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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 European Federation of Equipment Leasing Company Associations,  
Mr Peter D. Nescos and Ms Shiva Falsafi)

Rome, September 1996



## 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, Study LXXII - Doc. 26 Add. 1 and Study LXXII - Doc. 26 Add. 2, the Unidroit Secretariat received additional comments from the European Federation of Equipment Leasing Company Associations (Leaseurope) and Mr Peter D. Nesgos and Ms Shiva Falsafi of Winthrop, Stimson, Putnam & Roberts (New York). This paper reproduces these comments, set out hereunder.



### *EUROPEAN FEDERATION OF EQUIPMENT LEASING COMPANY ASSOCIATIONS*

On the occasion of its meeting on 22 April 1996, the Legal Affairs Committee of the Federation considered the first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (Study LXXII - Doc. 24).

Let us straight away reiterate all the reservations already voiced in our letter of 1 August 1995 (regarding Study LXXII - Doc. 16). In other words, LEASEUROPE wishes to confirm in the clearest way possible its concern at seeing the *right of ownership* assimilated, in one way or another, to a *security interest*, whatever form this might take.

For this reason, the Federation is of the view that *the right of ownership as such should be mentioned in the title* of the planned Convention.

#### *Re Article 4 (a)*

The members of the Legal Affairs Committee take the view that *the concept of the "international interest" is too vague to encompass the notion of the right of ownership*, which is the prerogative of the lessor alone. Whether in English or French, the word "interest" or "sûreté" is not adequate to describe the lessor's right.

#### *Re Article 1 (2)(c)*

This sub-paragraph refers to an interest "retained by a lessor under a leasing agreement" ("détenue par un bailleur en vertu d'un contrat de bail"). The members of the Legal Affairs Committee are also of the view that the term "retained" is *inadequate* in so far as the right of ownership vests in the lessor under a contract for the acquisition of the asset which is prior in time to the leasing agreement. It is therefore not a question of the lessor "retaining" this right,

as it would be in the case of a simple security interest, since a leasing agreement does not necessarily involve at the outset of the transaction any transfer of the right of ownership.

*Re Article 9 (1)(b)*

This sub-paragraph provides that "in the event of default by the chargor under a security agreement, the chargee may take possession of any such object or sell or grant a lease of any such object ...". *The first of the two conjunctions "or" should be replaced by "and / or".*

*Re Article 19 (6)*

The members of the Legal Affairs Committee noted that the planned Convention would not affect any special rules of insolvency law applicable in States. *Does this provision not contradict the terms of the Convention of the European Union on Insolvency Proceedings?*

*General remarks*

*Generally, the members of the Legal Affairs Committee doubt whether it will in practice be possible for the planned Convention to be applied in the context of the daily running of their activities.*



**MR PETER D. NESGOS AND MS SHIVA FALSAFI**

The following comments are proffered to improve the first set of draft articles' (hereinafter referred to as the Proposed Convention's) application to mobile equipment placed in space.

*Re Article 1(1)(g)*

The definition of a "satellite" should be expanded to include a satellite's constituent parts as well as all other equipment and goods (including goods manufactured in space) during their presence in space. Possible alternatives to the term "satellite" are such phrases as "space-based property" or "satellites, transponders and other orbiting space equipment, platforms and goods". Additionally, consideration should be given to whether the appurtenant benefits to such equipment, for example domestic licenses to launch and operate space-based equipment, where permitted by applicable law, should be included. The concept of "proceeds" might also be considered for general application in the proposed Convention.

*Re Article 7*

Alternative I is preferable to Alternative II. Alternative I enables the parties to tailor their own unique set of remedies unless they expressly agree in writing to be bound by the remedies

set out in Article 9 of the Proposed Convention. In the light of the unusual legal problems that may sometimes arise in the area of satellite financing, it may be more efficient to allow the parties to draft their own set of comprehensive remedies in applicable agreements.

*Re Article 9(1)*

The self-help remedies provided for in Article 9(1) will be more effective if language is included to require the debtor (i) to collect the collateral and make it available to the secured party, and (ii) to co-operate in obtaining the necessary international and domestic governmental approvals with respect to the sale, lease or other use of the space-based property.

*Re Article 9(1)(a)*

It is highly probable that under many circumstances the secured party will not be able to take actual possession of the collateral. Under such circumstances, Article 9(1)(a) should permit the non-judicial disposition of the collateral by the secured party by permitting constructive repossession.

*Re Article 9(1)(b)*

In order for a chargee to take constructive repossession of satellites that can be controlled by ground commands, it must be able to secure access and command codes. Article 9(1)(b) should provide for the co-operation by the chargor in the chargee's efforts to obtain constructive repossession of the charged object.

*Re Articles 9(1)(b) and 9(1)(c)*

The enforcement of remedies involving constructive repossession, sale, lease or the assumption of operations and control may be illusory in the case of financing of an entire satellite as a result of domestic governmental restrictions on the transferability and assignability of licences to operate a satellite. For this reason, co-operation by the chargor in assigning and transferring requisite domestic governmental approvals is desirable.

*Re Article 9(2)*

This Article would not be applicable to space-based equipment since outer space is beyond the claims of territorial sovereignty of any State.

*Re Article 14 and 14(1)*

Registration requirements should be mandatory in all circumstances including the registration of rights created under a security agreement. Requiring the consent of the chargor to the registration of an interest created under a security agreement, as required by Article 14(1), undermines the Proposed Convention's goal of eliminating unpredictability regarding the perfection of security interests in space-based property (as well as other equipment covered by the proposed Convention).

*Re Article 14 and 14(5)*

This Article does not provide any guidance for determining what constitutes a “seriously misleading” registration notice.

*Re Article 15*

This Article does not state what the consequences are in the event of an irregularity in either the registration amendment notice or the registration discharge notice.

In addition to the suggested changes to specific Articles, the proposed Convention should provide for the discharge of international interests in space-based property returned to earth or the continuation of perfection through a transfer of such international interests to an appropriate register for terrestrial-based mobile equipment.

Extending the application of the Proposed Convention to space-based property will help promote satellite financing. We commend the Institute’s efforts in this very important initiative.