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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:

WORKING GROUP TO CONSIDER THE LEGAL AND TECHNICAL ISSUES RAISED BY THE ESTABLISHMENT OF AN INTERNATIONAL REGISTER

(First session: Rome, 16 - 18 April 1996)

SUMMARY REPORT

(prepared by the Unidroit Secretariat)

Rome, April 1997

1. – A Working Group of the Study Group for the preparation of uniform rules on international interests in mobile equipment was set up pursuant to the decision taken at the third and final session of the Sub-committee of the Study Group responsible for the preparation of a first draft, held in Rome from 11 to 13 October 1995 (cf. Study LXXII - Doc. 21, § 39), to consider the legal and technical issues raised by the establishment of an international register. This Working Group held its first session in Rome at the seat of Unidroit from 16 to 18 April 1996. The session was opened at 3.10 p.m. on the 16th by Mr W. Rodinò, Deputy Secretary-General of Unidroit. Mr R.C.C. Cuming, Professor of Law in the University of Saskatchewan, was elected Chairman on a proposal by Mr Rodinò.

2. – The session was attended by the following experts and representatives of intergovernmental and international non-governmental Organisations:

Members of the Working Group

Mr J.R. Standell	Assistant Chief Counsel, Federal Aviation Administration - Aeronautical Centre, Oklahoma City, representing the Department of State of the United States of America
Mr T.J. Whalen	Partner, Condon & Forsyth, Washington D.C., representing the Department of State of the United States of America
Intergovernmental Organisations	
Central Office for International Carriage by Rail	Mr M. Burgman, Director General
Commission of the European Communities	Ms M. Afonso, Administrator, Air Transport Policy Unit, Directorate-General for Transport
United Nations Commission on International Trade Law	Mr R. Sorieul, Legal Officer
International non-governmental Organisations	
International Air Transport Association	Ms G. Deyhimy, Legal Counsel
International Bar Association	Ms L. Curran, Vice-Chairperson, Sub-committee of the Banking Committee on the Taking of Security in International Transactions

Advisers

Mr J. Wool

Mr H. Rosen

Partner, Perkins Coie, London; Assistant Affiliate Professor of Law, University of Washington, *co-ordinator of the Aviation* Working Group / expert consultant on international aviation finance matters

Attorney, Zug; expert consultant on international rail finance matters

3. - The Working Group was seised of the following materials:

(1) First set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment (established by the Drafting Group of the Sub-committee on 19 December 1995 as revised by the same on 4 March 1996) (Study LXXII - Doc. 24);

(2) Exploratory report prepared by Professor Cuming (Study LXXIIC - Doc. 1).

4.- The Working Group adopted the agenda which is set out in an appendix to this report.

5. – In introducing the business of the session, *the Chairman* indicated that the Working Group would not be looking at the technological aspects of the future international register, that is those questions relating to the hardware and software to be employed. As he had indicated in his report, he considered that the Group had three main goals, first, to identify the basic features of a modern electronic registration system of the kind designed to underpin the proposed Convention, secondly, to look at some of the policy choices available to those designing a system of this kind and, finally, to explore those particular considerations raised by the special needs of certain groups of users, such as the aviation finance sector and the railway rolling stock industry. In this last connection he took the view that it was extremely unlikely that one model would accommodate all these different types of users.

He suggested however that the Group should look first at those features of the future international registration system that would be applicable generally. He stressed the pioneering character of the Group's task, namely the fact that it would not have any international models to look to.

He explained that he had been involved in the design and implementation of three Canadian provincial systems for the registration of security interests in personal property. These systems were all electronic in the sense that both registration and searching could be done from a remote computer terminal; one of them was totally electronic in the sense that it did not permit the use of paper at all. His experience of these systems was that they had worked well and had not given rise to too many problems. They had been operating long enough - some of them for as long as four or five years - for him to be able to assert with confidence that the decision to go this route had been the right one. The Canadian experience had moreover demonstrated that distance was no problem: provided one had a lap-top computer with a reasonably good modem and some simple software supplied by a registry and had arranged to pay the appropriate fee, one would be able from Rome, for example, to register a financing statement in one of the Canadian provincial registries, to search any one of those registries and amend or discharge any registration that one might have effected there.

As regards those provisions of the proposed Convention relating to registration, he indicated that, while the Sub-committee and the Study Group had engaged in some discussion of the future international registration system and had indeed included some provisions on the international registry and the modalities of registration in the first set of draft articles (cf. Study LXXII - Doc. 24), it had by and large decided to defer to the Working Group with regard to the design of the future international registry. Among the features of the international registration system that had however been generally accepted by the Study Group was the idea that the operational rules which would govern the registry would be contained in Rules and not in the future Convention itself. This decision was dictated by recognition of the fact that, whereas the Convention as an international instrument would not be easy to amend, it would be essential to build sufficient flexibility into the rules governing the future registry to permit the amendments and fine-tunings that were bound to prove necessary from time to time. The second feature of the international registration system that had been agreed by the Study Group was that the priority system to be established under the future Convention would be based on the principle of the time of registration. Thirdly, whereas the precise scope of the future Convention and the international registration system still remained to be defined, it seemed clear that a fairly wide range of interests would be registrable, including security interests, title retention interests, leases and perhaps also such national interests as the interests of execution creditors and nonpossessory liens. A proposal had in addition been tabled by the Aviation Working Group for the registry also to cover title transfers in certain contexts. Fourthly, it was generally agreed that the international registration system would be a notice registration system and not a document filing system. Fifthly, it was generally accepted that the future system should, as far as possible, be electronic. Sixthly, the Study Group, at its second session held in Rome from 12 to 16 April 1996, had decided to allow for pre-attachment registration, that is to permit a filing even before the debtor, in the case of a security interest, had an interest, so that the only pre-requisite for registration would be the existence of an agreement and not the acquisition of an interest. Seventhly, the Study Group had decided that all the categories of mobile equipment to be covered by the future Convention should be uniquely identifiable, for instance by means of their manufacturer's serial number, and that this number would be used as the registration search criterion. It was not therefore the intention that registration should be made against the name of the chargor, buyer or lessee. Whilst it was thus envisaged that the future international registry would be essentially asset- as opposed to name-based, the Study Group had left open the possibility that a parallel name-based registry might also be set up, an issue on which it had moreover invited the Working Group's opinion.

6.- As a result of its deliberations the Working Group was able to reach a certain number of tentative conclusions. These were as follows:

(a) Source of Rules

It was agreed that the Rules which would govern the operation of the international registration system would be in the nature of secondary legislation. It was further agreed that the mechanism to be put in place for this purpose would have to be one that would accommodate amendments to permit such updating and other changes as were dictated by experience in its operation. There was general agreement that the body responsible for the ongoing process of amendment of the Rules would have to be someone other than the international registrar himself.

(b) Role of the registrar

almost all States maintained recording offices, operated by the local civil aviation authority, where aircraft could be registered as to nationality for the purposes of the 1944 Chicago Convention on International Civil Aviation and where interests in aircraft could be registered for the purposes of the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. It was recognised that it would be necessary for the international registry to preserve this facility. It was agreed that this could be done by feeding the information that would ultimately go into the international registration system through national satellite offices, although it was recognised that special arrangements would have to be made for those States that might not feel themselves able to act as agencies for the international registry.

In the case of a registration effected via a national satellite office, it was agreed that the actual filing in the international registration system should be able to be effected directly by officials at the satellite registry, the idea thus being that the latter should have direct access to the data base of the international registry.

As regards the vetting procedures to be complied with by the operators of the different satellite registries, it was agreed that the needs of uniformity would require the establishment in the Rules of some basic uniform standards regarding the pre-registration vetting of documents.

In respect of collateral other than aircraft equipment, the view was taken that it would probably be unrealistic to envisage a structure parallel to the satellite registries contemplated for aircraft. For assets such as railway rolling stock and containers it was recognised that it was unlikely that satellite registries could be established and that there would therefore have to be direct contact between a registering party and the international registrar. However, it was also agreed that such a registering party should not have immediate and direct access to the data base of the international registry and that there would have to be some vetting by the registrar to ensure that what was entered on the international register was a registration in respect of an existing agreement so as to avoid possible abuses of the system. The Working Group in this context considered the possibility of a requirement that the registering party submit, together with the registration notice, a copy of the relevant agreement. It was agreed that the registrar should however only have the obligation of ensuring that an agreement appeared to exist, that is that he should not be required to go beyond appearances and check, for instance, that the signatures on the agreement were indeed those of the parties named therein. Once the registrar had satisfied himself that an agreement did in fact appear to exist, he would be able to make the necessary direct entry in the data base.

It was recalled that the Study Group had made it a prerequisite for the making of a valid registration in the case of a security agreement that the chargor had consented in writing to the registration (cf. Study LXXII - Doc. 24, *sub* Article 14(1)(b)). It was agreed that for this purpose it should be sufficient for the registrar to satisfy himself that the chargor had *appeared* so to consent, namely by the presence of his signature on a consent form, without having to check whether the signature was indeed the chargor's. In the case of a security agreement it would thus be possible for the registering party to submit a consent form instead of a copy of the agreement itself.

It was suggested as a fall-back solution in cases, say, where the consent form was defective in some way, that the registrar should be able to treat an agreement between chargee and chargor to grant the former a power of attorney to file such documentation as might be required on behalf of the latter as evidence of the chargee's power to consent to registration on behalf of the chargor.

It was agreed that the question of the requirement of the chargor's consent under the future Convention was a matter that would have to be considered in the context of the review procedure to be carried out by satellite registries.

It was suggested that the registrar should be brought into the review process responsible for considering possible amendments to the Rules.

(c) *Control of the international registry: public or private*

On the question of whether the international registry should be run publicly or privately, there was general agreement that at the very least the international registry should be under public control, whether exercised by Government or an industry organisation, although its day-to-day operation could be left in the hands of a private contract operator.

(d) Need for efficiency and economy

There was general agreement as to the need for the international registry to be as efficient as possible in terms of the time required to effect registrations and searches. It was also agreed that fees should be moderate and based on handling costs rather than on an *ad valorem* or stamp duty approach.

(e) *Liability for errors or omissions*

It was agreed that it would in general be appropriate for the international registry to assume liability up to a certain level for loss sustained as a result of errors or omissions in the operation of the international registration system. It was further agreed that consideration should be given to the role played by insurance in ensuring compensation for loss in the registration systems operated in Canada. It was however also agreed that, in considering the upper limits to be set on such compensation, a distinction would probably need to be drawn between aircraft and other mobile equipment so as to ensure that these properly reflected the difference in value between one and the other.

(f) Searching

There was a lengthy discussion regarding remote access searching, that is the question of whether the data base should be accessible to anyone who had made the necessary arrangements with the registry. The only problem identified by the Working Group was that of security, that is whether it would be possible to establish a system that would allow searching without having access to the data base. It was noted that such a system had existed in Canada prior to the introduction of remote access for registrations and that that system had worked satisfactorily from the point of view of security. It was however recognised that there could be no absolute security in matters of this kind and in particular that the risk of fraud was bound to be greater with an electronic system than it would with a manual system.

(g) Possibility of separate collateral-based registries

There was general acceptance of the idea that there might well be separate central registries for different types of collateral. It would thus not necessarily follow that the central registry for aircraft, for example, would also be the central registry for railway rolling stock.

(h) Languages of registry

There was extensive discussion of the languages to be employed in connection with the registry. While no definitive conclusions were reached, it was noted that, in view of the decision to go for a notice registration, as opposed to a document filing, system and the fact that the registration notice would not contain a great many words but would rather hinge on the serial number of the collateral, language might well not be such a significant problem as it would be with a different type of registry. It was thought appropriate that the registration documents should be established in a limited number, say two or three, of the languages most commonly used world-wide, although it was recognised that it would in all likelihood be impossible to accommodate all languages and alphabets.

(i) Registration search criterion

It was agreed that the manufacturer's serial number or other identification mark should be employed as the registration search criterion for a particular asset. Some support was expressed for the idea of having in addition some minimal information about the collateral, such as its make and model, with a view to dealing with possible misinterpretations of the information or situations involving fraud.

(j) Jurisdiction

There was extensive discussion of the question of the court or courts which should have jurisdiction over the future international registry. While some support was expressed for the idea of the Convention specifically providing that the international registrar should not be subject to, and should accordingly be free to disregard orders emanating from national courts, it was recognised that this was essentially a political matter that would need to be settled in another forum and not one on which the Working Group had any special expertise to offer. It was suggested that assistance be sought in this respect from the World Intellectual Property Organization. The Working Group did however note the extent to which the efficacy of the registry might be adversely affected by a decision not to confer jurisdiction on a particular court or courts and to rely simply on *in personam* court orders against the users of the international registration system, thereby leaving it up to the registrar to determine the extent to which such orders should be reflected in the registry.

(k) Duration of registration

After consideration of the Canadian model which gave the registering party responsibility for choosing the registration life, the Working Group in general expressed itself against any rigid registration period, coming down rather in favour of either variable life registration, as in Canada, or automatic infinity registration.

Discussion focussed principally on mechanisms to deal with discharge, that is to ensure that once the debt had been paid out or the international interest had been otherwise discharged the registration was not retained on the international registry. No firm conclusions were reached as to the most appropriate solution. It was however recognised that, whilst in many transactions this would simply be a matter for negotiation, where it was not and the registration was being retained either intentionally or inadvertently by the registering party a means of procuring the discharge of the registration would have to be found so as to remove the cloud that would otherwise hang over the title of the property of the chargor. Whilst opposition was however registered as to the suggestion that the chargor should be given unilateral power to force discharge, on the other hand it was recognised that, failing the conferment of some kind of court jurisdiction over the registry that might be invoked by the chargor, the problem could otherwise become insuperable.

(l) Risk of delay in registration

The Working Group considered the question as to who should bear the risk of delay in registration, that is whether a registration should be regarded as effected when the documents were delivered to the registry office even though the interest was not at the time searchable or whether a registration should only be regarded as effected when it had become searchable. There was support for the idea of making registration and searchability co-terminous, although concern was expressed that this might cause certain problems.

(m) Pre-agreement registration

There was general support for the concept of the filing of a priority notice or preagreement registration, whereby a registration would have temporary effect even before an agreement was in place between the parties and would determine priority once an agreement was reached during the currency of that temporary registration, although, should an agreement not be reached during that period, the registration would lapse.

It was agreed that the same principles which had found support with regard to the filing of full registration notices should also apply to the filing of priority notices, namely, first, that such a filing should only be effective from the time when it was searchable and, secondly, that the chargor's consent should be required.

(n) Transitional provisions

The Working Group discussed the problems of transition that would arise in situations where there was already a national registration. It was agreed that significant publicity measures would have to be organised with a view to alerting parties of the need to comply with the new international registration system. It was suggested that other inducements might be offered to encourage parties affected by the new Convention to effect a registration under the new system. It was suggested that at same point in time parties should be required to transfer their national filings to the international register so as to guarantee the reliability of the new system.

(o) Relationship with existing Conventions and registration systems

There was agreement that it would be necessary to ensure that the future Convention and international registration system dovetailed with existing international Conventions and registration systems. It was noted that this was a technical matter which would need to be carefully explored by experts familiar with such other international instruments and registries.

(p) Fuzzy matching

The view was taken that the fuzzy matching system used in Canadian registries to accommodate errors made by registering parties in recording information that was entered into the data base should not be employed in the international registration system. It was noted that fuzzy matching would create significant problems with the registration of railway rolling stock because of the particular sequencing used for serial numbers of such equipment. There was general agreement that the sophistication of the registering parties contemplated under the future Convention was such that they might reasonably be expected to record serial numbers correctly and, if they did commit an error, then it was right that the registration should be invalid.

(q) Verification

There was agreement that the international registration system should employ the verification system employed by the Canadian registries, that is once a registration was effected a verification statement would be immediately sent out by the registry to the registering party. It was felt that this would in some way compensate for the decision not to employ fuzzy matching in the international registration system, since each registering party would thus receive a printed statement informing him exactly as to what had been recorded in the data base with the result that the onus would then be on him to ensure that the information recorded corresponded to his intentions.

(r) Registration notice

It was suggested that a model registration notice be drawn up so as to enable the Working Group to have a better idea of the issues involved.

7. – The Working Group also considered those provisions of the *first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment* (Study LXXIIC - Doc. 1, Appendix A) relating to the international register and registration of international interests.

(a) Re Article 4(b)

It was noted that this provision would be deleted pursuant to the decision taken by the Study Group at its second session to abandon the concept of the prospective international interest in view of its decision to allow registration before the chargor had acquired rights in the collateral. It was further noted that this decision was also in line with the view that had emerged within the Working Group to permit pre-agreement registration (cf. § 6(m) *supra*).

(b) Re Article 4(i)

It was pointed out that the language inside square brackets was designed to deal with the question of priority between a registering party and trustees in bankruptcy and unsecured creditors, in which connection it had been agreed by the Study Group that, while focussing essentially on an asset-based registration system, the possibility should nevertheless be kept open for the time being of a parallel name-based registry (cf. Study LXXII - Doc. 27, § 39). The general view of the Working Group was that it would be better not to introduce a factor that would substantially add to complexity, raising as it would the problem of the accurate recording of the chargor's name in more than one alphabet, when it would appear that the manufacturer's serial number would work perfectly well as a registration search criterion with all the different types of asset envisaged. It was suggested that, while the technological feasibility of employing a registration search criterion other than the asset's serial number could always be considered, the logic of the system envisaged as regards filing and priorities pointed rather in the direction of an asset-based registration system.

(c) Re Article 5

The Working Group took note of the Aviation Working Group's recommendations regarding this provision (cf. Study LXXII - Doc. 23, Annex 1, sub Article 4), in particular that concerning satellite registries. It was noted that the effect of the Aviation Working Group's proposal regarding satellite registries would be to confer radical new decision- making powers on these registries in relation to the amendment and discharge of registrations, although the precise details of this would necessarily depend upon the final shape of the Rules. It was further noted that as regards aircraft the basic intention was that there would be only one point of access to the international registration system, namely the satellite registry, so that a lender would not be able to bypass the satellite registry by going straight to the central registry. It was explained that the Aviation Working Group's thinking in this regard was that each country of aircraft registration had a policy interest in vetting the taking of other interests in that aircraft and it was for this reason that it believed that both the most convenient and the most efficient solution would be for filings under the proposed Convention to be made at the same office as that where filings were made under the Chicago and Geneva Conventions. It was argued that a decision only to allow filings to be made in one office would make the future international system that much clearer.

(d) Re Article 14

The Working Group took note of the Aviation Working Group's recommendations regarding this provision (cf. Study LXXII - Doc. 23, Annex 1, *sub* Article 17), in particular the proposal that the consent to registration of all the parties to the agreement and not just the chargor's should be required and the introduction of the concept of the "priority notice" (cf. \S 6(m) *supra*). However, in general the Working Group took the view that its brief did not extend to discussing those recommendations of the Aviation Working Group which raised policy questions as to the scope of the future Convention on which the Study Group had not yet taken a definite position.

The Working Group noted that Article 14(3) would need to be amended in the light of its decision to take searchability, rather than the time of receipt of the registration notice, as the appropriate criterion for the effectiveness of registration (cf. § 6(l), *supra*).

It further noted that Article 14(4) reflected the concept of variable life registration which had been accepted by the Working Group (cf. § 6(k) *supra*).

It was also noted that Article 14(5), which had essentially been drafted with the fuzzy matching system in mind, would have to be reviewed in the light of the Working Group's decision not to employ such a system in relation to the registration search criterion. Thus, whereas an irregularity relating to the name of the chargee or the chargor or even the description of the asset by kind as opposed to serial number might still be valid under this clause, this would not be so with an irregularity relating to the serial number of the asset.

(e) Re Article 15

It was noted that this article would have to be amended to reflect the bifurcated system of registration (central registry/satellite registries) that was now contemplated, at least for aircraft.

The Working Group also took note of the Aviation Working Group's recommendations regarding this provision (cf. Study LXXII - Doc. 23, Annex 1, *sub* Article 18), noting that, depending on the final shape of the Rules, the supporting evidence referred to therein as being necessary for the submission of registration amendment and discharge notices could include national court orders.

(f) Re Article 16

It was explained that the purpose of this provision was, where the existence of a registration was at issue in judicial proceedings, to enable evidence thereof to be put before the court in the form of a certificate of registration, it having been recognised that it would not be feasible to call the international registrar himself each time.

Some doubts were expressed as to the wisdom of retaining the word "order", featuring in square brackets in this provision, and it was suggested that it was probably redundant in a system intended to be computer-based. It was explained that this term was not however intended to refer to the legal issue of priorities but simply to cover a factual situation such as that where a large number of registration notices arrived at the same time, say in a post bag, and were each accorded a different number to reflect the order in which they were processed.

It was agreed that the Rules would need to address the question of the time-frame to be employed for the determination of the time of registration to cover the anomalies that would otherwise result from the world's different time-zones. It was suggested that the question of time should be regulated by the computer in the central registry.

(g) Re Article 17

It was noted that this provision would disappear following the decision to abandon the concept of the prospective international interest (cf. § 7(a) *supra*).

The Working Group took note in this context of the Aviation Working Group's recommendations regarding the priority rights of a party filing a "priority notice" (cf. Study LXII - Doc. 23, Annex 1, *sub* Article 22(2)(b); $\S6(m)$ *supra*).

It was noted that this provision, dealing with the difficult question of the liability of the international registry, raised major policy questions which would first have to be answered before any drafting could be essayed.

8. – The Chairman undertook to consider which additional provisions relating to the international registry and registration of international interests would be called for as well as the amendments that would be necessary to those provisions relating thereto set out in the first set of draft articles, in the light of the tentative conclusions reached by the Working Group and to prepare a revised draft of these provisions for submission to the Drafting Group of the Study Group with a view to their inclusion in the revised text to be laid before the Study Group at its

⁽h) Re Article 18

third session, to be held in Rome from 15 to 21 January 1997. He indicated that he would welcome the assistance of other Working Group participants, in particular Mr Wool in view of the Aviation Working Group's many recommendations bearing on these questions. It was agreed that participants in the Working Group might submit comments in advance of its next session, which might take the form of comments on this report. It was further agreed that a second session of the Working Group would be convened after the third session of the Study Group so as to allow time for the incorporation of such further drafting amendments as might prove to be necessary in the light of the Study Group's work. It was hoped that the Working Group would at its second session also be in a position to begin tackling the technological aspects of the establishment of the future international registration system. It was noted that it was the intention that the Study Group should be able, once it had completed its examination of the substantive provisions of the future Convention, to consider the registration-related provisions to emerge from the Working Group. It was agreed that the Rules would have to be drafted subsequently.

9. – At the request of the Working Group, Mr Wool agreed to undertake consultations within the aviation industry and with the relevant international Organisations with a view to exploring further the issues addressed at the Working Group's meeting and Mr Rosen agreed to undertake similar consultations within the railway rolling stock industry and with the relevant international Organisations.

APPENDIX

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

WORKING GROUP TO CONSIDER THE LEGAL AND TECHNICAL ISSUES RAISED BY THE ESTABLISHMENT OF AN INTERNATIONAL REGISTER

(First session: Rome, 16 - 18 April 1996)

AGENDA

- 1. Election of the Chairman
- 2. Approval of the revised draft agenda
- 2. Opening remarks of Chairperson
- 4. Discussion of features of the proposed Convention relating to registration
- 5. Possible features of an international registry (See Study LXXIIC Doc. 1)
 - (i) notice registration or document filing
 - (ii) the role of the registrar
 - (iii) the registration notice (hard copy and/or electronic)
 - (iv) the registration search criterion (criteria)
 - (v) the language(s) of the registry
 - (vi) duration of registration
 - (vii) safeguards against abuse of registration rights
 - (viii)when registration occurs (receipt or searchability)
 - (ix) the role of notice or knowledge
 - (x) effects of errors in registration information (esp. the registration-search criterion)
- 6. Jurisdiction over the registry
- 7. Liability for errors in the operation of the registry

8 – One registry or specialised registries (e.g., aircraft registry, railway rolling stock registry, cosmic objects registry, etc.)

- 9. A possible role for national or regional registry agency offices
- 10. Logistics of establishing the registry (registries)
- 11. Any other business.