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U n i d r o i t

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 Intergovernmental Organisation for International Carriage by Rail,
the European Company for the Financing of Railroad Rolling Stock,
the Danish Shipowners' Association and the Elf Aquitaine Group)

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 and Doc. 36 Add. 1, the Unidroit Secretariat received additional comments from Mr G. Mutz, Legal Adviser, on behalf of the Intergovernmental Organisation for International Carriage by Rail, Mr R. Reinhold, Senior Vice President, on behalf of the European Company for the Financing of Railroad Rolling Stock (Eurofima), Mr U. L. Rasmussen, on behalf of the Danish Shipowners' Association and Mr N. David, Head of Legal Services, on behalf of the Elf Aquitaine Group. This paper reproduces these additional comments set out hereunder.

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General introductory remarks

(Elf Aquitaine Group)

We should like to make three comments on the revised draft articles:

(1) The future Convention will be dependent for its effectiveness on its being applied correctly by national courts. We imagine that Unidroit has naturally given thought to this side of things. In the absence of more specific information, it is difficult for us to form a judgment of the real applicability of the future Convention in the different States that ratify it.

(2) Linked to our opening remark, we would note that a significant degree of power is to be vested in the body provided for. It does not appear to us as though provision has been made for any system of control over this body and we regret that the draft does not allow for any system of appeal.

(3) Finally, in order for the body to operate smoothly, it will be necessary to provide for its financing. We do not doubt that Unidroit will formulate proposals on this matter in the near future.

Re Article 2(1)(d), (e) and (f)

(Danish Shipowners' Association)

To be quite frank, we do not believe that it is possible nor desirable to establish an international register of "interests" in mobile equipment, at least not as far as vessels/ movable rigs or containers are concerned.

According to the applicable international Conventions and national laws vessels/rigs obtain nationality of, and the right to fly the flag of the State in whose register the vessel/rig, is owner-registered. There may be exceptions to this, but this is the general rule. Registration of mortgages and other rights over vessels etc. takes place in the same register. We believe it would lead to tremendous practical problems if, on the one hand, ownership and nationality registration

were to take place in one register and, on the other hand, registration of "interests" were to take place in a different international register.

In 1993 a new Convention on Liens & Mortgages was adopted by a Diplomatic Conference within UNCTAD/IMO. The Convention like earlier Conventions provides for registration of mortgages in national registries and for mutual recognition of registered mortgages. We strongly support the new Convention and hope that it will gain widespread acceptance. It would not be possible to reconcile the proposed Convention with the Liens and Mortgages Convention and also for that reason we cannot support the proposed Convention.

We should also like to mention that the question of the arrest of vessels/rigs is internationally regulated by the 1952 Arrest Convention. Article 14 of the draft Convention does not necessarily conflict with that Convention - we reserve our opinion on that point - but we would deem it rather dangerous that the same question is regulated by two different Conventions.

We are certainly prepared to come forward with a more detailed explanation of our opposition to include vessels/movable rigs or containers in the proposed draft in case there should be a majority in favour of such inclusion.

Re Article 2(1)(g)

(O.T.I.F.)

The Fourth O.T.I.F. General Assembly, held in Athens from 8 to 11 September 1997, authorised the Central Office, in the context of Unidroit's work on the preparation of a Convention on certain international aspects of the taking of security over mobile equipment, to co-ordinate the work regarding a possible special Protocol concerning railway rolling stock.

(Eurofima)

Eurofima does not have specific remarks on the revised Unidroit draft articles of a future Convention relating to international interests in mobile equipment (version proposed by the 4th session of the Drafting Group) as such.

From a railway financier's point of view it is, of course, somewhat disappointing that the Convention does not (and cannot) go as far as constituting any security rights as such but it will create notice registries only. In jurisdictions where the establishment of security rights is problematic, the Convention might therefore only solve part of the issues. This may not be an obstacle for the aviation sector, but it will become a competitive disadvantage for the rail sector in a privatised environment. The limitation to international interests only may create similar disadvantages since rolling stock is much more domestic oriented. Having said that, we think that the proposed Unidroit Convention is a good step in the right direction. It may also increase sensitivity to these issues.