisional agreement on this point. This compromise could consist in the addition of a new sub-paragraph (d) to what the Drafting Group had proposed as Article 3 (1), in which it would be provided that "the parties have agreed that they created an international interest", coupled with a rule, designed to protect third parties, in cases where there was no filing in the international register, in relation to any national interests that might exist in the equipment, in which it would be provided that national interests in the kinds of equipment listed in Article 1 (2) would not be valid against third parties except in situations that remained domestic. He suggested that such a rule would be helpful in clarifying the Sub-committee's intentions so that, in the same way as an international interest that had not been filed in the international register would not be valid under the Convention against third parties, so a national interest in equipment of a kind encompassed by the Convention would not be valid thereunder against third parties save where the situation was a purely domestic one. It was suggested that this was essentially a drafting question and it was therefore agreed to refer it to the Drafting Group.

14. - *Regarding Article 2 as proposed by the Drafting Group*, it was agreed that the international register would be primarily asset-based. The Sub-committee nevertheless at the same time envisaged the possibility of a separate debtor-based register as an alternative means of perfecting an international interest against the debtor's trustee in bankruptcy and unsecured creditors. Entry in such a register would however not affect other types of third party such as buyers or subsequent secured creditors.

15. - *Article 3 as proposed by the Drafting Group* would disappear altogether under the terms of the Sub-committee's provisional agreement to move the provisions of paragraph 1 of that article up into the sphere of application provisions of the proposed Convention (cf. § 12 *supra*).

16. - *Article 4 as proposed by the Drafting Group* was approved by the Sub-committee. It was explained that the intention of this provision was, where the parties did not opt into Chapter IV, to leave them free to choose whatever rules they wished to govern their relations *inter se* so long as the effect of this was not inconsistent with any terms of the Convention and subject to any mandatory rules of the applicable law. It was recalled that characterisation of the particular interest would fall to be made under the applicable national law. There might be a number of additional remedies that parties to agreements of the type covered by the Convention might be in the habit of including in their agreements. Mention was in particular made of the Aviation Working Group's proposals regarding rights of deregistration for aircraft. Examples of other additional remedies that were mentioned were rights of repair where the debtor failed to observe a covenant to keep the equipment in a state of repair and rights to sell from the debtor's premises.

17. - *Article 5 as proposed by the Drafting Group* was approved by the Sub-committee.

18. - *Regarding Article 6 (1) as proposed by the Drafting Group*, it was agreed that this should be amended to make it clear that the secured party should be entitled to the benefits of realisation of his security while leaving the methods by which this was permitted to be regulated by the local procedural law.

19. - *Regarding Article 6 (2) as proposed by the Drafting Group*, the Sub-committee agreed that the court's power to order ownership to vest in the secured party in full satisfaction of the debt should be exercisable only on the application of the secured party, that the court should have power on such an application to order transfers in satisfaction of part of the debt, that in exercising this power the court should have regard to the value of the equipment in relation to the amount of the debt to be satisfied by the transfer and that Contracting States should have the power to specify the courts or tribunals, including arbitral tribunals, having competence to make order under Article 6 (2) on their territory.

20. - *Article 6 (3) and (4) as proposed by the Drafting Group* were approved by the Sub-committee. It was also agreed as a general proposition that the applicable law and, to the extent permitted by that law, the terms of the security agreement should govern the rights of the parties *inter se* in so far as consistent with the rules of the Convention. The idea here was to indicate that the Convention was not intended to be exhaustive but could be supplemented by the agreement of the parties to the extent that this was consistent with the applicable law (cf. also § 16 *supra*).

21. - *Article 7 as proposed by the Drafting Group* was approved by the Sub-committee.

22. - *Regarding Article 8 (1) and (2) as proposed by the Drafting Group* the Sub-committee was agreed that it should be made clear that an international interest could be registered in the international register only if, first, the interest complied with the requirements of what had been proposed by the Drafting Group as Article 3 (1) and, secondly, the debtor had consented to the registration in writing (cf. § 12 *supra*). It was further agreed that the registration notice should include a certificate by the secured party attesting that the debtor had given his written consent to the registration.

23. - *Article 8 (3) as proposed by the Drafting Group* was approved by the Sub-committee, which nevertheless recognised that it would be necessary in due course, following examination by technical experts, to deal with the question of risk where, for one reason or another, there was delay in the effecting of the recording of a filed international interest.

24. - *Regarding Article 8 (4) as proposed by the Drafting Group* (cf. also § 27 *infra*), it was agreed that this was intended to be confined to irregularities in the registration notice, for example the mis-spelling of a party's name or an error in the serial number of the equipment, and was not intended to cover errors in, or non-conformity with registration procedures.

25. - *Regarding Article 9 (1) as proposed by the Drafting Group*, (cf. also § 27 *infra*) it was agreed that this was not intended to allow the amendment of registration where this would exceed the scope of the debtor's original written consent, unless the debtor gave fresh written consent covering the amendment. A new consent would thus, for example, be required to the addition of new equipment to the filed entry but not to corrections in the spelling of names, a change of name or a correction of an error in the description of the equipment. The basic idea was that amendments consistent with the debtor's original written consent should not require any further written consent.

26. - *Article 9 (2) as proposed by the Drafting Group* was approved by the Sub-committee.

27. - *Regarding Article 9 (3) as proposed by the Drafting Group*, it was agreed that this might need to be expanded in order to indicate *inter alia*, first, that the sale of equipment by a senior secured party would override a junior interest in the same equipment and, secondly, to record the overriding effect of a sale under a court order, for example the order of a bankruptcy court. It was further agreed that Article 9 (3) should not be amended to provide any fixed period for the duration of registration (cf. Study LXXII - Doc. 19 Add., p. 9), a matter which could be left to the agreement of the parties.

On the question of which court should have jurisdiction to make an order under Article 9 (3) (b), there were differing opinions within the Sub-committee. The following possibilities were considered:

- the possibility of a national court making orders directly to the Registry, which raised the question of which should be the court of competent jurisdiction in each State;
- the creation of a new international tribunal with authority to make such orders;
- to exclude any possibility of orders going directly from a court to the Registry and to leave the matter to be dealt with by *in personam* orders, whereby a secured party would be directed by the court to remove a filing from the Registry, with the latter as a result simply acting on the basis of its own rules and of an application for discharge from the secured party and, where the parties had filed for a set period, with the registration being discharged automatically upon the expiry of such period;
- the recognition of the enforceability of an agreement by the parties to security agreements and title reservation agreements to submit themselves to the jurisdiction of a particular forum for the purposes of issues relating to registration;
- the possibility of the Registry itself taking the decision in the light of all the documents, in particular any *in personam* court orders that may have been made.

It was recognised that the problem was not confined to Article 9 (3) (b) but also arose in the context of the order referred to in Article 9 (1) (b), a ruling on the validity of a registration under Article 8 (4) and the determination of the liability of the Registry under Article 11.

Taking the view that it was premature to reach a decision on this point pending such time as the content of the future Convention was more clearly defined, the Sub-committee decided in the circumstances to draw the Study Group's attention to the need for this issue to be explored further.

28. - *Regarding the Drafting Group's proposals for Article 10*, it was explained that the certificate of registration only being *prima facie* evidence of the fact, time and order of registration, it would always be open to a party to question the genuineness of the certificate by adducing the necessary proof.

As regards the term "order" as employed in this provision, it was explained that this was merely intended to convey a notion of time-sequence. Regarding a consequential proposal to

delete either this word or the word "time" on the ground that one or the other was superfluous, it was agreed not to take a decision on this matter until such time as it was clearer which type of registration system was to be put in place. It was explained that the need for the word "order" in addition to the word "time" would arise in those cases where a number of registration notices reached the Registry at the same time, say, in a post bag, as a result of which it would then be necessary to assign a numerical order to each such notice. With a computerised system, on the other hand, this problem would not arise as the computer would allocate a number to each registration notice as it was received, thereby assuring an order of its own.

29. - *Regarding the future Article 11*, it was agreed that this article, intended to deal with the liability of the Registry for mistakes, should be worked out by the group of technical experts for future consideration by the Study Group.

30. - *Regarding the Drafting Group's proposals for Article 12*, it was agreed that the wording should generally be amended so as to make it clear that what was meant by a "registered international interest" was an international interest validly registered in conformity with the Convention, as a registered interest might nevertheless be invalid, for example by reason of the fact that the debtor had not consented. It was also agreed that the phrase "not valid against the holder of" should be replaced by the expression "subordinate to", as it was felt that the term "valid against" might give rise to confusion.

31. - The Sub-committee was agreed that *Article 12 (1) as proposed by the Drafting Group* should accordingly be reformulated as follows:

"A validly registered international interest is subordinate to a previously registered international interest".

32. - *Regarding Article 12 (2) as proposed by the Drafting Group*, it was agreed, in addition to the same change as that made to Article 12 (1), to replace the phrase "as regards advances made", felt to be too narrow in scope, referring as it did essentially to banks, by the words "to the extent that the holder of the previously registered international interest gives value". It was further agreed that the phrase "after notice" should be replaced by the words "when the holder has actual knowledge", the words "after notice" being considered to have technical connotations in certain countries which were best avoided; for example, it would not be desirable for a first secured creditor to be treated as having notice merely by virtue of the fact of registration of a second interest, unless the intention were that he should take up permanent residence at the Registry. The effect of the change would be to safeguard the priority of such a senior secured creditor until such time as he had actual knowledge of the grant of the junior interest, provided that the value was given under a pre-existing obligation. On the other hand, where such a senior creditor gave value, otherwise than in pursuance of a pre-existing obligation, after he had actual knowledge of a junior interest, he would be subordinate to the holder of such a junior interest.

Regarding the reference in this provision to a pre-existing "obligation" to lend, it was explained that such an obligation need not necessarily be contained in the original security agreement creating the interest but could be contained in a quite separate agreement.

33. - *As regards Article 12 (3) of the Drafting Group's proposals*, the first change made by the Sub-committee resulted from its general decision in Article 12 to replace the words "not valid against the holder of" by the words "subordinate to" (cf. § 30 *supra*).

In order to bring out more clearly the intention behind Article 12 (3) in a case where the seller or lessor under a title reservation agreement as understood by the Convention had failed to register his Convention interest in equipment and a bank which had loaned money to the buyer or lessee on the security of the same equipment had registered its Convention interest, namely that the interest of the seller or lessor would be subordinate to that of the buyer or lessee's secured creditor, it was agreed that for the purposes of the Convention's priority rules the buyer/lessee under a title reservation agreement was to be deemed to have the power to transfer all the rights of the seller / lessor in the equipment where the seller / lessor's interest therein had not been filed in the International Registry.

In connection with this point the question was raised as to whether it would not make for a less compressed and therefore clearer drafting of the whole of Article 12 were each of the possible priority dispute scenarios that might arise in respect of each of the different interests covered by the term "international interest" to be treated separately. It was explained that, whilst it might in future no longer even be necessary to refer to these specific kinds of interest should the Study Group decide to take up the Aviation Working Group's proposal that the Convention should encompass all property transfers, for the moment the Convention covered security interests *stricto sensu*, title reservation and leases and was concerned with the relationship between these interests and the interests of third parties. While the Convention was intended to cover all types of third party - trustees in bankruptcy, unsecured creditors, subsequent secured creditors and buyers in the ordinary course of business - the only interests that were defined in the Convention's priority rules were what might broadly be termed "Convention interests" with no limitation being placed on the categories of other interest the priority of which in relation to Convention interests it was the business of these rules to determine.

34. - *Regarding Article 12 (4) as proposed by the Drafting Group*, it was agreed that, so as to avoid giving any impression of redundancy as between Article 12 (3) and (4), it should be made clear that priority disputes as between one international interest and another were governed by Article 12 (1), (2) and (3) and that the interest contemplated in Article 12 (4) was an interest other than an international interest.

It was further agreed that it would be necessary to complete the negative formulation of the rule set out in Article 12 (4) with another paragraph stating the positive equivalent of the same rule.

35. - *As regards Article 13 (1) as proposed by the Drafting Group*, the Sub-committee was agreed that this rule should be addressed not only to Contracting States but also to any other State that might apply the law of a Contracting State by the operation of its rules of private international law.

36. - The Sub-committee approved *Article 13 (2) as proposed by the Drafting Group*, on the understanding that this provision was in no way intended to interfere with the *lex specialis* of bankruptcy (rules on preferences and the like) (cf. Study LXXII - Doc. 18, § 15).

37. - The Sub-committee agreed to defer consideration of the connecting factor to be employed in the Convention to the Study Group.

38. - *Regarding the desired content of the proposed Convention as this related to aircraft and aircraft engines in general*, the Sub-committee took special note of the particular requirements of

aircraft finance as reflected in the Memorandum and comments to the Drafting Group's revised proposals prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 16 and Study LXXII - Doc. 19 Add. 4 respectively). The Sub-committee expressed its particular appreciation to the Aviation Working Group's representative, Mr J. Wool, for the very considerable amount of work that had been put in on this point since its last session by the Aviation Working Group.

As regards the Aviation Working Group's recommendation for a qualification to the Convention's priority rules in respect of preferred national creditors, such as tax creditors and materialmen (cf. Study LXXII - Doc. 18 Appendix, § 6), the effect of which would be that the classes of locally preferred creditor who would prevail under both Article 12 and in bankruptcy proceedings would be disclosed by each State in its enacting instrument and amended from time to time, it was noted that the utility of this idea might also be considered in respect of the generality of equipment to be covered by the proposed Convention. The Sub-committee agreed that it should, however, be made clear that the purpose of this proposal was not to enable States to specify the priority of consensual interests but only of those interests created by law and the *lex specialis* of bankruptcy.

The Sub-committee invited the Aviation Working Group through the person of Mr Wool, who had agreed to act as expert consultant to the Study Group on international aviation finance matters and in this capacity to liaise with the Aviation Working Group and aviation finance interests, to propose the text of supplementary rules for aircraft and aircraft engines, designed to reflect the special needs of the aviation finance community in a manner consistent with the Aviation Working Group's recommendations to date, the general structure of the planned Convention as proposed by the drafting group and further aviation industry consensus, for due consideration by the Study Group at its next session. It was suggested that, whilst it might in the end be found necessary to include certain specific supplementary rules for aircraft and aircraft engines in the proposed Convention, the possibility should not be excluded at this stage that some of the rules to be proposed by the Aviation Working Group might be found to have more general applications and might to this extent assist other industry groups in their analysis of the desired scope and content of the proposed Convention.

39. - It was agreed that the next step would be for the Drafting Group to meet to revise the text it had prepared at its second session, in the light of the discussions at this meeting, and for the resulting text to be forwarded to the Study Group. Prior to the next meeting of the Study Group it was agreed that the text as revised by the Drafting Group should be circulated for comment so as to enable the Study Group to benefit from additional input.

It was further agreed that a group of technical experts should be convened to look at both the legal regimen that it would, in the light of experience, be desirable for the proposed registration system to have and the computer technology aspects of this system.

It was noted that the Aviation Working Group had, through the person of Mr Wool, kindly agreed to propose the text of supplementary rules for aircraft and aircraft engines for consideration by the Study Group at its next session.

It was agreed that the active role being played by the aviation industry highlighted the need to involve other interest groups, such as satellite, container and railway rolling stock interests.

The Sub-committee requested the Unidroit Secretariat to take all the necessary steps to ensure that this project be carried forward as a matter of the utmost priority and to use its very best efforts to see that the necessary resources, in all terms, were made available in order to ensure that the work could be prosecuted as expeditiously as was conveniently possible, given the complex nature of the project.

40. - The Drafting Group will be meeting in Oxford on 18 and 19 December 1995 to give effect to the decisions taken by the Sub-committee at its third session.

The second session of the Study Group will be held at the seat of Unidroit from 12 to 16 April 1996, commencing at 10 a.m. on the 12th and ending at 1 p.m. on the 16th.

The first session of the group of registry experts will be held immediately after the Study Group session, commencing at 3 p.m. on 16 April 1996. The full dates of this session will be communicated in due course.



STUDY GROUP FOR THE PREPARATION OF  
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:

SUB-COMMITTEE FOR THE PREPARATION OF A FIRST DRAFT

(Third session: Rome, 11 - 13 October 1995)

AGENDA

1. - Approval of the revised draft agenda.
2. - Preparation of a first draft of uniform rules on international interests in mobile equipment in the light of:
  - (a) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group (Study LXXII - Doc. 16);
  - (b) Memorandum prepared jointly by Airbus Industrie and The Boeing Company on behalf of an aviation working group: comments (by members of the Study Group and the Sub-committee and the international Organisations and professional associations represented by observers thereon) (Study LXXII - Doc. 17 + Add., Add. 2, Add. 3, Add. 4 + Misc. 1);
  - (c) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (drawn up by the drafting group on the basis of the provisional conclusions reached by the Sub-committee at its second session) (Study LXXII - Doc. 18);
  - (d) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment: comments (by a member of the drafting group and by members of the Study Group and the Sub-committee and the international Organisations and professional associations represented by observers thereon) (Study LXXII - Doc. 19 + Add., Add. 2, Add. 3, Add. 4 + Misc. 2);
  - (e) Revised proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment: hypothetical scenarios designed to test the applicability of the revised proposals to given factual situations (suggested by Mr T. J. Whalen) (Study LXXII - Doc. 20 + Misc. 3).
3. - Consideration of the desirability of setting up a special task force to consider the issues raised by an international register (Study LXXII - Doc. 19 Add., p. 7).
4. - Any other business.



*REVISED PROPOSALS FOR A FIRST SET OF DRAFT ARTICLES OF A  
FUTURE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS  
IN MOBILE EQUIPMENT*

(drawn up by the Drafting Group on the basis of the provisional conclusions  
reached by the Sub-committee at its second session):

COMMENTS

(by Mr Howard Rosen)

Looking at the draft reminds me once again how daunting the whole subject is. The big difference between this and the 1988 International Financial Leasing Convention is that the latter applies in a particular country to a given state of affairs. What one has to deal with in relation to an arrangement ensuring the respecting of a security interest on an international basis is to ensure that the interests are respected world-wide. This has more or less been achieved in the aircraft sector through the international Conventions but I suspect that for this to apply for other movables will take an extremely long time. In other words if you do cover every country where assets can be moved then the system itself will not be able to work properly.

Turning to the specific articles:

*Re Article 1(2)*

In my view the Convention should apply to all movable goods since by definition they could cross borders. The differentiation of domestic and international equipment therefore is probably rather artificial.

To the extent that there are already registries in place for certain types of equipment, there clearly is a dilemma as to how one reconciles the two registration systems. I know that this is being reserved by the Aviation Working Group separately. It may be however that the Convention should apply to all movable goods in which case this will become a more substantive problem.

Over and above the specific problems with certain types of assets, I presume that the drafters are considering how an international interest registered at an international registry would mesh in with U.C.C./P.P.S.A. interests created in North America.

I note that in Article 1 (5) the Convention is not intended to cover all rights *in rem* in relation to movable equipment. For example under German law there is the concept of an *Anwartschaftsrecht* which can be subject to a security interest as I understand it.

Even if this is not included in the Convention, we should have regard to the fact that there is a more significant issue, namely that a security interest could be created (and often is) at a point in time prior to the delivery of the equipment and the passage of title to debtor. If the view of the drafters is that the interest actually only comes into play once the equipment is delivered, then does that interest still have priority over interests subsequently registered but effective at the same time? Perhaps this should be considered in more detail.

My largest concern however is the problem of so-called mixed equipment. There are often concepts under local laws whereby an upgrade or enhancement of a particular item of equipment becomes part of the equipment being upgraded as a matter of local law. How would this be dealt with on an international basis? Further, what about merging of interests in movables with real estate? See the recent decision of the House of Lords in *Melluish v. B.M.I.*

#### *Re Article 2*

I note that the intention is to create one register rather than regulate the registration of an interest in various jurisdictions. This has logic but could lead to a rather inefficient bureaucracy. One answer to this could be to legislate for registers for a particular asset (such as rolling stock). Taking that one stage further, in these days of retreat from Government involvement in every sector of the economy should we not consider making provision for a private body performing the role of a registry under the supervision of an international body? For example, again in my specialist area, could not the Union of International Railways be formally vested with authority to run a registry which they in turn can contract out if they so wish? It should not be excluded that individual trade associations could set up their own registries in anticipation of implementation of an international Convention. Again in that situation we should be encouraging this and providing for recognition of such bodies if they performed the function expected by the Convention.

#### *Re Articles 4 - 7*

There is one issue here that I suspect you have covered but it still causes me some concern through its absence in the draft Convention. A continuing problem for lawyers in practice is the fact that although parties may legislate for a particular law to apply, local courts may disregard a choice of law in connection with issues of title if the asset is physically located in its jurisdiction at the appropriate time. This may need to be regulated since otherwise it can cause great uncertainty as to what law the registrar must refer to in order to determine whether in fact a default has occurred and whether title can be validly passed by the secured party.

#### *Re Article 6 (2)*

This article troubles me. It seems to be providing for limited recourse financing. In many cases this would not be acceptable to funding institutions.

*Re Article 9*

I would personally be in favour of giving a registered interest a limited life ( as happens in North America). I also suggest that there should be provision for the international interest itself to lapse automatically if the liability for which it is given as security has been discharged and there should be a legal obligation on the secured party to file a notice withdrawing the interest.

*Re Article 9 (3) (b)*

This gives rise to some concern since one has to look at which court is the appropriate court in this case. Going back to the issues of *lex situs* mentioned above, it may well be that there is a conflict between two courts as to where title ought to be as a matter of law.

I appreciate that the draft as it currently now stands is a product of much discussion and I am sure that many of the issues I have raised above have already been considered. I hope nonetheless there may be one or two parts that still can be considered as useful.