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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
as revised by the same on 4 March 1996):

COMMENTS

(by the Cosmic Space Agency of the Russian Federation
and the Banking Federation of the European Union)

Rome, April 1996

INTRODUCTION

The 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, was subsequently circulated for comments among members of the Study Group and those international Organisations and professional associations represented thereon by observers. As of 4 April 1996 comments had been received from the Cosmic Space Agency of the Russian Federation and the Banking Federation of the European Union. This paper reproduces these comments, set out hereunder.

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COSMIC SPACE AGENCY OF THE RUSSIAN FEDERATION

PRELIMINARY REMARKS OF THE COSMIC SPACE AGENCY OF THE RUSSIAN FEDERATION CONCERNING THE FIRST SET OF DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (*)

Re Article 2, paragraph 1 (g)

(1) After the word "satellites" add "cosmic apparatuses, cosmic ships and other cosmic objects operating in the cosmic space".

(2) Insert new sub-paragraphs:

"(h) scientific apparatuses and other equipment allotted on satellites, cosmic apparatuses, cosmic ships and other cosmic objects;

(i) working time of scientific apparatuses and other equipment allotted on cosmic objects which are operating in cosmic space."

(*) In communicating these preliminary remarks, Mr V.A. Kouvshinov, a member of the Study Group, noted that he had found great interest in the Unidroit draft on the part of the Cosmic Space Agency of his country. He pointed out that Russia's cosmic industry, as was well-known, possessed high-level technology and was becoming ever more involved in foreign economic activity. These preliminary remarks had been conveyed to Mr Kouvshinov by the Cosmic Space Agency, a Government body, and by some business people working in the Russian cosmic space industry. The Cosmic Space Agency had also expressed its wish to set up a small group of experts to co-ordinate the position of the Russian cosmic space industry and that of the Aviation Working Group (many of the members of which were, to a greater or lesser degree, involved in the cosmic space industry and its financing in Western countries) in relation to the future Convention.

Re Article 4 (g)

Exclude the words "for a period not less than [three] years" since there are some kinds of high-value cosmic equipment with a short-life use.

Re Article 5 (4)

Insert provisions reflecting:

(1) the idea of the "hybrid" registrar encompassing a central registrar and national registrars [State cosmic agencies] registering international interests in cosmic apparatuses and cosmic ships;

(2) the idea of the availability of a separate registrar of scientific apparatuses and other equipment allotted on cosmic objects operating in cosmic space (along the lines of the idea put forward for a separate registrar for aircraft engines);

(3) the idea of the international registrar replacing all other registrars registering interests except (i) registrars of nationality of a cosmic object and (ii) the United Nations Registrar of cosmic objects.

Other remarks

(1) Insert a provision indicating that it is not possible to place limitations on the amount that may be secured under a security agreement.

(2) Insert a provision concerning the right of a lessor or a seller of a cosmic apparatus or a cosmic ship to equip an object with technical devices enabling it to recover possession of the object in the event of a lessee or buyer's default or in the event of the termination of a leasing agreement or a title reservation agreement (conditional sale).

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BANKING FEDERATION OF THE EUROPEAN UNION

General comments

All the members of the Banking Federation agree that an international register of guarantees would provide a useful source of information for credit institutions. Beyond this function, most of our members welcome the establishment of a harmonised interest in mobile equipment used internationally, since this would serve to put financing on a more secure footing. At the same time, however, it should be ensured that the registration of the interest

does not lead to any significant increase in costs for the acceptance and administration of security. The register must also be easily accessible. In addition, registration must not be time-consuming, since it may be a condition for disbursement of a loan. Finally, already existing national interests must not be placed at a disadvantage by an international interest.

Some of our members fear, however, that the fact that the new international interest will co-exist alongside national interests likely to relate to the same goods and will be enforceable in the signatories' countries, may well give rise to disputes or even litigation. The effectiveness of national interests may well be undermined in certain cases. Moreover, one of these members deems that two cases are confused, i.e. the one of the chargor who is constituting a security (subordinate right *in rem*) for the benefit of the chargee and, on the other hand, the case of the seller and the lessor who are maintaining their right of ownership in their own interest. The method used, which treats in the same way a subordinate right *in rem* over movable property (mortgage on aircraft, collateral security) and a right of ownership, will most likely result in inextricable difficulties, in particular with regard to bankruptcy law.

Specific comments

Re Article 2

With regard to the scope of the Convention, it would be advisable to identify the objects to which it is to apply as clearly as possible. Over and above those listed in Article 2(1) of the draft Convention, we consider, given the frequency of cross-border operations and the level of financing each object involves, that it would be appropriate to include lorries, omnibuses and construction machinery. The inclusion of non-registered ships would also be desirable. Application of the Convention to these objects could be made conditional upon a certain minimum value being exceeded.

As for the envisaged inclusion of aircraft, we note that the Geneva Convention on the International Recognition of Rights in Aircraft already provides for an internationally-recognised interest (registered lien) in this area. Notwithstanding the fact that the Geneva Convention dates back to 1948, many countries have signed it, during the last few years in particular. The legal situation here is therefore, in our view, similar to that for registered ships. The Unidroit Convention, however, offers the advantage of allowing the establishment of a uniform interest in aircraft engines as well. Practice under the Geneva Convention is non-uniform in this area, so that the replacement of engines in the financing of aircraft can cause difficulties. The crucial advantage of the Geneva Convention in aircraft financing is, as we see it, that in its present form it poses no liability problems for a registered lienholder. In order to avoid this in the establishment of a new international interest, this issue should be dealt with in the planned Unidroit Convention. A clear delimitation of the planned Convention as compared with the Geneva Convention is at any rate required.

Re Article 6

From the current wording, it is not necessary for the chargor and the chargee to have agreed that the interest they have created by contract will become an international interest in accordance with the draft Convention. The prior agreement of the parties on this point would seem necessary.

Re Article 7

Variant II has the advantage that it would not create a legal vacuum; it is therefore preferable to Variant I.

Re Article 9

Enforcement of the rights of the chargee, referred to under Articles 9(1)(b) and 9(1)(c) of the draft Convention, should be in conformity with the law of the country in which the object is charged.

On Article 9(6), it is appropriate for the chargor to have been given the possibility of redeeming the charged object before the sale or before the making of a court order vesting ownership in the chargee. It should however be stated that the costs and fees incurred by the chargee before the debtor/chargor redeems his debt will be charged to the latter.

Concerning Article 9(7), the mechanism provided for in the event that the sale results in a surplus above what is due to the chargee, implicitly, but necessarily, rules out any procedure whereby the sale surplus could be held by a third party appointed to this end, for example an official receiver, who would allot it to the creditors in accordance with their ranking. Difficulties are likely to arise in the following cases:

- bankruptcy of the first ranking creditor before he has paid the surplus to the next ranking chargee;

- the existence of a national interest, which would be eliminated if the surplus paid by the creditor remained part of the assets of the chargor.

Re Article 14

Since it is stated that the consent of the chargor must be given "in writing", a definition of "in writing" is required; Article 4(o) must therefore be kept unchanged. This definition is indeed indispensable if certainty is to be ensured in limiting the scope of the Convention.

Re Article 15

In Article 15(3), an indication should be given of the conditions to be met and the procedure to be followed for registration discharge in the event of negligence, default or ill will on the part of the creditor.

Re Article 19

The objective of Article 19(1) is clear: it is to impose a restriction on the rights of the first creditor registered. But the consequences are not clear; clarification is therefore required.

Concerning Articles 19(1), 19(2) and 19(3), it would be preferable to establish separate provisions for title reservation and for leasing. In both cases, it is essential to know "who has priority over who".