

UNIDROIT 1995
Study LXXIIB - Doc. 1
(Original: English)

Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

MEETING OF INTERNATIONAL ORGANISATIONS
CURRENTLY INVOLVED IN THE PREPARATION OF LEGISLATION
IN THE FIELD OF PERSONAL PROPERTY SECURITY

(Rome, 29 November 1994)

Report

(prepared by the Unidroit Secretariat)

Rome, March 1995

1. – In line with the decision taken by the sub-committee of the Unidroit Study Group responsible for the preparation of a first draft of its planned Convention on International Interests in Mobile Equipment at its first session, held in Rome from 14 to 16 February 1994⁽¹⁾, a Meeting of international Organisations currently involved in the preparation of legislation in the field of personal property security was held in Rome, at the seat of Unidroit, on 29 November 1994. The idea behind this meeting was, in the light of the ever-growing number of parallel initiatives that had taken off in this field in recent years, to permit an exchange of information regarding the current activities of those international Organisations working in this field, designed above all to ensure maximum co-ordination between these different projects. The meeting was opened at 11.25 a.m. by Mr M. Evans, Secretary-General of Unidroit, who took the chair.

2. – The meeting was attended by the following representatives of inter-governmental and international non-governmental Organisations:

INTERGOVERNMENTAL ORGANISATIONS

European Bank for Reconstruction and Development

Mr J.-H. Röver, Legal Adviser, Office of the General Counsel

Mr J. Simpson, Office of the General Counsel

Hague Conference on Private International Law

Mr M. Pelichet,
Deputy Secretary-General

International Bank for Reconstruction and Development

Mr H. Fleisig, Economic Adviser, Private Sector Development Department, Finance & Private Sector Development

Ms N. de la Peña, Consultant Attorney, Private Sector Development Department, Finance & Private Sector Development

United Nations Commission on International Trade Law

Mr S. Bazinas, Legal Officer

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

International Bar Association

Mr M. Gioscia, Immediate past Co-chairman, Banking Law Committee

International Chamber of Commerce

Mr R.M. Goode, Chairman, Commission on International Commercial Practices

(1) cf. *Summary report* on that session prepared by the Unidroit Secretariat (Study LXXII - Doc. 12) at § 8.

International Maritime Committee

Mr R. Herber, Professor of Commercial Law,
University of Hamburg; C.M.I. representative on
the Unidroit Study Group/Sub-committee for the
preparation of uniform rules on international
interests in mobile equipment

In view of the work underway within the National Conference of Commissioners on Uniform State Laws of the United States of America on the revision of Article 9 of the Uniform Commercial Code, Mr C.W. Mooney, Jr., Co-reporter to the Drafting Committee for the Revision of Article 9, also attended the meeting as the representative of the National Conference of Commissioners.

3. — The meeting approved the agenda which is set out in an appendix to this report.

4. — In introducing the business of the meeting, *the Chairman* explained that the hope of Unidroit in organising this meeting was to see to what extent the exchange of information that it was designed to facilitate might indicate possible ways in which these Organisations might be able to pool their resources.

5. — *Unidroit's* own work in this field, he explained, had grown out of the Unidroit Convention on International Financial Leasing adopted in Ottawa in 1988 and was currently being carried forward on two fronts. The one involved it in the preparation of a draft Convention on international interests in mobile equipment and was being pursued within a sub-committee of the Study Group, set up pursuant to a decision of the Unidroit Governing Council taken in June 1992, responsible for the preparation of a first draft. The other resulted from the Governing Council's decision one year later to ask the same sub-committee to look into the desirability and feasibility of Unidroit in due course preparing a model law in the general area of secured transactions. The thinking behind this decision was founded on a perception of the need for co-ordination between the various regional initiatives that had taken off in this area of the law in recent years, in Central and Eastern Europe under the auspices of the European Bank for Reconstruction and Development, in a number of Latin American countries but also in Bangladesh, Bulgaria and Sierra Leone under the auspices of the Private Sector Development Department of the International Bank for Reconstruction and Development and in the United States of America under the auspices of the National Conference of Commissioners on Uniform State Laws. The goal of this co-ordination was seen as being the employment in these different initiatives of concepts that were as uniform as possible with a view *inter alia* to avoiding unintended prejudice to the efforts underway to develop a new global regimen for the secured financing of mobile equipment.

6. — Unidroit had the previous day organised, in conjunction with the International Bar Association, a seminar designed not only to give exposure to its own work in this field but also to take stock of some of the other related developments taking place in different parts of the world. Faced by the phenomenon of an ever-lengthening number of international instruments in the business law field which, notwithstanding the most thorough intergovernmental preparation and the very best efforts of the international Organisations that had promoted these instruments to encourage their subsequent implementation by the very same Governments that had participated in their preparation, had either failed to enter into force at all or, at best, operated only as between a limited number of States, the Institute had become ever more convinced of the need to ensure that the instruments which it was

preparing should be founded right from the outset on the perceived needs of business practice so as to ensure that, at the moment when the question of their national implementation came up, these same business circles would see it as being in their interest to bring the necessary pressure to bear on Governments to implement them as speedily as possible. Unidroit had in recent years sought to maximise the opportunity which its flexible working methods afforded it to associate the professional business circles and the practising lawyers advising them in its preparation of international instruments in the business law field with a view to ensuring that its end-products would commend themselves sufficiently to these same circles that they would be prepared to advocate their adoption by national Governments. As an instance of an international Convention which had ignored the force of these arguments with disastrous results, he cited the 1980 United Nations Convention on International Multimodal Transport of Goods which, notwithstanding long years of preparation, had only been adopted by a very small number of States, moreover including some land-locked countries, whereas the Rules for Multimodal Transport Documents, prepared by the United Nations Conference on Trade and Development (U.N.C.T.A.D.) and the International Chamber of Commerce and first published in 1973, had enjoyed enormous success.

7. - It was with this in mind that the Chairman proposed that the meeting first hear from the representatives of those international non-governmental Organisations representing the interests of professional circles and, in the first place, *the International Bar Association (I.B.A.)*. The representative of the I.B.A. informed the meeting of a number of projects underway within the *Section on Business Law (S.B.L.)* of that Organisation regarding the taking of security in general. He explained that the S.B.L. was currently pursuing work in this field across three fronts. The first of these was a study of the pledging of securities in a foreign country, being conducted by the *Sub-committee of the Banking Committee on Legal Opinions*, the new chairman of which, Mr Michael Kutschera, had attended the joint Unidroit/I.B.A. seminar the day before. A session of the I.B.A.'s last Annual Conference, held in Melbourne in October 1994, had been devoted to this sub-committee's study. This was a subject which caused many problems of a conflicts of law nature for practising lawyers called upon to give opinions in cases which were transnational in character, that is where the lender was in one country, the borrower in another and the securities given by way of pledge in yet another country, and even more so when the securities took the form of a book entry. One of the problems which arose in this context concerned whether the pledge should be governed by the *lex rei sitae* or by the *lex societatis*. He expected the Sub-committee on Legal Opinions to publish its study on this matter early in 1995. Another front on which the S.B.L. was moving in this field was being handled by the *Capital Market Forum*, comprising representatives of different S.B.L. committees, including the Banking Committee. The Capital Market Forum was preparing a study on *Fundamental issues in modernising national securities' ownership, transfer and pledging laws*. The reporter for this project was Mr Randall Guynn, who had also been present at the joint Unidroit/I.B.A. seminar the day before. He expected Mr Guynn in this study to be touching *inter alia* on the revision of Articles 8 and 9 of the Uniform Commercial Code. The studies put out by the Capital Market Forum were intended to be provocative, being designed as the basis for discussion in various parts of the world. The third front on which the I.B.A. was active in the area under discussion was being pursued by an *ad hoc Sub-committee of the Banking Committee on the Taking of Security in International Transactions*, currently chaired by Mr Francis Chronnell. It was planned to give this sub-committee a session at the 1995 Annual Conference of the I.B.A., scheduled to be held in Paris, and he was considering the possibility of suggesting that speakers from other international Organisations working in this field be invited to take part in this session.

8. — *The representative of the International Chamber of Commerce (I.C.C.)* expressed his particular interest in the extremely valuable work being carried out in this field by the I.B.A., the usefulness of which was enhanced by the fact that it was being conducted by practising lawyers engaged on a day-to-day basis with secured transactions. He explained that the I.C.C. was divided into specialist commissions, departments and institutes, each with its own special area of responsibility, as well as the Court of International Arbitration. The activities being carried out by these bodies were broadly of two types. One group was concerned with global issues like the General Agreement on Tariffs and Trade (G.A.T.T.) and environmental law. The other, including the commission which he chaired, was concerned with the harmonisation of business practice and the rules relating thereto. The I.C.C. was very active in this field, although, not being a law-promoting body, it went the contract route. This meant that its work was basically limited to those issues which could be dealt with by contract between the parties. The I.C.C. had four main vehicles for achieving harmonisation of business practice. One of these was uniform rules or customs, the most prominent of which was probably the Uniform Customs and Practice for Documentary Credits, which had been going for a long time and were very popular. He noted that most of these uniform rules were in the banking and financial obligations sector. Among the more recent examples of such uniform rules he mentioned the Uniform Rules for Demand Guarantees, dealing with guarantees of a stand-by character, and the Uniform Rules for Contract Bonds, produced by the I.C.C. Insurance Commission, dealing with suretyship bonds. He recalled that the Secretary-General of Unidroit had also mentioned the Rules for Multimodal Transport Documents. Effect was given to these uniform rules essentially by piggy-backing on contracts. A second vehicle employed by the I.C.C. was that of forms, which in many cases were associated with uniform rules, such as Documentary Credit Forms, Demand Guarantee Forms and, prospectively, Contract Bond Forms. Another type of form, not directly tied to uniform rules, was rather linked to a model contract, examples of this being the Form of Model Commercial Agency Contract and the Form of Model Distributorship Contract. The third vehicle was that of uniform trade terms, essentially Incoterms, setting out price and delivery terms for incorporation in contracts. The fourth was that of guides. Examples of these were the Guide to Retention of Title and the Guide to Electronic Data Interchange Agreements. He emphasised that all these vehicles were primarily concerned with business practice, although legal consequences clearly followed from the adoption of I.C.C. rules.

9. — Referring to the need for co-ordination between the different Organisations so as to ensure that everyone was not doing the same thing at the same time, he indicated that the criteria which he saw as relevant to any decision by the I.C.C. to take up work on a particular subject were, first, that the issues involved were contractual in character. Thus in its work on documentary credits and demand guarantees, the I.C.C. could not address the circumstances in which a court should or should not grant an injunction where there was suspected fraud, as this raised questions which would require the taking of measures going beyond the sort of provisions that could be incorporated in the parties' contract.

10. — The second criterion singled out by him related to the homogeneity of the interests in play. The banking and insurance communities were relatively homogeneous in character, following a broadly consistent practice and speaking broadly the same language, which tended to facilitate considerably the task of preparing rules in these sectors. The commission he chaired, the Commission on International Commercial Practice, did not have this advantage, which meant it had to exercise especial care when determining what it would be able to produce.

11. - The I.C.C. had a number of projects underway. These included a study on leasing, another on transfer of ownership and a new project for the drawing up of rules for business contracts for manufactured consumer goods.

12. - He felt the time had certainly come for a focussed discussion on ways of avoiding unnecessary duplication of work amongst international institutions, all the more so given the limited resources at their disposal. By way of example of the possibilities that existed for international Organisations to work together, he cited the co-operation that Unidroit had established with the European Bank for Reconstruction and Development and the International Bank for Reconstruction and Development in the context of its work designed to ascertain the case for its preparation of a model law on the general body of secured transactions. He had become ever more aware of the need for each international Organisation in its choice of new projects to take care not to prejudice or interfere with work already being effectively carried out by another Organisation and, more generally, to ask itself whether this was a project which it ought to be taking up or whether it was not rather a subject more suited to another Organisation. Thus just as the I.C.C. recognised that there were projects which were more suited to an Organisation capable of promoting international Conventions, so it questioned whether it was right that other Organisations should be taking up projects which were essentially contractual in character.

13. - The I.C.C. was planning a seminar in Paris, that would probably last one day, to bring together all the leading Organisations involved in the harmonisation of law, such as Unidroit, UNCITRAL, the World Bank and the I.B.A., with a view to seeking to identify in a broad sort of way what each Organisation saw as the criteria presiding over its choice of activities, that is those criteria which would help it to ascertain which types of activity it was best suited for and which types of activity would best be done by other Organisations. The objective of this seminar would be to ensure that international Organisations husbanded their resources and co-ordinated their respective activities in the best way possible.

14. - *Mr J. Simpson, representing the European Bank for Reconstruction and Development (E.B.R.D.),* explained that the Model Law on Secured Transactions prepared by the Bank had to be seen in the context of its overall efforts to meet a huge, immediate problem in the countries of its operations. The idea for the Model Law had grown out of a suggestion made by a person from one of the Bank's countries of operations at its first annual meeting during a seminar organised to discuss the problem of not having security to support lending. The choice of the model law solution reflected a pragmatic approach, namely recognition of the fact that something needed to be done and that a model law would provide a useful focus for the principles that were needed. When preparing the Model Law he and Mr Röver had always worked on the basis that it was not intended to be something that States could just take off the shelf and incorporate in their domestic law. The Model Law was to be seen as a working document, an indicator, a template, a guide or a reference point and not as a definitive work on the treatment of secured transactions in all the 26 countries of the Bank's operations. The Bank was keen to make good use of the Model Law and all the research that had gone into it as well as all that had been learned in the course of its preparation. It had no particular game-plan for the Model Law's adoption: rather it was engaged in discussions with almost all the countries of its operations as to how it should be used and this varied enormously from one country to another. The Bank had been struck by the enthusiastic way in which the countries of its operations had acknowledged its usefulness, even if they often then went on to indicate completely different ways in which it would be useful to them. He indicated that the Bank would continue to be guided by a pragmatic approach. He estimated that only a quarter of the work that needed to be done had been completed to date: for the remainder he

indicated that it was the Bank's intention, working together with the individual countries and with others with experience in the field, to explore ways appropriate to each jurisdiction of making use of what had been done so far.

15. -- Mr H. Fleisig, representing the Private Sector Development Department of the International Bank for Reconstruction and Development (the World Bank), explained that it would normally be the Bank's Legal Department that would make representations regarding its international legal activities. He was not a lawyer nor was he in that department. Within the World Bank there was an operational department responsible for the making of loans. It was this department that undertook reform efforts in borrowing member countries. He worked with the group that advised this operational department, supporting reform efforts in the secured transactions laws of a number of countries. These reform efforts were actively underway in Honduras, where draft legislation, prepared by his colleague Ms de la Peña, was currently before Parliament, in Bolivia, where the terms of reference for draft legislation had been worked out, and in Uruguay, where work on the drafting of the terms of reference for legislation had been begun and where the Central Bank was planning to present revised legislation in June 1995. In the meantime work was at the study stage in Bulgaria, Bangladesh and Sierra Leone. His department had a co-operation arrangement with the Inter-American Development Bank and planned to move into six other countries together with the I.D.B. somewhere between January 1995 and January 1996. In addition it had some operations underway with private organisations.

16. -- He stressed that the work being conducted by his department did not involve the drafting of a model law. His group typically went in with lending operations and used the technical assistance component of the lending operation to support the legal reform efforts. These legal reform efforts typically cost between U.S.\$ 250,000 and U.S.\$ 1 million. The loans ranged between U.S.\$ 60 million and U.S.\$ 300 million. They might or might not have additional conditions. The operation in Uruguay, for instance, was a U.S.\$ 170 million operation and the only condition was to revise that country's secured transactions law. He stressed that the remaining funds represented a credit line and that his department did not spend U.S.\$ 170 million reforming the secured transactions law of one country. The operational costs in such countries were under U.S.\$ 1 million.

17. -- Turning to the problems which his group's efforts were designed to address, he pointed out that in all the countries where his group was currently active about one-third of the capital stock and one-half of the annual investment was movable property and that each of these countries faced an almost total incapacity to finance transactions solely with movable property, difficulties arising in the creation, the perfection and the enforcement of security interests in these countries. His group's strategy was typically to try to build from the bottom up and to move each country forward as far as possible in every dimension regarding these problems, the objective of each operation being to free the flow of credit as greatly as possible. His group had found that each country had a peculiarity that could be extremely important in determining the shape of the legal reform in that country. Thus in Bolivia the State Agricultural Bank had the right of harmless repossession for loans that it made and consequently was able to obtain extremely good performance from very small loans to farmers in the Altoplano. This had proved to be a very important point in the discussions with the Bolivian Government designed to convince the latter as to the constitutionality of his group's proposals. Similarly, in Uruguay the health regulations permitted meat inspectors to seize diseased cows at any time in the production process and condemn them without the need for court proceedings, which had proven to be very important in the discussion of ways in which non-judicial officers could intervene in the debt-collection process. His group always sought to build a consensus first within the business community regarding the nature of the planned reforms, designed in particular to demonstrate which

reforms were legally practicable. His experience had been that the business community in these countries was not interested in spending a great deal of time discussing reforms that might in principle be attractive but which they did not believe, as a practical matter, would be instituted. Another key ingredient in ensuring the success of his group's efforts was to bring home to the Government in question the broad economic gains which were to be expected to accrue from the reforms. In Bolivia, for example, his group had estimated that the annual gain would be over U.S.\$ 200 million for a reform that would cost U.S.\$ 1 million and this pushed its legal reform proposals up on that Government's reform agenda, which probably would not have been possible had there only been a consensus in favour of the reform proposals in the business community.

18. — He indicated that the efforts of Unidroit in this field and the Model Law that had been prepared by the European Bank had been extremely useful to his department in a number of respects. First, it had been able to circulate the results of these endeavours in the World Bank's borrowing member countries as examples of reform efforts that were underway. These countries were then free to pick and choose among these examples for pieces that might be suitable for their own reform efforts. Secondly, and possibly more importantly, it showed borrowing member countries that these reforms did not result from some idiosyncratic suggestion of the World Bank applicable to their countries alone but were part of a general problem that was being addressed the world over. Turning to the matter of co-ordination, he indicated that his group was already bringing news of the work being done by Unidroit and the European Bank in this field to the attention of borrowing member countries in the normal course of its operations and the more it knew, clearly the more it would be able to do this. Subject to a proper examination of the budgetary implications, he added that his group would also be happy to assist Unidroit in obtaining feedback from its borrowing member countries in the context of the inquiry that Unidroit would be launching into the specific problem areas that might be covered by a possible Unidroit model law. One interesting fact the potential significance of which Unidroit might wish to consider was, he suggested, that the countries where his group was currently active had legal systems which were frequently the grandchildren and cousins of the legal systems of Europe and thus in one way might be seen as laboratories for the broader reform efforts underway in this area of the law.

19. — The representative of the United Nations Commission on International Trade Law (UNCITRAL) began by indicating the current state of the work on projects that had already been referred to by previous speakers. The Working Group on International Contract Practices was expected to complete its consideration of a draft Convention on independent bank guarantees and stand-by letters of credit during its January 1995 session in New York, following which the resultant draft Convention would be submitted to the next session of the Commission, due to be held in Vienna in May 1995. This would be the main item on the agenda of the Commission at that session.

20. — The Working Group on Electronic Data Interchange, at its last session, held in Vienna in October 1994, had adopted a Model Law on Legal Aspects of Electronic Data Interchange, designed in general to lessen discrimination against E.D.I. users and, in particular, to ensure that E.D.I. documents would be admitted in court proceedings and given the same evidentiary value as paper documents. At its next meeting, scheduled to be held in New York in February/March 1995, the working group would begin consideration of a new E.D.I.-related subject, the negotiability and transferability of rights in goods. It would in this context be considering electronic bills of lading.

21. — Turning to possible future work items being considered by UNCITRAL, he mentioned first receivables financing, explaining that the idea for this had emerged during a congress held by

UNCITRAL in New York in May 1992. In 1993 the Secretariat had prepared a preliminary study in which it sought to identify the problems regarding receivables financing that arose in the context of international commerce. The Secretariat was then asked by the Commission to prepare a more detailed study of the problems and possible solutions, essentially a desirability and feasibility paper. This study was circulated in draft form to a number of international Organisations and was also presented by the Secretary of UNCITRAL to the 73rd session of the Unidroit Governing Council, held in Rome in May 1994. The UNCITRAL Secretariat was intending, in a spirit of co-operation, to continue to circulate its drafts for comment amongst interested international Organisations. The next step in this work would be for the Secretariat to prepare another study highlighting the problems encountered in this area of the law and proposing possible solutions, to include perhaps a first set of preliminary draft rules on receivables financing, which would then be submitted to the next session of the Commission. He indicated that no decision had however yet been taken as to what was to happen subsequently, that is whether another study would be needed or whether the preliminary draft would be submitted to a working group for further consideration.

22. — Explaining the idea behind the Secretariat's proposal for work in the field of receivables financing, he indicated that the intention was to build on the achievement of the Unidroit Convention on International Factoring but to go beyond that Convention and cover a broader range of transactions. The intention would be to cover not only simple financing transactions involving an assignment, by way of sale or security, from a trader to a bank but also those inter-bank assignments involved in refinancings, whether at the initial or at a subsequent stage, thus including securitisation. It was also the intention to cover some aspects of project financing transactions. In so far as the idea was to cover only international assignments, the UNCITRAL Secretariat did not see any potential conflict with a model law that Unidroit might decide to prepare in the field of secured transactions, any more than there should be a conflict between such a possible model law and both the Unidroit Convention on International Factoring and its projected Convention on International Interests in Mobile Equipment.

23. — Moving on to a number of other items which UNCITRAL was considering for possible future work, he mentioned first cross-border insolvency. This was another subject which had been suggested at the UNCITRAL congress held in New York in May 1992. A report had been presented to the Commission at its last session and another report was to be presented to the Commission at its next session. The Secretariat was planning to hold a colloquy in Toronto in April 1995 in order to discuss possible means of judicial co-operation in cross-border insolvency cases.

24. — Another item down for discussion at the next session of the Commission was a check-list of items arising in the context of preparatory conferences in arbitral proceedings. A first draft was presented to the Commission at its last session and was considered at the congress of the International Council for Commercial Arbitration (I.C.C.A.) that took place in Vienna in October 1994. A final draft would be submitted to the Commission at its next session.

25. — A third subject on which the UNCITRAL Secretariat was considering the possibility of future work was the build-operate-and-transfer contractual arrangement. A study on this subject would be laid before the Commission at its next session.

26. — Another subject under consideration for possible future work was dematerialised securities. The Secretariat was hoping to have a study on this subject ready for the next session of the Commission.

27. — Referring to the international registry which Unidroit was contemplating in the context of its projected Convention on International Interests in Mobile Equipment, he indicated that the question of a registry was also likely to arise in the context of a number of the projects under consideration for possible future work within UNCITRAL, namely receivables financing, the transferability of rights in goods and dematerialised securities.

28. — *The Chairman* invited the representatives of other international Organisations attending the meeting, even if the Organisations they were representing were not currently engaged in the drafting of legislation in the field of secured transactions, to feel free to make any comments on the general question of inter-Organisational co-operation in the light of the statements that had already been made.

29. — *The representative of the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.)* indicated that both the National Conference and the American Law Institute had an enormous interest in efforts directed toward the international unification of law, in particular with a view to seeing how best they might assist those involved in such law reform. A meeting of these two bodies, hosted by the Department of State of the United States of America, had been held in Spring 1994. This meeting had devoted several hours exclusively to a discussion of the need for co-ordination and communication.

30. — This discussion had shown how little the individual U.S. representative or representatives following one activity carried out by an international Organisation working in the unification of law field might know about a related activity of another Organisation being followed by a different U.S. representative and he was sure that this problem was not peculiar to the U.S. As a result it had been decided to take measures to improve this communication, which led him to suggest, in the light of the statements that had already been made, first, that some way be found to hold regular annual meetings of the kind inaugurated by this meeting designed to facilitate communication between those involved in international secured financing and related projects and, secondly, and perhaps more importantly, that the preparation of a brief annual report of these activities be instituted. He urged Unidroit to take the lead in responding to this need.

31. — Turning to the National Conference's work directed toward the revision of Article 9 of the Uniform Commercial Code, he indicated that it would greatly welcome assistance and in this context suggested that the International Bar Association and UNCITRAL, the latter by reason of its work on receivables financing, might be able to help with some of the cross-border implications of the choice-of-law rules it was considering. Conveying a message from the Office of the Legal Adviser to the U.S. Department of State, he indicated that the multiplicity of fronts on which work in this field was proceeding in no way lessened the value of the various end-products, each of which could be expected to make a significant contribution to the learning process, and that anything which might tend to stifle the market in ideas for legal reform projects would be unfortunate. He nevertheless emphasised the importance of a way being found to permit UNCITRAL's proposed receivables financing project to fit with the Unidroit Convention on International Factoring.

32. — *The representative of the Hague Conference on Private International Law* explained that his Organisation was in a rather special position in relation to the other Organisations attending this meeting in so far as its work, directed toward the unification of the rules of private international law, whether by means of conflicts rules or by means of rules of recognition or enforcement, ranged across the whole field of the law, taking in family law and succession, not just commercial law.

33. — In the area of personal property security and related matters, he indicated that, while the agenda of the Conference included bank guarantees, stand-by letters of credit and E.D.I., this was not so much with a view to the Conference drawing up instruments of its own on these subjects — even if he had been attracted for a long time to the idea of drawing up a Convention on the law applicable to transactions involving a tripartite relationship, such as bank guarantees — as with a view to following the work being conducted thereon in other Organisations, and in particular the private international law aspects of such work. It was here that his Organisation had been experiencing difficulties of late. This consisted in the growing trend of certain international Organisations to include in their substantive law instruments provisions dealing with conflicts of laws and jurisdiction, provisions which were almost always so inadequately prepared that when it came to the question of their adoption, roughly one-third of the States attending would be absolutely in favour, another third would be absolutely opposed and the remaining third would not know which way to vote. He pleaded for the meeting to consider ways of dealing with this problem based on the recognition by international Organisations of the limits of their respective areas of competence. This problem was especially acute in the case of his Organisation, given that its brief extended across the whole field of law. It was a problem that essentially related in his opinion to the way in which subjects were placed on the work programmes of individual international Organisations. He stressed the need for each international Organisation before entering new items on its work programme to make a thorough study of all related efforts either underway or already completed by other Organisations.

34. — *The Chairman* expressed the hope that the problems of inter-Organisational co-ordination to which the representative of the Hague Conference had referred had not arisen in the course of that Organisation's participation in Unidroit projects; in particular the preparation of the Unidroit Conventions on International Financial Leasing and International Factoring and of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects. *The representative of the Hague Conference* confirmed that his Organisation had not experienced problems of this nature in its relations with Unidroit.

35. — *The representative of the International Maritime Committee (C.M.I.)*, recalling his experience in Government, expressed the view that the root of all co-ordination problems lay with Governments and that there was little chance of Organisations making progress with this problem so long as Governments did not co-ordinate properly at home. This problem was compounded by the low priority the complex issues normally addressed in unification of law efforts enjoyed in Government circles in relation to questions of greater political significance. In these circumstances, while such inter-Organisational co-ordination meetings were as necessary as they were sometimes limited in their success, inter-Organisational co-operation was nevertheless the only answer and he pointed to the valuable work already being done in this direction by both Unidroit and UNCITRAL, which edited an annual or bi-annual survey of the current activities of international Organisations working in the field of the unification and harmonisation of international commercial law.

36. — Turning to the current work of the International Maritime Committee, he indicated that, whilst it could prepare draft Conventions and produce rules for incorporation in the parties' agreement, in much the same way as the I.C.C., it no longer possessed the influence it had had in days gone by. A recent C.M.I. conference, held in Sydney, had adopted rules on general average. General average had an impact on the issue of personal property security in that there was a lien on goods shipped in the case of general average. The conference had also discussed the possibility of a draft Convention on mobile off-shore craft, which basically referred to oil-drilling rigs. A great deal of the discussion revolved around the issue of whether fixed drilling rigs should be considered to be craft.

37. — Referring to the relationship between the 1993 Geneva Convention on Maritime Liens and Mortgages and Unidroit's projected Convention on International Interests in Mobile Equipment, he indicated that the C.M.I. had originally thought that the existence of the 1993 Convention and the rules it contained meant that ships should be excluded from the scope of the Unidroit exercise. The C.M.I.'s main problem lay in the area of maritime liens which were very particular to maritime law. However, he recognised that the maritime lien was only one of a whole category of liens arising by operation of law, whether national or international, the relationship of which with the international interest that it was the intention of Unidroit to create would have to be considered as a whole. As he saw it, the really important issue was that of the mortgage. In the opinion of the C.M.I., no additional rules on this matter were needed either for ships or for ships under construction. However, he believed that there was a possibility that ships might ultimately benefit from inclusion in the projected Unidroit Convention if they could be shown to fit into the system created thereunder, but this could only be seen at such time as the system was complete. For ships he explained that the system for registering a mortgage was relatively simple: the register did not cover individuals but only ships. If the projected Unidroit Convention were to be based on an asset-based registration system, this might be expected to contribute to a broadening of the application of the mortgage principle and might even lead to an improvement of the law governing ship mortgages. However, this could only be seen at such time as the projected Convention's system was complete, at which time it would be necessary to make sure it would not interfere with the application of the 1993 Convention and the national laws which more or less corresponded to the provisions of the Convention. In this sense he saw a parallel between the C.M.I.'s interest in seeing to what extent the projected Convention might improve the present situation relating to ships and the keenness of the aviation industry to see the projected Convention improve on the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, which in practice was no longer working.

38. — The same reasons which had led the C.M.I. to monitor closely Unidroit's work on the development of its projected Convention on International Interests in Mobile Equipment would also cause it to wish to monitor any work that UNCITRAL might decide to undertake on receivables financing. He also anticipated C.M.I. interest in UNCITRAL's new project on the negotiability and transferability of rights in goods, especially that part of it which would relate to electronic bills of lading. In this connection he recalled that the C.M.I. had at its 1990 Paris conference adopted Rules on Electronic Data Transfer as to Bills of Lading, although he noted that these rules were very rough, a reflection of the feeling that it was at the time premature to embark on such a task and that it was better to wait upon future developments. He explained that it was feared at the time that the employment of such electronic data transfer in respect of bills of lading would not in practice materialise because of the expenditure involved and the practical problem that not every shipowner or carrier had a terminal at the time. Subsequent developments however tended to point to not only shipowners and carriers but even ships themselves having such terminals in a short time.

39. — *The representative of UNCITRAL*, responding to *the Chairman's* invitation to reply to the points raised by the representative of the Hague Conference, indicated that he only represented the UNCITRAL Secretariat and not the Governments that made up UNCITRAL's membership and suggested that it was Governments that should be targeted in any attempt to influence the decision-making process as regards the attribution of subjects among the different international Organisations. He pointed out that the UNCITRAL Secretariat could make suggestions but that it was for the Commission to decide.

40. — Referring to the proposal made by the representative of the N.C.C.U.S.L. that such inter-Organisational co-ordination meetings should take place annually, he indicated that the UNCITRAL Secretariat welcomed such an idea for avoiding duplication of work, all the more so given current budgetary restrictions. He suggested that, with a view to saving limited resources, such a meeting might be organised in conjunction with a meeting of one or other of the interested Organisations, whether it be UNCITRAL or Unidroit or some other Organisation. Referring to the N.C.C.U.S.L. representative's other suggestion, for the preparation of an annual report detailing the activities of those international Organisations involved in the field of international secured financing and related projects, he recalled what the C.M.I. representative had said about the lengthy reports which UNCITRAL prepared, at least once every two years, on the work of international Organisations working in the field of the unification and harmonisation of international commercial law. He indicated that UNCITRAL invited all international Organisations involved in this field to contribute to this report. Not all Organisations responded, in which case the Secretariat itself combed the publications of the relevant Organisations in order to produce as comprehensive a report as possible. This was a practice which the Secretariat intended to continue, since it was a function which the Commission wished it to perform.

41. — As a token of UNCITRAL's commitment to the principle of the need to avoid duplication of work, he cited the way in which the Secretariat circulated its reports on receivables financing, even in draft form, among the other interested Organisations and, even after these reports were finalised, it still welcomed comments which could thus be brought to the attention of the Commission at its sessions. This was a practice which it also intended to continue.

42. — Referring to the comments made regarding the way in which choice of law and jurisdiction rules were included in instruments under consideration by UNCITRAL working groups, he recalled that decisions within UNCITRAL were not made by majority voting but on the basis of consensus. He pointed out that it was this very consensus which required UNCITRAL's instruments to contain such choice of law and enforcement rules where otherwise the effect would be that the substantive law rules contained in such instruments would suffer. To take the example of receivables financing and in particular the question of the third party effects of an assignment of receivables, he pointed out that certain substantive law solutions, however desirable they might be, might in the end turn out not to be feasible, in which case it would be normal for Governments to expect UNCITRAL to try to address such problems in choice of law rules. The UNCITRAL Secretariat therefore always welcomed input from the Hague Conference and would be continuing to send it drafts of its reports for this purpose. He stressed that it was not that his Organisation set out to address choice of law issues but argued that, if efforts to achieve unification of law were to make sense, one had to address a particular problem and, if at the end of the day a substantive law solution proved not to be feasible, there could be no justification for not seeking a possible choice of law solution merely on the ground that it thus became a matter of choice of law and no longer of substantive law. This he believed to reflect the consensus within UNCITRAL.

43. — Turning to the manner in which topics were taken up by UNCITRAL, he stressed the fact that, whereas this was the third year the UNCITRAL Secretariat had submitted a report on receivables financing, no decision had yet been taken on the question of whether UNCITRAL should start work on the subject, which was, he suggested, proof of the UNCITRAL Secretariat's caution and the consideration it gave to the need to avoid duplication of work. He suggested that evidence of this caution was in particular to be seen in the way UNCITRAL had welcomed co-operation with Unidroit

on this matter in view of the fact that that Organisation had already prepared a number of texts in this area of the law in recent years.

44. — *The representative of the I.C.C.* saw the root of the problem as lying in the perception shared by many conflicts lawyers that conflicts could stand on its own as a subject. He suggested that it was impossible to detach conflicts of law issues from the substantive law issues in a given area of the law. He noted that the core of the problem was to be seen in conflicts textbooks where, notwithstanding the best efforts of the authors, their inability to be familiar with absolutely every branch of substantive law inevitably tended to make their treatment of the conflicts of law issues in given areas less than totally satisfactory. It was difficult, he suggested, to give a satisfactory exposition of the conflicts of law issues in commercial law without being a commercial lawyer. This was why in his opinion the drafting of a sensible conflicts rule required the combined expertise of conflicts lawyers and specialists in the area of substantive law under consideration. It was therefore necessary for the two to work together.

45. — *The Chairman* noted that just six years earlier the Governments attending the diplomatic Conference for the adoption of the Unidroit Convention on International Factoring had signally failed to come up with a solution to the question of third party rights, judging the whole matter to be too difficult. While the possibility of a conflicts of law solution was not examined in any depth on that occasion, his recollection of the seemingly endless number of alternative conflicts of law rules for different aspects of assignments suggested by no less an authority than Professor Ernst Rabel, however many years ago, made him wish UNCITRAL every success if it decided to take that route.

46. — By way of conclusion, he took his cue from previous speakers in suggesting that this should be seen as the first of a regular series of such meetings. He believed that a great deal had been learned from the meeting. Proper co-ordination between international Organisations required a regular supply of information. UNCITRAL of course performed an invaluable service in the report it normally put out every two years on the activities underway in the different international Organisations on the unification and harmonisation of international commercial law. Unidroit too sought to play its own part in this process, in an area going well beyond that of commercial law, by the publication of its *Digest of Legal Activities of International Organisations and other Institutions*. This had now run to its tenth edition and was regularly updated at least every two years. He pointed out that the information provided on this occasion would moreover be reflected in the report on the meeting, which would thus serve as a first contribution to the building up of information in this special area of the law.

47. — The purpose of such information should, he suggested, be seen in terms of mutual assistance rather than merely in terms of the risk of duplication. He was not sure whether the whole blame for duplication could be laid at the door of Governments, although he did note a trend for certain Governments to prefer to deal with certain subjects in certain *fora*. One obvious example of this was the way in which Governments tended in maritime law matters to turn to the International Maritime Organisation and U.N.C.T.A.D. This reflected the way in which certain Organisations had a different flavour attaching to them in the eyes of Governments which, he suggested, was one reason why a particular Government would choose to go to one Organisation rather than to another. He nevertheless believed that the Secretariats of these different Organisations had a role to play in avoiding any resultant overlapping. Referring to the role that information might play in the lending of mutual assistance, he had been most interested to hear how the World Bank's Private Sector Development Department had in its efforts to assist the modernisation of the secured transactions laws

of a number of its borrowing member countries taken steps to circulate in these countries the results of the E.B.R.D. and Unidroit's efforts in this field. He moreover particularly appreciated the spirit of generosity in which the representatives of both the World Bank Private Sector Development Department and the E.B.R.D. had offered to assist the Unidroit Secretariat in the enquiry it had been asked to launch with a view to identifying specific problem areas capable of being addressed in the model law that Unidroit was considering preparing in the general field of secured transactions. The wealth of experience accumulated by both these Organisations in the course of their work in this area would be invaluable in the enquiry Unidroit had been asked to carry out. In the same way he pledged that Unidroit would in due course be only too happy to make available to these same Organisations the results of its enquiry, thus emphasising the two-way flow of information which he regarded as vital. The idea of mutual assistance, moreover, could not fail to be advanced by initiatives of the kind announced by the representative of the I.C.C. in bringing together representatives of the various Organisations in order to examine the criteria which determined the choice of their respective activities.

48. — Whilst he was not sure it was necessary for the various Organisations to meet at regular fixed intervals to discuss all these matters, he did believe that such meetings were vital at an appropriate time, that is when there were serious matters to be discussed and information to be exchanged, especially in such complex areas as the law of personal property security where so much was going on both at the national and the international level.

49. — Finally, he echoed what he had said at the beginning of the meeting regarding the absolute need for inter-governmental Organisations to work in ever closer co-operation with non-governmental Organisations, and in particular those representing practitioners like the I.B.A., the I.C.C. and the C.M.I., which could in a way be seen as representing the interests of the ultimate consumers of their work. In expressing his thanks to all the representatives of the Organisations who had found the time to attend the meeting, he expressed his particular appreciation to the representative of the I.B.A. for the professional sacrifices he had had to make in order to be present.

APPENDIX

MEETING OF INTERNATIONAL ORGANISATIONS CURRENTLY INVOLVED IN THE PREPARATION OF LEGISLATION IN THE FIELD OF PERSONAL PROPERTY SECURITY

(Rome, 29 November 1994)

AGENDA

1. - Election of the Chairman
2. - Approval of the draft agenda
3. - Exchange of information regarding those current activities of international Organisations involving the preparation of legislation in the field of personal property security
4. - Any other business

