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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 Professor B. Foëx)

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, Doc. 36 Add. 1, Doc. 36 Add. 2 and Doc. 36 Add. 3, the Unidroit Secretariat received additional comments from Professor B. Foëx (Switzerland). This paper reproduces these additional comments set out hereunder.



General introductory remarks

For my part, I believe that the efforts at unification being carried out in the field of security interests are as necessary as they are welcome. In this context, the future Unidroit Convention appears to me exemplary in many respects. I therefore offer my congratulations for all the work done, admire the results already achieved and look forward to the future development of this particularly promising draft.

That being the case, not having taken part directly in the work and having at my disposal only some of the papers, it is difficult for me to make a detailed analysis of all the revised draft articles. I shall therefore limit myself to two remarks.

Re Article 7(d)

The draft merges in a single institution the security interest vested in the seller under a title reservation agreement, that vested in the classic secured creditor and that vested in the lessor. If this solution is atypical (from the viewpoint of many legal systems), it also bears the hallmark of pragmatism. However, given that this means giving up the drawing of a distinction according to the origins of the interest (sale with reservation of title, *pactum de pignore dando*, lease), it is hard to see the point of reintroducing a distinction as regards the regimen to govern the different types of secured obligation.

It appears to me that, as matters stand at present, Article 7(d) implies that only the parties to a security agreement have a certain amount of freedom regarding the identification of the secured obligations. This would lead to the totally paradoxical result that the interest of a “simple” secured creditor would at the end of the day be more advantageous than that retained by the owner (either the lessor or the seller under a title retention agreement), insofar as the former would be capable of securing a more extensive range of obligations.

Should not the future Convention therefore also leave the parties to a leasing agreement or a title retention agreement the option of identifying the secured obligations and of agreeing that the object leased or sold subject to reservation of title will secure other obligations than that covering the payment of the rentals or the sale price respectively?

Re Article 8(6)(a)

I find myself asking why Article 8(6)(a) treats only the chargor, and not the obligor or the owner, as an "interested person".

In fact, the capacities of chargor, obligor and owner of the charged object will not necessarily be vested in the same person. Where these capacities are dissociated, each of these persons has a legitimate interest in exercising the rights reserved to "interested persons" (cf. Articles 8(3) and 9(1) and (3); see also Article 9(2) as regards the chargor and the owner).

It is true that one of the definitions featuring in the Appendix to the draft (paragraph (h)) assimilates the obligor to the chargor. The dissociation of the capacities of chargor and obligor would therefore seem to be excluded. One would nevertheless hope that this was not what the drafters intended: it would result in a highly regrettable loss of flexibility.

As regards an owner who would not simultaneously be the chargor, I would imagine that the reason why he has not been mentioned in Article 8(6)(a) is because he will not in general be able to take advantage of Article 8(6)(d).

If this is the case, the question arises as to whether the requirement of form laid down by this provision is justified: is an owner known to the chargee to be deprived of the rights granted to "interested persons" on the pretext that no notice in writing has been given?

It accordingly seems to me that Article 8(6)(a) should mention not only the chargor but also the obligor and the owner of the object given as collateral by the chargor, to the extent that the identity of this owner is known to the chargee.