

UNIDROIT 1996
Study LXXII - Doc. 29
(Original: English)

Unidroit

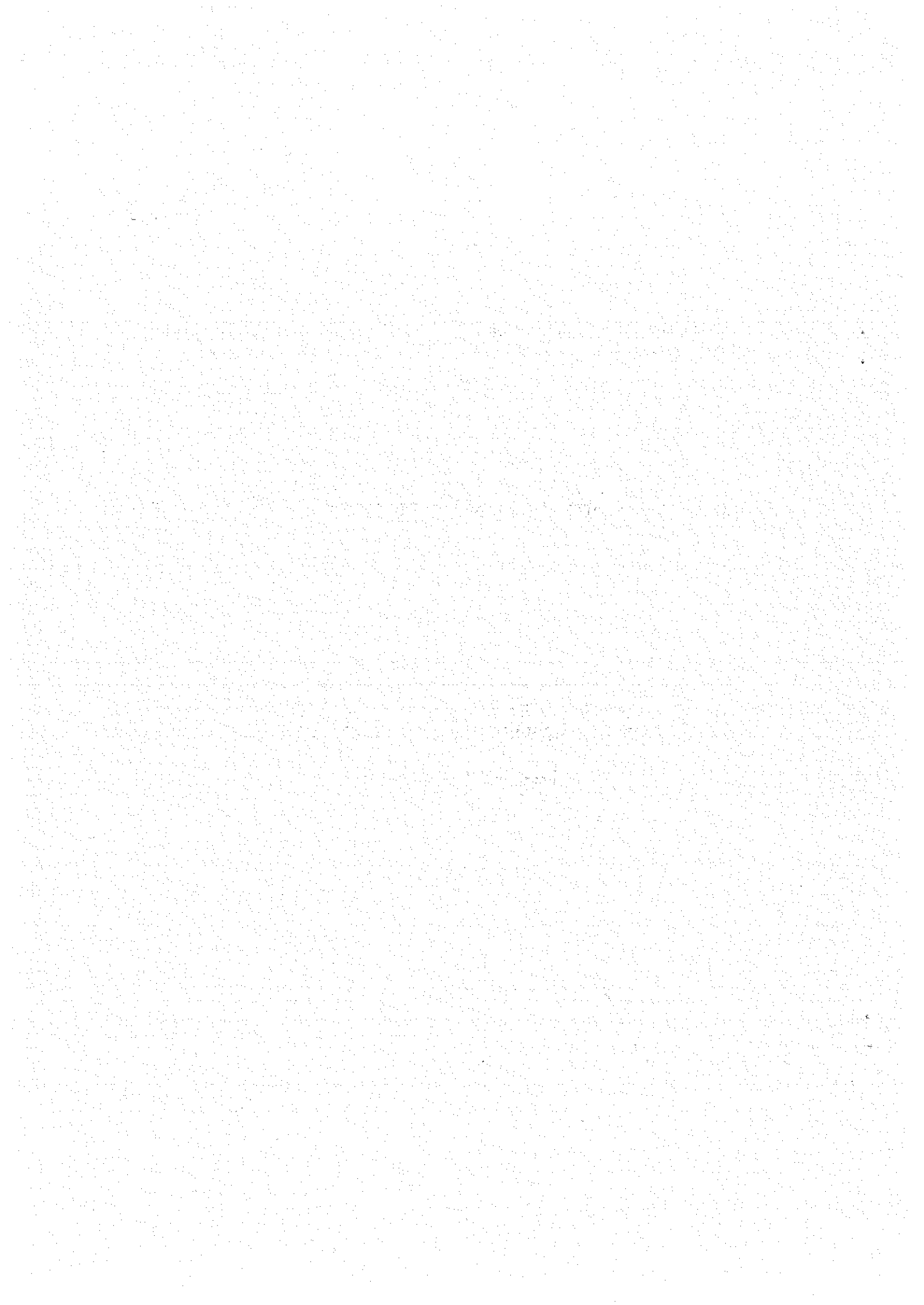
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

CONSIDERATION OF THE CASE FOR THE EXCLUSION OF REGISTERED SHIPS
FROM THE SPHERE OF APPLICATION OF THE FUTURE CONVENTION

(Secretariat memorandum)

Rome, August 1996



1. - Article 2(1)(c) of the first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment established by the Sub-committee (Study LXXII - Doc. 24) provides provisionally for the application of the Convention to registered ships, the provisional nature of this coverage being indicated by the use of square brackets .

2. - By letter dated 4 July 1996 (a copy of which is reproduced in Appendix I to this memorandum) Mr R. Ricupero, Secretary-General of the United Nations Conference on Trade and Development (U.N.C.T.A.D.), and by letter dated 10 July 1996 (a copy of which is reproduced in Appendix II) Mr W.A. O'Neil, Secretary-General of the International Maritime Organization (I.M.O.), called for the exclusion of registered ships from the sphere of application of the Convention. The arguments adduced in favour of their exclusion by U.N.C.T.A.D. and I.M.O. were essentially two-fold:

(1) International maritime law is a distinctive *corpus juris* and it is important to safeguard the sphere of application of the International Convention on Maritime Liens and Mortgages adopted at a U.N. / I.M.O. Conference of Plenipotentiaries in 1993 (hereinafter referred to as *the 1993 Maritime Liens and Mortgages Convention*). It is feared lest the inclusion of registered ships in an international Convention of a general nature might prove to be source of conflict with the 1993 Maritime Liens and Mortgages Convention and cause confusion and uncertainty.

(2) The preparation of international rules governing ships and shipping has always been the preserve of particular international Organisations with the full participation of shipping circles.

Both letters expressed the hope that the concerns raised therein would be taken into consideration in the forthcoming stages of the work on the preparation of the Unidroit Convention and that appropriate consultations would take place with the competent international Organisations, both inter-governmental and non-governmental, in this regard.

3. - In his letters of 19 and 16 July 1996 replying to the Secretaries-General of U.N.C.T.A.D. and I.M.O. respectively, the President of Unidroit laid emphasis on two facts:

(1) Notwithstanding the fact that the observer representing the International Maritime Committee (C.M.I.) on the Study Group had at the inception of Unidroit's work on this subject argued in favour of the exclusion of registered ships from the sphere of application of the future Convention for much the same reasons as those invoked by the Secretaries-General of U.N.C.T.A.D. and I.M.O., he had nevertheless seen fit to concur in the Chairman of the Study Group's proposal that registered ships should provisionally be included in its sphere of application (cf. Study LXXII - Doc. 7, § 7) pending such time as it was possible to have a clearer picture of the kind of rules to emerge and therefore also of any benefits that might be seen as accruing to shipping interests thereunder which were not otherwise available.

(2) C.M.I. was continuing to monitor the case for or against the ultimate inclusion of registered ships in the sphere of application of the future Convention and, at the

last session of the Study Group, had been invited, through the person of its representative, to organise a working group, comparable to that organised on behalf of the international aviation industry, to submit a representative shipping industry view on the desirable content of the future Convention as it related to shipping (cf. Study LXXII - Doc. 27, § 18).

In view of C.M.I.'s participation as an observer at all stages of the work of the Study Group, the President copied his replies to the Secretaries-General of U.N.C.T.A.D. and I.M.O. to the President of that Organisation too, as also to both its past and present representatives on the Study Group. He further vouched that the I.M.O. / U.N.C.T.A.D. proposal would be brought to the attention of the Study Group at its third session and suggested that it would therefore be helpful if these Organisations could be represented at that session.

4. - Ever since the inception of its work on this subject Unidroit has been keenly aware of the delicate balance between the arguments for and against inclusion of registered ships in the sphere of application of the Convention. Already at the meeting of the restricted exploratory Working Group which took place in Rome in March 1992 to examine the feasibility of the project (cf. Study LXXII - Doc. 5) there was recognition that a strong argument for excluding registered ships might be made out on the basis that there were existing Conventions (the 1926 Brussels International Convention for the unification of certain rules relating to maritime liens and mortgages (hereinafter referred to as *the 1926 Brussels Convention*) and the 1967 Brussels International Convention for the unification of certain rules relating to maritime liens and mortgages (hereinafter referred to as *the 1967 Brussels Convention*)) as well as a proposed new Convention (the 1993 Maritime Liens and Mortgages Convention) regulating the recognition and priority of security interests in ships (*idem*, § 7). On the other hand, it was also pointed out that one had not only to consider those ships to which the aforementioned Conventions were applicable⁽¹⁾ but also those not affected by any of these Conventions but governed by equivalent national legislation and ships not affected either by these Conventions or by national legislation (*idem*). As already noted, the Study Group at its first session accordingly judged it wise that registered ships should *provisionally* be included in the sphere of application of the future Convention. It was felt that this solution had the dual advantage of ensuring that the voice and therefore also the special needs of shipping interests would be heeded at every stage in the preparation of the Convention whilst at the same time leaving these same interests free to determine at the appropriate time whether or not they could expect to derive benefits, not otherwise available, under the terms of the planned Convention. Given the unique features common to the different types of equipment intended to be encompassed by the latter, namely the fact that they were high-value mobile assets of a kind normally used in more than one jurisdiction and that lent themselves to unique identification,

(1) The 1926 Brussels Convention entered into force on 2 June 1931. The *C.M.I. Yearbook 1994* shows it as being in force between Algeria, Argentina, Belgium, Brazil, Cuba, Estonia, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Malgache Republic, Monaco, Poland, Portugal, Romania, Spain, Switzerland, Syrian Arab Republic, Turkey, Uruguay and Zaire. The 1967 Brussels Convention has not entered into force (the Contracting Parties thereto, according to the *C.M.I. Yearbook 1994*, are Denmark, Morocco, Norway, Sweden and Syrian Arab Republic). The 1993 Maritime Liens and Mortgages Convention has not yet entered into force. Ten Contracting Parties are required for its entry into force. The Contracting Parties as of 29 March 1996 were two in number, namely Monaco and Tunisia.

typically by manufacturer's serial number, there could at the same time be little doubt that the experience acquired in dealing with problems relating to the secured financing of one such asset could well prove to be extremely relevant and instructive in considering analogous problems arising in respect of other such assets. There can likewise be no question that on this basis the Study Group has benefitted considerably from the full and active role played by the successive representatives of the International Maritime Committee in the development of the planned Convention to date.

5. - It was precisely with a view to carrying this participation one stage forward that at the last session of the Study Group the Chairman invited the International Maritime Committee to formulate the viewpoint of the shipping industry on the desirable content of the future Convention (cf. § 3 *supra*). This invitation was designed to provide shipping interests with the same sort of opportunity as that already taken up by the aviation industry (cf. Study LXXII - Doc. 16 and Study LXXII - Doc. 23) ⁽²⁾ and that addressed to the other equipment sectors covered by the future Convention, namely to indicate the extent to which the solutions proposed in the first set of draft articles were suitable and adequate from the point of view of their special needs. The two memoranda submitted by Airbus Industrie and The Boeing Company on behalf of an aviation working group have, while focussing on the special needs of aviation finance nevertheless at the same time supplied the Study Group with invaluable inspiration for filling out the first draft with rules capable of application to the generality of the equipment intended to be encompassed by the future Convention. The structure of the revised draft articles at present being prepared on the basis of the deliberations of the Study Group at its second session will thus, while conserving the basic structure of the first set of draft articles established by the Sub-committee (Study LXXII - Doc. 24), incorporate significant elements of the aircraft-specific proposals contained in the second of the Aviation Working Group's memoranda (Study LXXII - Doc. 23) both as rules common to the generality of equipment subject to the Convention and in the form of rules special to aircraft. It is contemplated that special rules may well similarly prove to be necessary for other types of equipment (cf. Study LXXII - Doc. 27, § 124 *in fine*).

6. - In these circumstances the Unidroit Secretariat would submit that consideration be given to deferring action on the proposal made by the Secretaries-General of U.N.C.T.A.D. and I.M.O. pending such time as it becomes clearer whether the rules to be embodied in the future Convention are likely to confer certain benefits on shipping interests that are not otherwise available. The concurrence of C.M.I. in this point of view has permitted it to play a highly constructive part in this work to date and it is further submitted that it would be most unfortunate if a definitive decision on whether or not registered ships should be included in the sphere of application of the future Convention were to be taken at the moment when the future uniform rules were just beginning to take shape. In this connection it is perhaps wise to recall the words of no less an authority than Professor R. Herber, until recently C.M.I.'s

(2) cf. also Study LXXII - Doc. 26, pp. 1 and 2, incorporating proposals for amendment of the first draft submitted by the Cosmic Space Agency of the Russian Federation with a view to meeting special requirements of the satellite industry.

representative on the Study Group, in the *C.M.I. News Letter* 1994 No. 4 (at p. 15) where he stated that:

"So the Geneva Convention (the 1993 Maritime Liens and Mortgages Convention) - and earlier conventions and national laws in this field in the maritime sector - could well serve as a pattern for the Unidroit Convention on other mobile equipment. On the other hand, maritime trade could perhaps make use of the possibility of proliferation and wider acceptance of maritime mortgages by the new Convention."

CONFÉRENCE DES NATIONS UNIES
SUR LE COMMERCE ET LE DÉVELOPPEMENTUNITED NATIONS CONFERENCE
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CH - 1211 GENÈVE 10Réf. N°: TDO 530 UNIDROIT
(à rappeler dans la réponse)

4 July 1996

Dear Mr Ferrari Bravo,

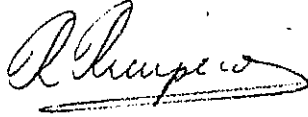
We understand that the UNIDROIT Study Group for the Preparation of Uniform Rules on International Security Interests in Mobile Equipment has produced the first set of draft articles for a future UNIDROIT Convention on International Interests in Mobile Equipment. Article 2(c) of the draft convention includes in brackets "registered ships" within the scope of its application.

As you are aware, international Rules and Conventions governing ships and shipping operations have always been elaborated within the competent international/intergovernmental organizations with full participation of the shipping community. An international Convention governing security interests in ships, ie, the International Convention on Maritime Liens and Mortgages, was adopted, by consensus, by the UN/IMO Conference of Plenipotentiaries on Maritime Liens and Mortgages as recently as 1993. Over sixty-five Members of UNCTAD and IMO, together with a large number of non-governmental and specialized organizations, participated at the Conference which adopted the 1993 Convention. You appreciate that the inclusion of registered ships in an international convention of a general nature could create conflict with the 1993 Maritime Liens and Mortgages Convention and could only cause confusion and uncertainty. The situation may be different as far as aircraft and the air industry is concerned but it would be a disservice to international shipping if registered ships were to be included in a future UNIDROIT convention on this subject.

Mr Luigi Ferrari Bravo
President
International Institute for the
Unification of Private Law
Via Panisperna 28
ROME, Italy

I trust that the UNIDROIT Study Group takes account of the concerns of the shipping community during its future preparatory work and that close consultations are held with the appropriate governmental and non-governmental organizations in this regard.

Yours sincerely,



Rubens Ricupero
Secretary-General of UNCTAD

cc Mr W A O'Neil, Secretary General, IMO
Professor A Philip, President, CMI



INTERNATIONAL MARITIME ORGANIZATION

SECRETARY-GENERAL

LE SECRETAIRE GENERAL

EL SECRETARIO GENERAL

10 July 1996

Dear Professor Ferrari-Bravo,

I wish to refer to the first set of draft articles of a prospective UNIDROIT Convention on International Interests in Mobile Equipment produced by the Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment (reference: UNIDROIT 1996, Study LXXII - Doc. 24).

Draft article 2, paragraph 1(c) (in square brackets) provides for the application of the treaty to registered ships. It is the opinion of the IMO Secretariat that the inclusion of ships could be the source of conflict with the International Convention on Maritime Liens and Mortgages, 1993, adopted at the United Nations/International Maritime Organization Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages.

In the view of the IMO Secretariat, the most suitable solution to avoid such conflict would be not to include the referred text in the prospective treaty. Such a solution would preserve the features of international maritime law as a distinctive *corpus juris* and, in particular, the specific scope of application of the International Convention on Maritime Liens and Mortgages, 1993.

I trust that this view will be taken into account during forthcoming preparatory work regarding the draft UNIDROIT Convention, and that appropriate consultations with the United Nations and IMO will be held in this regard.

Yours sincerely,

W. A. O'NEIL
Secretary-General

Professor Luigi Ferrari-Bravo
President
International Institute for the Unification of
Private Law (UNIDROIT)
00184 Rome
Via Panisperna, 28
Italy

APPENDIX III

INSTITUT INTERNATIONAL
POUR L'UNIFICATION DU DROIT PRIVE
INSTITUTO INTERNACIONAL
PARA LA UNIFICACION DEL DERECHO PRIVADO

UNIDROIT

INTERNATIONAL INSTITUTE
FOR THE UNIFICATION OF PRIVATE LAW
INTERNATIONALES INSTITUT
FÜR DIE VEREINHEITLICHUNG DES PRIVATRECHTS

ISTITUTO INTERNAZIONALE PER L'UNIFICAZIONE DEL DIRITTO PRIVATO
00184 ROMA - VIA PANISPERNA, 28 - TEL. (39-6) 69 94 13 72 - FAX (39-6) 69 94 13 94

THE PRESIDENT

Rome, 19 July 1996

Our refces.: S72/UN/3352

Dear Mr Ricupero,

Thank you for your letter of 4th inst.

I note with interest your proposal that Unidroit's planned Convention on International Interests in Mobile Equipment should not apply to registered ships. I am sure that you will not be surprised to learn that the arguments which you adduced in support of such an exclusion were put forward by the observer on the Study Group representing the International Maritime Committee at the inception of this work. The International Maritime Committee nevertheless agreed to the Chairman of the Study Group's proposal that registered ships should be included *provisionally* in the sphere of application of the proposed Convention until such time as it might be possible better to assess the extent to which the Convention might be seen as conferring certain benefits on shipping interests not at present otherwise available. The provisional nature of the inclusion of registered ships is indicated by their inclusion in the text inside square brackets.

Let me take this opportunity to inform you that discussions are continuing within the International Maritime Committee with a view to determining the case for or against the ultimate inclusion of registered ships in the sphere of application of Unidroit's planned Convention. At the last session of the Unidroit Study Group responsible for the preparation of this text, the International Maritime Committee was invited, through the person of its representative, Dr. T.M. Remé, to organise a working group, comparable to that organised on behalf of the international aviation industry, to submit a representative shipping industry view on the desirable content of the proposed Convention as the same relates to shipping.

Rubens RICUPERO, Esq.
Secretary-General
United Nations Conference on Trade and Development
Palais des Nations
CH-1211 GENEVE 10

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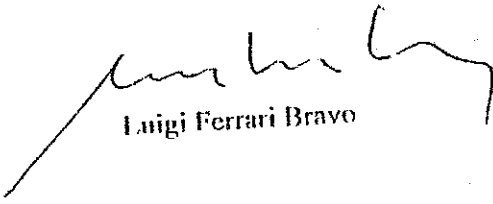
UNIDROIT

In the light of your proposal that registered ships should be excluded from the splicre of application of the proposed Unidroit Convention, I have deemed it appropriate to copy this letter to the President of the International Maritime Committee and both its past and present observers on the Study Group. I can further assure you that your proposal will be brought to the attention of the Study Group at its next session, due to be held here from 9 to 13 December 1996. In view of your proposal, I believe that it would be helpful if your Organisation could be represented at this session and shall therefore ensure that an appropriate invitation is addressed to you.

I am,

With all best wishes,

Yours sincerely



Luigi Ferrari Bravo

cc.: Professor A. Philip
Professor R. Herber
Dr T.M. Remé

APPENDIX IV

INSTITUT INTERNATIONAL
POUR L'UNIFICATION DU DROIT PRIVE
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PARA LA UNIFICACION DEL DERECHO PRIVADO

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00184 ROMA - VIA PANISPERNA, 28 - TEL. (39-6) 60 94 13 72 - FAX (39-6) 60 94 13 94

THE PRESIDENT

Rome, 16 July 1996

Our refces.: S72/UN/3316

Dear Mr O'Neil,

Thank you for your letter of 10th inst.

I note with interest your proposal that Unidroit's planned Convention on International Interests in Mobile Equipment should not apply to registered ships. I am sure that you will not be surprised to learn that the arguments which you adduce in support of such an exclusion were put forward by the observer on the Study Group representing the International Maritime Committee at the inception of this work. The International Maritime Committee nevertheless agreed to the Chairman of the Study Group's proposal that registered ships should be included *provisionally* in the sphere of application of the proposed Convention until such time as it might be possible better to assess the extent to which the Convention might be seen as conferring certain benefits on shipping interests not at present otherwise available. The provisional nature of the inclusion of registered ships is indicated by their inclusion in the text inside square brackets.

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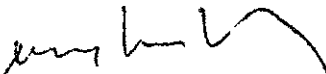
W.A. O'NEIL, Esq.
Secretary-General
International Maritime Organization
4 Albert Embankment
LONDON
SE1 7SR

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I am,

With all best wishes,

Yours sincerely



Luigi Ferrari Bravo

c.c.: Professor A. Philip
Professor R. Herber
Dr T.M. Remé