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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

EXTRACT

from the report on the 75th session of the Unidroit Governing Council

(prepared by the Unidroit Secretariat)

Rome, August 1996

INTRODUCTION

One of the items on the agenda at the 75th session of the Governing Council of Unidroit, held in Rome at the seat of the Institute from 19 to 22 June 1996, was consideration of the work accomplished by the Study Group. In the course of this consideration a number of proposals were made by members of the Council. It was agreed that these should be brought to the attention of the Study Group. This paper seeks to give effect to that decision by reproducing hereunder that part of the report on the Council session at which these proposals were raised.



EXTRACT FROM THE REPORT ON THE 75TH SESSION OF THE UNIDROIT GOVERNING COUNCIL

Item 9 - Study Group for the preparation of uniform rules on international interests in mobile equipment (C.D. (75) 9; Study LXXII - Docs. 16, 18, 21, 22, 23, 24, 25)

(a) Background

In introducing this agenda item, Mr Stanford (Unidroit Secretariat) briefly described the principal stages that had marked the progress made on the subject since the last Council session. First, in May 1995, the Secretariat had received the first of two substantial memoranda prepared jointly by Airbus Industrie and the Boeing Company on behalf of an aviation working group. This memorandum had been prepared at the request of the Sub-committee of the Study Group, in view of the special needs of aviation finance, for the purpose of giving a representative aviation industry view on the desirable content of the future Convention as it related to aircraft.

In June 1995 the Drafting Group of the Sub-committee had met in Oxford to revise its proposals for a first draft in the light of the provisional conclusions reached by the Sub-committee at its November / December 1994 session. On that occasion, preliminary consideration had also been given to the Aviation Working Group's first memorandum. In October 1995 the Sub-committee had met for the third time to complete its preparation of a first draft. Its principal working materials had been the Drafting Group's revised proposals for a first draft, the Aviation Working Group's first memorandum and a number of comments from members of the more broadly composed Study Group. In December 1995 the Drafting Group had again met in Oxford to establish the first draft of a future Unidroit Convention on International Interests in Mobile Equipment on the basis of the conclusions reached at the Sub-Committee's October session. Some further work on the French text had been required and a third Drafting Group meeting had taken place in Paris in March 1996. The work of the Sub-committee set up pursuant to the Governing Council's instructions in 1993 could be considered as having been completed at this Drafting Group meeting.

In March 1996 the Secretariat received a second memorandum from the Aviation Working Group containing its detailed recommendations both on the first draft and regarding the international registry to be set up under the future Convention. The Aviation Working Group had been invited by the Sub-committee at its October 1995 meeting to propose the text of such special supplementary rules as were considered to be necessary for aircraft and aircraft engines. This memorandum was the aviation working group's response to that request.

In April 1996 the Study Group had met to consider both the first draft prepared by its Sub-committee and the second memorandum of the Aviation Working Group. Also in April 1996 the first session had been held of a working group set up to consider the legal and technical issues raised by the establishment of the international register to be created under the future international Convention.

Mr Goode, in his capacity as Chairman of the Study Group, stressed the major proportions which the project was assuming. The basic purpose of the Convention under preparation was, he recalled, to provide for the creation, recognition, perfection and priority of security and other interests in high-value mobile equipment of defined categories and the protection of those interests in the case of the insolvency of the debtor. The idea was that various groups of interests be created by the Convention itself and that they would have the effects ascribed to them by the Convention, as opposed to deriving in any way from national law, as well as being perfected by registration in an international register which would be administered by a body approved by the Governing Council of Unidroit.

With regard to the chief features of the proposed Convention, it would first apply to security interests in the strict sense, to title reservation agreements and to the rights of lessors and lessees in defined categories of equipment. It was also envisaged that it would extend to assignments of those interests, whether absolutely or by way of security, and that it might be further broadened - and this was the wish of the Aviation Working Group - to cover outright transfers.

The international interest would be created according to the formalities prescribed by the Convention and would be protected by registration against an existing and identified asset: in other words, what was contemplated was asset registration rather than registration against a debtor. This had certain implications, not least that the Convention would be limited to stated categories of equipment of a kind that would lend themselves to unique identification, typically by serial number, equipment of a kind that normally moved from one State to another and that was used in more than one State. It was also envisaged that the Convention would apply only to relatively high-value equipment such as aircraft, aircraft engines, containers, railway rolling stock, satellites and other cosmic space objects, oil rigs etc.

The Convention would prescribe basic registration provisions which, it was suggested, would be supplemented by administrative regulations made by whatever body was appointed to administer the register. It was also envisaged that the Convention would establish basic default remedies which the parties could for the most part agree to modify or exclude. It would in addition provide for the priority of registered international interests over other interests and would, like the Unidroit Convention on International Financial Leasing, make provision for the recognition of international interests in the event of the debtor's insolvency.

Another idea before the Study Group, which had once again originated in the Aviation Working Group, was the possibility of extending the scope of the Convention to cover certain types of national interest. First of all, it was envisaged that there could be a facility for certain types of lien creditor, such as execution creditors, to register their interests in the international register and, secondly, that States could declare in the Convention that specified types of insolvency interest to which they attached importance would have priority even over a registered international interest.

In the meantime, the registration Working Group, chaired by Mr R.C.C. Cuming, was considering the legal and technical aspects of the international register, in which connection it was contemplated that there would be at least notionally a central registry but that registration could, where available, be effected through satellite registries in the various countries, building on existing national registration systems. In the context of registration, one important matter that merited further study was whether the international register should be susceptible to orders by national courts or whether a new supranational court would be necessary and whether disputes between competing rights should be regulated simply by *in personam* orders against one party and in favour of the other.

Finally, it was still necessary to address such questions as the establishment of core provisions for all the equipment to be covered by the Convention, with some special rules for specific types of equipment, notably aircraft, the establishment of connecting factors to a Contracting State for the triggering of the Convention's application and its relationship with a number of existing Conventions.

As to future work, Mr Goode stated that the next session of the Study Group was scheduled to be held in December 1996 and that it was hoped that its work could be completed at a final session towards the end of 1997. On the assumption that the Study Group text would meet with the approval of the Governing Council, he could then anticipate the convening of at least two sessions of governmental experts to prepare the ground for a diplomatic Conference which would see the adoption of the Convention.

(b) Discussion

In the course of a wide-ranging discussion, a number of comments and requests for information were made by Council members. While arguing in favour of the broadest possible scope of application for the future Convention in terms of the types of equipment to be covered by it, even if this entailed a core of general rules with specific provisions for certain categories of equipment, Mr Loewe enquired as to the extent to which the Study Group had taken into consideration the existence of national registers of ships and inland navigation vessels, in respect of which well-established regimes already existed. In addition a difficult, although probably not insoluble, problem lay in the varying national laws governing liens and mortgages of ships and vessels which raised delicate choice-of-law issues. Also in connection with the list of equipment in Article 2 of the draft, he asked why permanently installed oil platforms had been excluded.

Mr Voulgaris stated that he felt some unease at the inclusion, albeit in brackets, in Article 2 of the draft Convention, of ships, not least in view of the existing international

maritime Conventions. His own preference would be for the exclusion of such vehicles but in any event it would be necessary to maintain the closest contact on this matter with the International Maritime Committee.

Mr Putzeys saw the project as being one that, if it proved successful, would be of the greatest significance for the development of the law of security over vehicles and indeed for transport law as a whole. He had however to voice a word of caution as to the choice of serial numbers as a basis for registration in view of the notorious ease with which these numbers were altered in the case of road vehicles and effaced in the case of containers. A similar problem arose in regard to the existence of national registries of ships and aircraft which were again subject to frequent and often rapid changes. As to the question already mentioned of liens and mortgages created under national law, he suggested that thought be given to the possibility of such interests being included in the registry alongside the entry of those contemplated by the future Convention, in which connection he drew attention in particular to the severe problems that arose in practice in relation to the non-payment of airport fees by airlines. Lastly, and although this matter could be taken up at a later stage of the work, he expressed some doubts as to the functions which it was proposed to confer on the Governing Council in relation to the international registry.

Mr Pirrung voiced concern at the broadening of the list of equipment which it was now proposed to cover and wondered whether it might not, with a view to proceeding with the greatest expedition, be preferable to deal in the first instance only with aircraft and perhaps one or two other categories, possibly leaving other types of equipment to be catered for in a second instrument. This view was endorsed by Mr Sen.

By way of reply to the various points raised, Mr Goode stated that in connection with the question of registration, the Study Group had been unable to identify any existing international registers of the types of equipment with which it was currently proposed that the future Convention deal and that in relation to ships the C.M.I. had been represented at the highest level at all sessions of the Study Group and of its Sub-committee, notwithstanding the quite serious reservations it had voiced at the inclusion of ships in the future Convention. This being said, the C.M.I. participation had always been highly constructive and it was not inconceivable that shipping circles might ultimately see something of value to them in the future Unidroit Convention given the uneven degree of acceptance of the relevant maritime Conventions so far adopted in relation to liens and mortgages. In that connection, he recalled his introductory statement in which he had referred to the idea already mooted in the Study Group of enabling States to list, when they accepted the future Convention, the types of national interests that would have a super-priority, which could be amended from time to time, so as to ensure that these priorities would in fact be preserved even over a registered international interest.

In relation to the point mentioned concerning the alteration and removability of serial numbers, this was clearly an important practical matter that would have to be addressed. The question on the other hand of the exclusion of permanently fixed oil rigs, which were by their very nature more in the nature of immovables, was one which went to the philosophy underlying the Convention, namely to deal with equipment of a kind regularly crossing national frontiers and therefore having no fixed *situs*.

In reply to two questions raised by Mr Farnsworth, Mr Goode stated that while the size and complexity of the project was such that it had proved necessary to constitute formally a number of sub-groups, they were to a very large extent manned by members of, and observers on, the Study Group, although it had naturally been thought essential to draft in a number of technical experts for the registration group. As to the question of the compatibility of the draft with the ongoing work on the revision of Article 9 of the United States Uniform Commercial Code, he further recalled that one of the members of the Study Group was in fact one of the co-reporters responsible for that revision, namely Mr C.W. Mooney, Jr.

Another issue in respect of which clarification was sought by Council members was the involvement, apart from the C.M.I., of other interested agencies representing rail, aviation and other constituencies, in which connection Mr Marotta Rangel drew attention in particular to the desirability of securing from the earliest possible stage the involvement of the International Civil Aviation Organization (I.C.A.O.), a view shared by Mr Putzeys who stressed the need to avoid the all too frequent lack of communication between Organisations dealing respectively with public and with private law matters.

Mr Stanford stated that the Central Office for International Carriage by Rail was represented on the Study Group and that links had also been established with the International Union of Railways which was sending out the draft to its national networks in different parts of the world. The European Company for the Financing of Railway Rolling Stock in Basle was also represented on the Study Group. Contact had also been made with the International Union of Private Wagon Owners Associations in Hamburg, which had expressed the greatest interest in the Institute's project, while Mr Howard Rosen, the recently named consultant to the Study Group on international rail finance matters, was seeking to do on the railway rolling stock front what had been done by Mr Jeffrey Wool on the aviation front, in the first instance contacting all the various interest groups in the railway rolling stock area with a view to seeing to what extent the solutions so far proposed could be acceptable to those interests or if there were some special rules that they might need on the lines of the special rules being proposed for aircraft. As to relations with I.C.A.O. and with the International Air Transport Association (I.A.T.A.), Mr Wool had been in close touch with those two bodies and already I.C.A.O. had indicated its intention to be represented at the next session of the Study Group.

Mr Pirrung enquired into the extent to which the Study Group had considered conflict of laws issues in general and in particular issues relating to jurisdiction and the enforcement of judgments as well as the instruments already adopted or under preparation in relation to bankruptcy. This concern was shared by Mr Voulgaris who sought guidance as to the relationship between any international jurisdiction that might be created under the future Convention or administrative decisions of the international registrar and rules or decisions given by national courts.

Mr Goode replied that, as regards issues of conflicts of law in general and of jurisdiction and enforcement of judgments in particular, both the Study Group and its Sub-committee had greatly benefitted throughout their sessions from the advice of the Deputy Secretary-General of the Hague Conference on Private International Law, Mr Michel Pelichet, and careful thought was being given to these matters as also to questions associated with insolvency, although he did not contemplate too many difficulties arising in that connection. As to the question of how

court orders would work in relation to the registration system, this was under study but in his view it would be impractical to have an international registry subject to national courts, which would to his knowledge probably be unprecedented. In the event of an entry being made in the register which should not have been made, then the remedy should be to seek an *in personam* order against the party responsible for the entry, requiring him to remove the entry, and not an order running directly to the register itself.

In response to the expression by Ms Trahan of her belief in the need to ensure from a very early stage the widest possible divulgation of information concerning the project and the involvement of developing countries and economies in transition, Mr Stanford stated that both a Nigerian and a Russian member sat on the Study Group and that its work had also been greatly enriched by direct personal participation and the submission of written comments by representatives of both the European Bank for Reconstruction and Development and the World Bank, the latter of which had over the last few years been preparing modern secured financing laws for a number of jurisdictions in the developing world and also more recently in those countries moving towards a market economy system, particularly Bulgaria. At the same time, the European Bank for Reconstruction and Development had prepared a model law on secured transactions with a view to modernising the law on secured financing in the former Soviet Union countries and in the countries of Central and Eastern Europe.

On the question of giving exposure to the work of the Study Group, Mr Stanford recalled a very useful seminar arranged in London in March 1996 by Mr Goode, involving amongst others Government officials, business people and practising lawyers, a formula which might profitably be employed elsewhere so as to permit early consultation and to reduce substantially the perennial difficulty of governmental experts being faced for the first time with a text with which neither they nor the relevant constituencies had any degree of familiarity. It would certainly help if similar meetings could be arranged elsewhere, in which connection he drew attention to those arranged in Beijing in March and in Moscow in May 1996 by Ms Zhang and by the Russian member of the Study Group respectively in conjunction with the Aviation Working Group. A similar meeting was under preparation by Mr Sen to be held in New Delhi in September and it went without saying that the organisation by other Council members of such events would be of the greatest value, in which case they could always count on such assistance as the Secretariat could make available.

Mr Plantard voiced grave concern at what appeared to be a serious linguistic imbalance in the Study Group, as also in some aspects of the method of work followed in the preparation of the English and French texts, in particular in relation to the drafting procedure used. From paragraph 46 of the Secretariat paper before the Council (C.D. (75) 9) it seemed that at present the French version was little more than a translation of the English, which he found unacceptable. A remedy to this situation should be found urgently. These views were strongly endorsed by Ms Trahan who insisted on the need for simultaneous drafting in English and French which, on account of the conceptual differences between the Civil and Common Law systems, would serve to enrich both language versions. As a mixed system, Canada had a long experience in such matters and she undertook to do what she could to seek to provide the Secretariat with assistance in this regard.

The Secretary-General expressed his appreciation to Ms Trahan for her offer of help. The problems lay, he felt, not so much with the composition of the Study Group, where a balance existed between representatives of the Common and Civil Law systems, and even less in the Drafting Group, on which the two working languages of the Institute were equally represented, but rather in the fact, that on the one hand, almost all the documents, some of them extremely lengthy, were submitted in English and, on the other, the commitments of the Secretariat simply did not permit one of the French-speaking research officers to be allocated to the project on a regular, let alone a full-time basis. Up to now, recourse to outside translation had permitted the Secretariat to cope by and large with the problems of the translation of documents and reports of meetings and he assured Council members that it was one of his top priorities to devise means of ensuring a procedure that would permit the drafting of the two language versions of the draft Convention to go forward in parallel.

(c) Conclusions

The Governing Council expressed its satisfaction at the very considerable progress accomplished by the Study Group and all its subsidiary bodies, together with the Secretariat, since the last Council session in relation to the preparation of the draft Convention on International Interests in Mobile Equipment. While being fully cognisant of the complexity of the issues involved, which called for the maximum degree of freedom to be left to the Study Group in the prosecution of its work, in particular in regard to the categories of mobile equipment to be covered by the future Convention, the Council urged the Secretariat to continue its efforts to ensure the involvement of all the relevant interest groups.