

UNIDROIT 1997
Study LXXII - Doc. 36 Add. 5
(Original: English)

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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

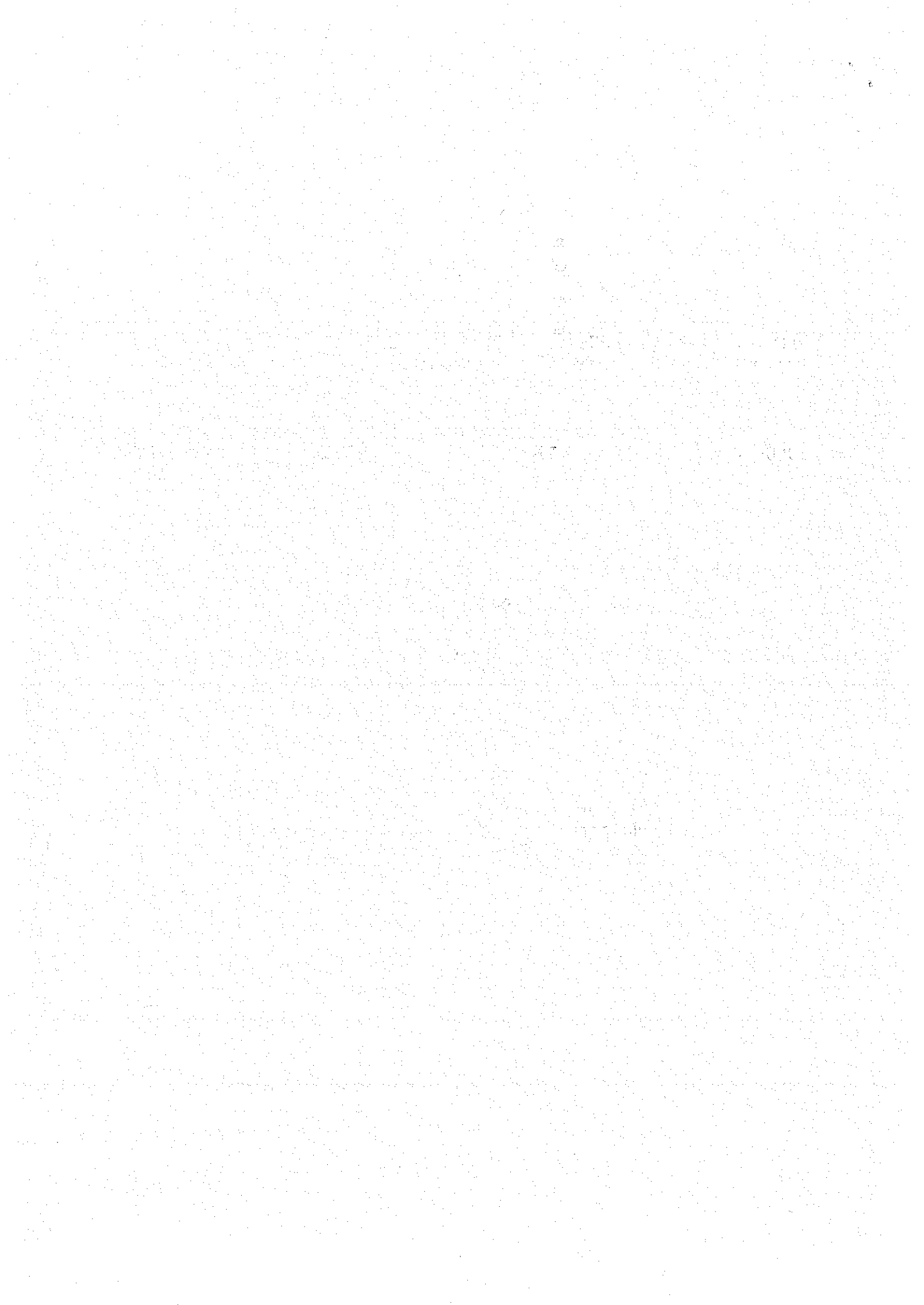
*REVISED DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT*

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

COMMENTS

(by Mr H. W. Fleisig,
Director of the Center for the Economic Analysis of Law (C.E.A.L.) and
expert consultant on international economic matters to the Study Group,
and Professor L.E. Girton, consultant to C.E.A.L.)

Rome, November 1997



C • E • A • L
Center for the Economic Analysis of Law

WASHINGTON, DC

MEMORANDUM

TO: Mr. Martin Stanford, UNIDROIT
FROM: Heywood W. Fleisig and Lance E. Girton
DATE: October 30, 1997
Fax #: 39-6-699-41394
RE: Some Economic Issues Arising in the Draft Articles of the UNIDROIT
Convention on International Interest in Mobile Equipment

Introductory Remarks

To begin with generalities, the potential economic importance of the effort being undertaken by UNIDROIT is enormous: in the industrial countries, movable property accounts for about 2/3 of the capital stock and about 3/4 of gross investment. Efforts to reform domestic secured transactions systems aimed at improving the financing of these investments move higher on governments policy agendas. As these efforts expand, so does the need for an international framework for such interests. Such a framework would facilitate the financing of international trade in such equipment and the foreign financing of stocks of such equipment. In this effort, the initiative of UNIDROIT is pioneering.

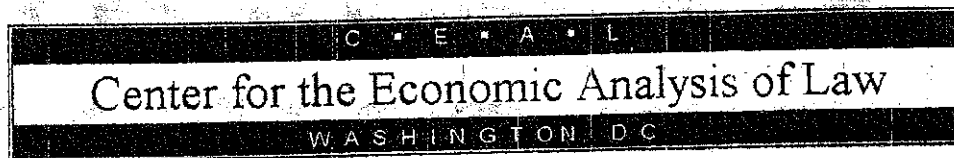
Against this general background, we offer some comments on various economic aspects of the present draft. No doubt had time and budget permitted CEAL's more active participation in deliberations, these comments could be sharper. We apologize to our colleagues for any avoidable error in what follows.

In general, our comments have stressed the likely impact of these changes to encourage private lenders to make loans or credit sale secured by the equipment. The measure of success would lie in private lenders being persuaded to make larger loans at lower interest rates with longer repayment periods.

The economic calculus we have used is straightforward: the improvement in the quality of the collateral attributable to the convention will depend, as an economic issue, on the probability of seizing it, the length of time required before it is seized, the length of time before it is sold, and its value at the time of sale.

Past comments

We have previously commented on different economic aspects of the proposed convention. Those comments apply to this draft.



Comments:

Registered versus Mobile Equipment

We wonder if the draft gives sufficient attention to the implicit reliance of its provisions on domestic registration systems of reinforcement. Society has already undertaken immense social investment in the registration of some kinds of mobile equipment: airplanes, ships, automobiles and trucks. That investment includes laws that define exactly what this property as distinct from other movables that might have similar characteristics; registries for that property; and policing systems to link the item shown in the registry with the physical mobile equipment.

Societies introduce these licensing and registration systems for reasons largely independent of the use of this equipment as collateral. Implicitly, the convention will rely on these registration and policing systems for creation, perfection, and enforcement. Other forms of mobile equipment do not have such universal and powerful registration systems: oil rigs, satellites, railway rolling stock, containers.

Opportunities:

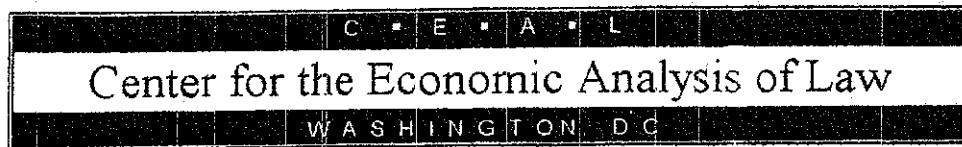
That observation leads to a possible course of action and a concern. The course of action is to shift the focus of the convention away from the somewhat amorphous category of "mobile equipment" and more toward registered property. That would take advantage of the relatively highly developed domestic procedures for such property in the creation, perfection, and enforcement of security interests. This would go some distance toward compensating for a potential weakness in the convention: the reliance on domestic systems for enforcement and for resolution of ambiguities in creation and perfection. It would also provide a rationale for the convention's neglect of the economically more important general class of movable property in favor of the economically less important categories, such as aircraft.

This strategy would build on the relatively advanced security systems for licensed goods in many developing countries. The emphasis in this sentence remains, unfortunately, on the word "relative" and lenders may still regard the risk as excessive.

Limitations and concerns:

However, the strength arising from focusing on registered movable property betrays a mirror weakness: how will protocols work when they deal with property that is not well-defined and registered under local law? How will this affect the "unregistered" parts of equipment.

Here we raise a question for consideration by the experts in the specific equipment: aircraft, ships, automobiles. confess to basic ignorance of facts; we raise the issue for discussion. However, it is our casual impression that with automobile registration, the registry and the enforcement system applies to the chassis. So if someone



stole the engine out of my car and put it in another car, the police would have no easy way to see that a "properly licensed" car -- that is, a car whose license plate matched its chassis ID number -- More important, the police have typically no interest in checking the serial number on my engine. Consequently, the registration of that serial number would provide little comfort to a potential lender. NO more than the serial number on a electric razor, pocket calculator, or camera: items that are routinely stolen and transferred with little prospect of recovery. There is no strong link between the serial number

If the same problems apply to ships and aircraft, then there will be little additional comfort to lenders from the convention to the manufacturers of parts and engines. The same would apply to other equipment for which protocols are imagined. Accordingly, there would be little change in the economic quality of these items as collateral for a loan despite its inclusion as a covered item in the convention.

Space Equipment

The lack of correspondence between the equipment and the underlying social investment in enforcement appears to be quite large in the case of space equipment. First, it is not clear how an object moving in space creates any problem of national jurisdiction. National jurisdiction does not appear to include the air space up to where flying space equipment is located. Even if it did, as a practical matter, do not objects retrieved from space would normally come down in the same country whence they ascended? In any event, there appears to exist no other means of getting hold of them.

What a lender could seize is the equipment on the ground used to control the space equipment. It is unclear why international jurisdiction could be a very serious problem here. What would be of great value to potential lenders are associated (intangible) rights and "licenses to use the equipment". [RM.6,8]. But that seems to involve registration of international security interests against intangibles outside the present scope of the convention.