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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

*REVISED DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT*

(as proposed by the Drafting Group at its fourth session, held in Würzburg
from 24 to 26 July 1997):

COMMENTS

(by the Federal German Association of Banks)

Rome, October 1997

INTRODUCTION

Subsequently to the comments to the revised draft articles of a future Unidroit Convention on International Interests in Mobile Equipment as proposed by the Drafting Group of the Study Group at the conclusion of its fourth session, held in Würzburg from 24 to 26 July 1997 (Study LXXII-Doc.35), reproduced in Study LXXII-Doc. 36, the Unidroit Secretariat received additional comments from Messrs H. DOLL and W. HARTMANN, on behalf of the *Federal German Association of Banks*. This paper reproduces these additional comments set out hereunder.



FEDERAL GERMAN ASSOCIATION OF BANKS

General introductory remarks

As already stated in the past, we basically welcome the creation of a standardised security interest in mobile equipment moved from one member State to another, as it means that financing can be put on a sound basis internationally as well. At the same time, however, it should be ensured that the registration of an interest does not lead to much higher costs in connection with the acceptance and administration of security. The envisaged registry must also be easily accessible. Furthermore, registration should not take a long time, as this may be a condition for loan disbursement. Finally, the relationship between international security interests and national security interests should be regulated clearly.

Remarks on specific provisions of the revised draft articles

Re Article 2(1)(i)

Article 2(1) lists the mobile equipment that is to be covered by the Convention. Paragraph 1(i), according to which all objects that are moved from one State to another in the ordinary course of business are to fall under the scope of the Convention, is new, with specification of such objects by way of a Protocol envisaged in Article 2(2). This new paragraph is, in principle, to be welcomed. However, it may mean that the scope of the Convention is too wide in regard to less valuable objects. For low-value equipment, the cost of international registration will be likely to exceed the actual value of the secured object. It would thus be preferable if Article 2(1)(i) were to stipulate that only objects upwards of a certain value will be included in the scope of the Convention. The threshold applied for implementation of the Convention should be determined on the basis of criteria that are as simple as possible (e.g. original value of the object).

Re Article 6

Under Article 6, the Convention is to be interpreted with due regard to its international character, the legal uniformity it is intended to promote and the principle of good faith in

international trade. Fleshing out these abstract features in a preamble to the Convention would considerably facilitate interpretation of its Articles.

Re Articles 8(1)(a)-(c) and (5) and 12(1) and (2)

The default remedies available to the creditor under Article 8(1)(a)-(c) of the present draft may, in principle, be exercised even without a court order. An important qualification is, however, contained in Article 12(1), which states that without a court order remedies may only be exercised in conformity with the procedural law of the place where the remedy is to be exercised, except where the Contracting State has made a declaration to the contrary in the applicable Protocol under Article 12(2). We wish expressly to support this regulatory approach, as it ensures that in the event of execution against an object covered by a security interest only those measures that are permissible under the *lex rei sitae* may be taken. If the security enforcement proceeds exceed the amount secured by the security interest, the chargee will be required under Article 8(5) to pay the excess to the chargor. This Article does not make sufficiently clear whether legal costs (court fees and execution charges) are covered by the amount secured by the security interest, so that these would have to be deducted from the excess to be returned by the chargee. Clarification to the effect that the legal costs are also covered by the security enforcement proceeds is therefore required in Article 8(5).

Re Articles 15(1)(a) and 35(1)

Consideration is given in Article 15(1)(a) to allowing the registration also of non-consensual interests pursuant to Article 35 in the International Registry. Should liens arising through operation of law (e.g. lessor's lien, contractor's lien) also be included among these, their registration in the International Registry would, in principle, make sense, as this would mean that the security interest would apply also in relation to subordinate interests of third parties pursuant to Chapter VI.

Re Article 26(1)

The priority principle applying to the ranking of registered international security interests under Article 26(1) is basically appropriate. The priority of a registered interest over an unregistered interest established in Article 26(1) is also logical. Besides unregistered international interests, the term "unregistered interest" is likely to include also unregistered national interests. This means that a registered international interest would always have priority over a national interest in an object, even if the national interest was created long before registration of the international interest. In view of the internationalisation of security interests intended by the Convention, this approach is understandable. Chargees will accordingly have to adapt in future to covering their interest in an object vis-à-vis third parties through international registration. International registration will therefore play an important role in protecting international law against subordinate and unregistered security interests. Yet, at the same time, the effects on individual national legal systems and individual loan collateralisation practice will have to be examined closely. At least for a transitional period after entry into force of the Convention in the Contracting States, holders of national security interests should, however, be allowed the privilege of subsequently obtaining international registration to enable them to protect duly acquired interests through such international registration.

Re Article 26(2)

Two alternatives are currently being discussed for Article 26(2). Alternative A would be preferable in our opinion in view of its clear regulatory content. The drawback of Alternative B is that contractual law and property law are lumped together.

Re Article 27(1) and (4)

The relationship between paragraph 1 and paragraph 4 of Article 27 is not sufficiently clear. Is paragraph 1 qualified as a basic rule by the exception provided for under paragraph 4 or is it the other way round?

Re Article 31(a)

Article 31(a) stipulates that the obligor has a duty to make payment or give other performance if he has been given written notice of assignment by the obligee. The question is when such notice of assignment must be given to the obligor. Is it sufficient for notice to be given to the obligor by the assignee when the claim is asserted? If this is not the case, the so-called "undisclosed assignment" of international interests, not uncommon in Germany, will scarcely be possible.