

UNIDROIT 1996
Study LXXII - Doc. 26 Add. 1
(Original: English)

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
as revised by the same on 4 March 1996):

COMMENTS

(by Professor C.W. Mooney, Jr. and Mr T.J. Whalen)

Rome, April 1996

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part of the document outlines the various methods and techniques used to collect and analyze data. It highlights the importance of using reliable sources and ensuring the accuracy of the information gathered.

3. The third part of the document focuses on the interpretation and analysis of the collected data. It discusses the various statistical tools and techniques used to identify trends, patterns, and correlations in the data.

4. The fourth part of the document discusses the importance of communicating the findings of the research. It emphasizes the need for clear and concise reporting, as well as the use of appropriate visual aids to enhance the presentation of the data.

5. The fifth part of the document discusses the ethical considerations and responsibilities associated with the collection and use of data. It emphasizes the need for transparency, informed consent, and the protection of personal information.

6. The sixth part of the document discusses the future of data collection and analysis. It highlights the importance of staying up-to-date with the latest technological advancements and the need for continuous learning and development in the field.

7. The seventh part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

INTRODUCTION

Subsequently to the comments to 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 as revised by the same on 4 March 1996 (Study LXXII - Doc. 24), grouped together in Study LXXII - Doc. 26, the Unidroit Secretariat received additional comments from Professor C.W. Mooney, Jr. and Mr T.J. Whalen, members of the Study Group, representing the Department of State of the United States of America. This paper reproduces these comments, set out hereunder.



PROFESSOR C.W. MOONEY, JR. AND MR T.J. WHALEN (REPRESENTING THE DEPARTMENT OF STATE OF THE UNITED STATES OF AMERICA)

We are pleased to submit to the members of the Study Group and the Unidroit Secretariat our preliminary observations on the first set of draft articles (Doc. 24). We thank and commend the Drafting Group and the Sub-committee for their efforts and express our hope that the draft articles will support substantial progress during the second meeting of the Study Group.

We also commend the outstanding efforts of the Aviation Working Group, sponsored by The Boeing Company and Airbus Industrie. We have not yet completed our review of the Aviation Working Group's second memorandum and draft aviation text. Accordingly, these observations address only the draft articles formulated by the Drafting Group. We believe, however, that the Aircraft Working Group's work product will be of great assistance to the Study Group in its upcoming deliberations.

As always, the observations contained in this submission are subject to further input from interested persons and groups in the United States as well as the continuing deliberations of the Study Group.

For convenience, we have set forth our observations in the order of the draft articles. Coincidentally, this approach has resulted in the presentation of our most serious concerns at the end of this document. They relate to Article 19(4) and the Drafting Group's decision to reverse the decision of the Sub-committee on an important principle of validity and priority.

CHAPTER I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Re Article 1

Paragraph 1

In making the following observations, we assume that Article 3 (discussed below) will contain a satisfactory provision dealing with connection to a Contracting State.

The phrase "throughout the territories of Contracting States" seems too limiting. The Convention should have effect on the open seas and in space as well as in non-Contracting States. If the phrase is intended to instruct courts sitting in Contracting States to give effect to the Convention, it also is too limiting. If a court sitting in a non-Contracting State would be willing to apply the Convention, the Convention itself should not dissuade the court from doing so. The Unidroit Convention on International Financial Leasing contains no such limitations.

Paragraph 2

As we have previously noted, the inclusion of "true" leases within the Convention's scope might create problems for lessors in the United States as well as other States. Including true leases might be more feasible if certain issues of substance were treated adequately. This would include a clear provision to the effect that non-compliance with the Convention's registration provisions would not have the effect of invalidating a lessor's interest against a trustee in bankruptcy if the interest were valid under the applicable local law. This issue is discussed below in connection with Article 19.

Re Article 3

We appreciate that neither the Study Group nor the Sub-committee has dealt extensively with the requisite connection between the Convention and a Contracting State. In our September 1995 observations (Doc. 19 Add.), we suggested that the Sub-committee consider a clear directive to a forum court inclined to apply the Convention as to when it should be applied. We explained that the then existing draft rules were ambiguous. The current draft rules remain ambiguous in this respect.

The Study Group may wish to consider the following draft Article 3:

Article 3

1. - This Convention applies if the object of an international interest or the chargor, buyer or lessee is located in a Contracting State.

2. - If the chargor, buyer or lessee is organised under the law of a State or sub-division of a State and the State or sub-division maintains a public record showing the chargor, buyer or lessee to have been organised, the chargor, buyer or lessee shall be deemed to be located in that State. In other cases, the chargor, buyer or lessee is located in the State where its principal executive office is located.

Under this draft Article 3, by its terms the Convention would not apply when neither the forum court, the object nor the debtor is located in a Contracting State. The Convention also would not apply if the only connection to a Contracting State is the location of the forum court. In all other cases - when either the object or the debtor is located in a Contracting State - the Convention would apply.

Re Article 4

We suggest that the Study Group consider the following new definition:

(xx) "applicable law" means the law applicable by virtue of the rules of private international law.

This definition would be used in connection with suggestions made below concerning a suggested new article and Article 19. It is derived in part from the formulation in Article 6(2) of the *Unidroit Convention on International Financial Leasing*.

The suggested definition reflects a somewhat narrow view of the applicable law. However, it would be used only in connection with the rights of third parties under Article 19, which generally are not affected by party autonomy in the selection of the applicable law, and the following new draft article.

Re New Article

We suggest that the Study Group consider the following new article, to be inserted between draft Articles 4 and 5:

Article --

1. - In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international commercial transactions.

2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the agreement of the parties and the general principles on which it is based or, in the absence of such agreement or principles, in conformity with the applicable law.

This new article would address a problem that we mentioned in our September 1995 observations (Doc. 19 Add.), namely, the need to clarify that the applicable law supplements the provisions of the Convention.

The suggested new article is derived substantially from the Unidroit Convention on International Financial Leasing. Although the Study Group has not yet given attention to a preamble, in suggesting this new article we express our hope that the preamble that eventually emerges will mention goals such as the need to promote the validity and enforceability of commercial transactions, international recognition, international harmonisation and international rules as a source of the applicable law.

CHAPTER III

CONDITIONS FOR THE APPLICATION OF CHAPTERS IV - VII

Re Article 6

We note that paragraph (d) of Article 6 could be construed narrowly to require a detailed description of the obligations that are secured by an international interest. It should be sufficient if the description is such that no one could be misled.

CHAPTER IV

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

Re Article 9

Paragraph 7

We note that the last sentence of this paragraph could place an impossible burden on an enforcing party (chargee, seller or lessor). A party might not have any means of determining the actual "rank" of other holders of international interests. For example, if the first-to-register party enforces its interest by selling the object, priority as between the second-to-register and third-to-register parties might turn on whether a loan by the second-to-register party was discretionary or made pursuant to a pre-existing agreement. *See* Article 19(1).

At a minimum, paragraph 7 might make clear that it does not adversely affect any right of the enforcing party to employ judicial procedures to determine the proper claimants and their relative priorities. In addition, in cases of non-judicial enforcement, it should provide that the enforcing party could pay any surplus to other parties in the direct temporal order of registration, leaving it to the various claimants to intervene judicially if they believe a different priority is applicable. Finally, a non-judicially enforcing party should be entitled to rely on the

registry for determining whom to pay, even if a registered interest may have been satisfied or otherwise may be ineffective.

CHAPTER V

REGISTRATION OF AN INTERNATIONAL INTEREST

Re Article 14

We support the future efforts of the Working Group to consider the legal and technical issues raised by the establishment of an international register. In that connection, we wish to express our appreciation to Professor Cuming for his excellent exploratory report (Study LXXIIC - Doc. 1). Although many details concerning the proposed registration process remain to be resolved, we think it important to note a few points concerning Articles 14 and 15 at this time.

Paragraph 2

We believe that the Convention should specify the basic contents of a registration notice. Sub-paragraph (a) is incomplete in this respect. This important matter should not be left to the Rules.

We also question the wisdom of requiring, in sub-paragraph (b), that the chargor's written consent to registration be made a part of the registration. This requirement would seriously jeopardise future efforts to provide an electronic, non paper-based system. The same point applies equally to Article 15(1)(b).

Paragraph 4

We suggest that this paragraph be revised to contemplate the possibility of an earlier discharge under Article 15(3). Adding the words "unless earlier discharged" to the end of the paragraph should suffice.

Other

We suggest that the Study Group consider adding three additional provisions to Article 14 (or to another appropriate article).

First, we suggest consideration of a provision stating the grounds on which the registrar could refuse to accept tendered documents for registration. One of the most persistent problems encountered with registration systems arises from well-meaning but misplaced attempts by administrative staff to guard the gates of the registry too closely. If the proper fee is tendered and the registration notice can be indexed correctly, for example, there is no reason why the registrar should be permitted to refuse the requested registration. If the notice is defective, the party requesting the registration should bear that risk.

Secondly, chargors, buyers and lessees would benefit from a requirement in the Convention that the chargee, seller or lessor discharge a registration when the chargor's, buyer's or lessee's obligations have been satisfied.

Thirdly, the Convention should require the registrar to respond promptly to requests for information concerning the records in the registry.

CHAPTER VI

EFFECTS OF AN INTERNATIONAL INTEREST AS AGAINST THIRD PARTIES

Re Article 19

Paragraph 1

We note that the exception in paragraph 1 implies that a qualifying second-to-register party could achieve priority. Yet the paragraph does not so state affirmatively. In addition, it should be clarified to the effect that a "pre-existing obligation" must not have been entered into with knowledge of the subsequently-registered interest.

We also note that the exception contained in paragraph 1, when applied with paragraph 3, creates the possibility of circular priorities. To avoid this problem, the Study Group may wish to consider an exception to the priority rule in paragraph 3 similar to the one in paragraph 1. Stated otherwise, the holder of an interest (such as an ownership interest) other than an international interest also might be granted seniority over an earlier-registered international interest to the extent that the holder of the international interest makes discretionary advances with knowledge of the other interest.

Paragraph 4

We note that the Drafting Group did not include in the draft an important principle of validity and priority which the Sub-committee agreed to provisionally at its last session. It was agreed that the effect of the Convention should be to validate interests, not to invalidate interests that currently are valid under applicable law. To that end, we understood and reported to our constituencies that the failure to effect an international registration would not render an interest ineffective against attaching creditors and a trustee in bankruptcy if it otherwise would be effective under the applicable law. In paragraph 12 of its introduction to the draft articles (Doc. 22), the Drafting Group gave two reasons for this omission.

First, the Drafting Group observed that the agreed approach "would be inconsistent with the autonomous character of the international interest proclaimed in Article (1)(1)." Secondly, the Drafting Group noted that "it [the agreed priority rule] would follow automatically in that, if the international interest had not been registered, it could only take effect under the applicable law." As to the first point, we submit that there is nothing inconsistent about the Convention recognising that the same agreement may create an interest that is enforceable

under two different regimes. As to the second point, we take it to mean that the Drafting Group did not take exception to the results called for by the Sub-committee's agreed approach. Instead, we understand that the Drafting Group was of the view that the desired result - effectiveness under the applicable law notwithstanding the failure to make an international registration - would occur even without including a special provision in the Convention. However, as we read Article 19(4), it implies strongly that the failure to make an international registration would subordinate the interest to a trustee in bankruptcy. The Convention's priority rules, if adopted by the State whose applicable law otherwise would apply, would override its applicable law.

The principal advantage of the principle agreed on by the Sub-committee is that it largely solves the most difficult problems of the "purely local" transaction and a "test of internationality." As the Sub-committee struggled with those issues, it discovered that the approaches it considered gave rise to uncertainty, enormous complexity or both. In a "purely domestic" transaction, where the chargee, seller or lessee is confident that the object will never leave the jurisdiction, it may choose to rely on domestic law without worrying that a failure to register internationally will invalidate its interest. This is especially important for domestic leasing transactions that currently are not subject to registration in many systems of local law. Alternatively, if the chargee, seller or buyer is concerned that the interest will be ineffective under local law, it can ensure effectiveness by making an international registration.

In sum, we respectfully request the Study Group to reinstate the approach to which the Sub-committee agreed. We emphasise that this approach would not protect an unregistered interest against registered interests and buyers under the priority rules of paragraphs 1, 2 and 3 of Article 19. The Study Group may wish to consider revising paragraph 4 by broadening the scope of sub-paragraph 4(a) or by adding a new sub-paragraph 4(c). Each approach is reflected by language in square brackets in the following formulation:

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 [or if the interest is valid under the applicable law].

(b) * * *

[(c) This Convention does not render invalid as against the trustee in bankruptcy and creditors of a chargor, buyer or lessee an interest that is valid under the applicable law, whether or not the holder of the interest has registered an international interest in conformity with this Convention.]