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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

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

(established by the Drafting Group of the Sub-committee on 19 December 1995 pursuant to the
decisions taken by the Sub-committee of the Study Group at its third session)

Rome, January 1996

INTRODUCTION

1. - The Drafting Group of the Sub-committee of the Unidroit Study Group for the preparation of uniform rules on international interests in mobile equipment held its third session at St John's College, Oxford on 18 and 19 December 1995. The session was opened at 9.30 a.m. on the 18th by Mr R.M. Goode, Professor of English Law in the University of Oxford and member of the Unidroit Governing Council, who chaired the session in his capacity of chairman of the Sub-committee.

2. - The session was also attended by the following other members of the Sub-committee:

Mr K. F. Kreuzer

Professor of Law in the University of Würzburg

Mr H. Synvet

Professor of Law in the University of Paris II
(Panthéon - Assas)

3. - The main business of the session was the completion of the broad framework of a first set of draft articles of the proposed Unidroit Convention on International Interests in Mobile Equipment on the basis of the decisions taken by the Sub-committee at its third session. The basic working document of the session was a revised version of the text that had been submitted to the Sub-committee at its third session (cf. Study LXXII - Doc. 18) prepared by the Chairman of the Sub-committee to take account of the decisions taken at that third session (cf. Study LXXII - Doc. 21).

4. - At the conclusion of its work, on 19 December, the Drafting Group established a *first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment*. This text is set out hereunder. It will be noted that, for reasons of time, the Drafting Group has still not been able to give headings to each of the articles. This is a matter to which it intends to revert on the occasion of a future meeting. For the same considerations of time, neither was the Drafting Group able to realise its aim of producing a French text that was both fully comprehensible to French speakers read on its own and fully consistent with the English text. It should be noted that it is the intention of the Unidroit Secretariat, together with the French-speaking members of the Drafting Group, to remedy this problem in time for the second session of the Study Group with a revised version of the French text set out hereunder. It will further be noted that the text contains a number of provisions that might be expected to find their rightful place in the Final Clauses of the future Convention. These provisions have been identified by an asterisk.

5. - The purpose behind the new Article 1(1), modelled on Article 2 of the Convention for the European Patent for the Common Market (Official Journal of the European Communities 30 December 1989, No. L 401/10), was to make it clear that the international interest created by the future Convention was to be accorded priority throughout all Contracting States over purely national interests.

6. - In deference to the wish expressed by the Sub-committee, the Drafting Group, except in the title and in Article 1, replaced the term "equipment" by the term "object". On the other hand, it proved impossible for it to come up with a term more appropriate than "interest", which was consequently retained. Another terminological change made by the Drafting Group with a view to satisfying the Sub-committee's request for the employment of neutral terminology consisted in the

replacement in the English text of the terms "debtor" and "secured party" by the terms "chargor" and "chargee" respectively.

7. - The use of square brackets around the language contained in the second part of Article 4(i) and in Article 5(3)(b), intended to distinguish between serial number registration and debtor name registration for the limited purposes of Article 19(4), reflected the Drafting Group's feeling that, given the Sub-committee's decision to concentrate essentially on serial number registration, these provisions could probably be deleted. It was agreed to refer this matter for decision to the Study Group.

8. - Another provision where the Drafting Group's use of square brackets denoted its feeling that this was again a matter that should be referred for decision to the Study Group was Article 7(1). However, the difference here was that the Drafting Group took the view that the issue was such as to merit being framed in the form of alternatives. The problem which the Drafting Group saw with the previous formulation of this provision, set out in Alternative I, was in its failure to address the question of which regimen should govern relations between parties who had not agreed to make Chapter III applicable to their agreement. The purpose of the alternative formulations proposed by the Drafting Group was to indicate the need for the Study Group to determine whether the provision in question was to be an opt-in clause or an opt-out clause and, depending on the answer, to spell out what were to be the legal effects of such a determination.

9. - The question was raised by one member of the Drafting Group as to whether the reference to the applicable law in Article 11 might not in certain jurisdictions have the effect of compromising the international uniformity of the rights and remedies of parties to agreements creating international interests. It was agreed that this was a matter that might be brought to the attention of the Study Group.

10. - It was further agreed that, in the context of Articles 14(4) and 15(2), consideration should be given to the question as to whether, in the absence of any indication by the parties of an expiry date for a registration or an amended registration, provision should be made for a limit to the duration of the same.

11. - The Drafting Group was agreed that Article 19 as redrafted would need to be examined carefully by the Study Group so as to ensure that its provisions fitted all the types of agreement it was envisaged as covering, in particular a situation where neither of the two agreements involved in the particular priority dispute was a security agreement.

12. - With regard to the view taken by the Sub-committee at its last session to the effect that the international interest should also be effective as against the chargor's trustee in bankruptcy and unsecured creditors under the proposed Convention where it had 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 (cf. Study LXXII - Doc. 21, § 12 *in fine*), the Drafting Group felt upon reflection that such a rule would not be appropriate in the future Convention, first, because it would be inconsistent with the autonomous character of the international interest proclaimed in Article 1(1) and, secondly, because it would follow automatically in that, if the international interest had not been registered, it could only take effect under the applicable law.

13. - The new Article 19(6) was designed to make it clear that the provisions of Article 19(4)(a) were in no way intended to interfere with special rules of insolvency law (rules preserving

preferences and the like). This was in line with the view taken by the Sub-committee at its last session (cf. Study LXXII - Doc. 21, § 36).

14. - It will be noted that the Drafting Group judged it opportune to introduce a new chapter heading: Chapter VII: *Transfer of an international interest*, in recognition of what it saw as the need to be able to transfer international interests. The fact that this chapter heading is presented inside square brackets is intended to indicate that it was felt to raise a matter that merited discussion by the Study Group. The idea would be that, where the underlying rights of the chargee were transferred to another party under the applicable law, then that party should be able to apply to register its interest in the international register in place of the original chargee and, following such registration, to avail itself of the rights and remedies provided under the Convention. It was suggested that inspiration for the drafting of appropriate provisions might be sought in Article 39 of the aforementioned Community Patent Convention.

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(established by the Drafting Group on 19 December 1995
pursuant to the decisions taken by the Sub-committee at its third session) ⁽¹⁾

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

1. - This Convention provides for the creation and effects of an international interest in mobile equipment. The international interest shall be of an autonomous character and shall have effect throughout the territories of Contracting States.

2. - For the purposes of this Convention an international interest in mobile equipment is an interest in an object of a kind listed in Article 2:

- (a) granted by a chargor under a security agreement;
- (b) retained by a seller under a title reservation agreement; or
- (c) retained by a lessor under a leasing agreement.

Article 2

1. - This Convention applies in relation to objects of any of the following kinds:

- (a) aircraft;
- (b) aircraft engines;
- (c) [registered ships];
- (d) oil rigs not intended to be permanently immobilised;
- (e) containers [with a cubic capacity of not less than x];
- (f) railway rolling stock;
- (g) satellites;
- (h) [other?].

⁽¹⁾ The use of an asterisk (*) against a particular provision indicates that the provision in question is envisaged as part of the Final Clauses of the future Convention.

* 2. - [Add provision for amendment from time to time of list set out in Article 2 (1) by designated procedure pursuant to Article X]

Article 3

[Add provision on connection to a Contracting State]

Article 4

In this Convention:

- (a) "international interest" means an interest to which Article 1 applies;
- (b) "prospective international interest" means an interest that will come into existence as an international interest upon the chargor, seller or lessor acquiring rights in the object to which the agreement providing for the interest relates;
- (c) "object" means an object of a kind listed in Article 2 (1);
- (d) "agreement" means a security agreement, a title reservation agreement or a leasing agreement;
- (e) "security agreement" means an agreement by which one person ("the chargor") grants to another person ("the chargee") an interest ("security interest") in or over an object to secure the performance of an existing or future obligation;
- (f) "title reservation agreement" means an agreement by which one person ("the seller") agrees to sell an object to another person ("the buyer") on terms that ownership does not pass until performance of the buyer's obligations;
- (g) "leasing agreement" means an agreement by which one person ("the lessor") leases an object (with or without an option to purchase) to another person ("the lessee") for a period of not less than [three] years;
- (h) "Rules" means rules laid down by the body referred to in Article 5 (2);
- (i) "registered" means registered in the international register against the object or objects to which the agreement providing for an international interest relates [or, for the purpose only of Article 19 (4), registered either against such object or objects or against the name of the chargor, buyer or lessee];
- (j) "unregistered" means not registered as stated in the preceding subparagraph;
- (k) "registrar" means the registrar of the International Registry;
- (l) "registration notice" means the notice in writing referred to in Article 14 (2);
- (m) "registration amendment notice" means the notice in writing referred to in Article 15 (1);

(n) "registration discharge notice" means the notice in writing referred to in Article 15 (3);

(o) "writing" means an authenticated record of information (including information sent by teletransmission) which is in tangible form.

CHAPTER II

THE INTERNATIONAL REGISTER

Article 5

1. - An international register shall be established for the purpose of registering international interests in conformity with this Convention.

2. - The international register shall be located in such place or places and managed by the registrar under the direction of such body as shall be determined from time to time by the Governing Council of the International Institute for the Unification of Private Law (Unidroit) and shall be operated in accordance with the Rules.

3. - The international register shall be arranged so as to accommodate:

[(a)] registration by reference to the serial number or other identification mark of the object to which the international interest relates [; and

(b) for the purpose only of Article 19 (4), registration by reference to the name of the chargor, buyer or lessee of the object].

4. - [Other provisions to be inserted].

CHAPTER III

CONDITIONS FOR THE APPLICATION OF CHAPTERS IV - VII

Article 6

Subject to the provisions of Article 17, Chapters IV to VII of this Convention apply in relation to an international interest only where the agreement providing for the interest:

(a) is in writing;

(b) relates to an object in which the chargor, seller or lessor has rights;

(c) describes the object in a manner sufficient to enable it to be identified;

(d) in the case of a security agreement, states the obligations secured.

CHAPTER IV

EFFECTS OF AN AGREEMENT FOR AN INTERNATIONAL INTEREST AS BETWEEN THE PARTIES

Article 7

[Alternative I

1. - This Chapter applies to an agreement only where the parties have so agreed in writing, whether in the agreement or otherwise.

Alternative II

1. - The parties may agree in writing to exclude, wholly or in part, any right or remedy conferred on the chargee, seller or lessor by this Chapter.

* 2. -] This Chapter has effect subject to the provisions of the Unidroit Convention on International Financial Leasing where applicable.

Article 8

The parties may provide in their agreement as to what constitutes default giving rise to the remedies specified in Articles 9 to 11.

Article 9

1. - In the event of default by the chargor under a security agreement, the chargee may:

(a) obtain a court order for sale of any object charged to it and payment of the proceeds to the chargee, or otherwise obtain the proceeds and other benefits of realisation of the object;

(b) take possession of any such object; or

(c) sell or grant a lease of any such object on reasonable terms.

2. - At any time after default by the chargor, the parties may agree or the court may on the application of the chargee order that ownership of any object charged to it shall vest in the chargee in full satisfaction of all or any part of the chargee's claims under the security agreement.

3. - In exercising its powers under the preceding paragraph the court shall have regard on the one hand to the value of the object to be vested in the chargee and on the other to the amount of the obligation which is to be satisfied by the vesting.

* 4. - A Contracting State may at any time make a declaration specifying the courts or tribunals (including arbitral tribunals) empowered to make an order under paragraph 2.

5. - At any time before sale of the charged object or the making of an order under paragraph 2, the chargor may redeem it by paying the full amount secured by the security interest, subject to any lease granted by the chargee under sub-paragraph (c) of paragraph 1.

6. - A sale by the chargee in exercise of its rights under paragraph 1 or pursuant to an order of the court under that paragraph shall pass title to the buyer free from any other international interest over which the chargee's international interest has priority under the provisions of Article 19. Where such a sale results in a surplus above what is due to the chargee, the surplus shall be paid by the chargee to the holder of any other registered international interest ranking immediately after the chargee's international interest or, if there is none, then to the chargor.

Article 10

In the event of default by the buyer under a title reservation agreement or by the lessee under a leasing agreement, the seller or lessor, as the case may be, may take possession of any object to which the agreement relates.

Article 11

The parties may agree upon any additional remedies for default by the chargor, buyer or lessee to the extent that they are consistent with the preceding provisions of this Chapter and are permitted by the applicable law.

Article 12

1. - Any remedy provided by this Chapter shall be exercised in conformity with the procedural law of the place where exercise of the remedy is sought.

* 2. - A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that where the charged object is situated within its territory:

(a) the chargee may exercise the remedy conferred by Article 9(1)(b) only pursuant to an order of the court;

(b) the provisions of Article 9(1)(c) shall not apply to such an object.

Article 13

Except as provided by the preceding provisions of this Chapter the rights of the parties to an agreement shall be governed by the applicable law.

CHAPTER V

REGISTRATION OF AN INTERNATIONAL INTEREST

Article 14

1. - An international interest may be registered in the international register where:
 - (a) the agreement relating to it conforms to the provisions of Article 6; and
 - (b) in the case of a security agreement, the chargor has consented in writing to the registration.
2. - A party to an agreement wishing to register an international interest shall transmit or deliver to the registrar in conformity with the Rules:
 - (a) a notice in writing ("registration notice"); and
 - (b) in the case of a security agreement, a copy of the chargor's written consent to the registration.
3. - Registration of an international interest shall take effect when a registration notice has been received by the registrar and the international registration system has allotted a registration number and recorded the date and time of registration.
4. - Registration of an international interest shall remain effective up to the date or until expiry of the period specified in the registration notice.
5. - A registration is valid despite an irregularity in the registration notice unless the irregularity is seriously misleading. The irregularity may be seriously misleading whether or not anyone is actually misled by it.

Article 15

1. - A chargee, seller or lessor wishing to have its registration of an international interest amended shall transmit or deliver to the registrar in conformity with the Rules:
 - (a) a notice in writing ("registration amendment notice"); and
 - (b) in the case of a security agreement, a copy of the chargor's written consent to the amendment, except where the amendment is covered by a prior written consent of which a copy has been transmitted or delivered to the registrar in conformity with the provisions of this or the preceding article.

2. - An amended registration shall take effect when recorded by the international registration system and remain effective up to the date or until expiry of the period specified in the registration amendment notice.

3. - The registration of an international interest shall be discharged on the transmission or delivery to the registrar, in conformity with the Rules, of a notice in writing ("registration discharge notice") signed by or on behalf of the chargee, seller or lessor.

Article 16

A certificate of registration which records on its face that it was issued by the registrar shall be *prima facie* evidence of the [fact and time] [fact, time and order] of registration without the need to prove the authenticity of the certificate.

Article 17

Articles 14 to 16 apply *mutatis mutandis* to a prospective international interest as they apply to an international interest.

[*Article 18*

Liability of International Registry]

CHAPTER VI

EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Article 19

1. - A registered international interest has priority over a subsequently registered international interest except to the extent of any [value added] [advances made] by the holder of the previously registered interest without a pre-existing obligation to do so and at a time when it had actual knowledge of the subsequently registered interest.

2. - A registered international interest has priority over an unregistered international interest, even if the holder of the registered interest acquired it after the creation of the unregistered interest and with actual knowledge of it.

3. - A registered international interest has priority over any other interest acquired from the chargor, buyer or lessee at a time when the international interest was registered.

However, a registered international interest is subordinate to an interest which is not an international interest if the latter was acquired at a time when the international interest was unregistered, whether or not the person by whom it was acquired had actual knowledge of the international interest.

4. - (a) An international interest is valid against the trustee in bankruptcy and creditors of the chargor, buyer or lessee, including creditors who have obtained an attachment or execution, if prior to the bankruptcy, attachment or execution (as the case may be) the international interest has been registered in conformity with this Convention.

(b) For the purposes of this paragraph "trustee in bankruptcy" includes a liquidator, administrator or other person appointed to administer the estate of the chargor, buyer or lessee for the benefit of the general body of creditors.

5. - For the purposes of this article, where a registered prospective international interest becomes an international interest as the result of the chargor, seller or lessor acquiring rights in the object to which the interest relates, the international interest shall be treated as registered from the time of registration of the prospective international interest.

6. - Nothing in this article shall affect any special rules of insolvency law applicable to the insolvency of the chargor, buyer or lessee.

[CHAPTER VII

TRANSFER OF AN INTERNATIONAL INTEREST]

[CHAPTER VIII

SPECIAL PROVISIONS FOR AIRCRAFT AND AIRCRAFT ENGINES]