

NEWS FROM UNIDROIT

The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment. Should ships be included?

1. Introduction

A Preliminary Draft Convention on International Interests in Mobile Equipment has been established by the Study Group created by the International Institute for the Unification of Private Law-UNIDROIT at the conclusion of its fourth session, held in Rome in November 1997.

The work of the Study Group has been followed by the CMI because since the beginning amongst the "mobile equipment" to which the future convention would apply reference was made to registered ships. And in the Preliminary Draft established in November 1997 reference to ships may still be found, although in square brackets, in Article 3.

The purpose of this paper is to consider whether the inclusion of ships in the sphere of application of this Convention would be in conflict with existing maritime conventions relating to ships and whether, in any event, the provisions of this Convention could apply in respect of ships.

The structure of the Draft Convention is different from that of most other conventions. The draft in fact contains, as clarified by Mr. Stanford in his paper entitled *Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment-Basic Features*, "a core of rules which may be universally applied across the whole spectrum of equipment intended to be covered by the Convention" to be complemented by rules "corresponding to the special characteristics of each specific category of equipment" contained in separate protocols. Article X of Chapter X (Final Provisions) provides that the Convention shall enter into force as regards a category of object (a) at the time of entry into force of the protocol (relating to that category of object); (b) subject to the terms of that protocol; and (c) as between Contracting Parties to that protocol.

At present only one preliminary draft protocol has been prepared on matters specific to aircraft equipment. If that draft protocol is taken as an example, it appears that each individual protocol may not only supplement the convention but also amend it, by deleting some of its provisions or replacing some others with different provisions⁽¹⁾.

Nevertheless, what is described by Mr. Stanford as "core of rules" must be substantially preserved, otherwise there would be no "core" at all and each protocol would become an independent convention, almost entirely unrelated to the other protocols. If this were the ultimate result, the very purpose of this exercise would

(1) Inter alia new default remedies are added (article XI(1) of the Preliminary Draft Protocol on Matters Specific to Aircraft Equipment), article 9(2), which provides that the remedies must be exercised in a commercially reasonable manner, is deleted (article XI(2) of the Preliminary Draft Protocol), and replaced by a new article (article XI(7)).

obviously be defeated. To which extent, however, the provisions of the Convention may be amended or deleted without affecting the unity is difficult to say.

For the stated purpose of this paper it seems legitimate to consider the rules of the draft Convention as rules applicable to any kind of "object" and, therefore, also to registered ships: provided always that a specific protocol applicable to ships is prepared and agreed and enters into force.

In the following paragraphs, an attempt will be made to compare the system created by the Draft Convention with that created by the maritime conventions covering the same matters. The maritime conventions that will be considered are the 1993 Maritime Liens and Mortgages Convention and the 1952 Arrest Convention, together with the Draft Articles for a Convention on Arrest of Ships that will be submitted to a Diplomatic Conference convened by the United Nations in the first two weeks of March, 1999.

For the purposes of such comparison the following questions and issues will be considered:

- the structure of the conventions
- the rationale of the conventions
- the relationship between national and international registration
- the relationship between registered charges and secret charges
- the enforcement of the claims
- jurisdictional issues
- whether there is any need for a global system
- the effects of a convention based on the Unidroit draft on the existing maritime conventions.

2. *The structure of the conventions*

In maritime law the uniformity of the rules on security rights have been kept separate from those on "conserving" measures. Although this originally was due to the different time when attempts to reach uniformity were first made, the question whether security rights (i.e. mortgages and "hypothèques" and maritime liens) and arrest could be covered by one global convention was raised when the revision of the 1926 and 1967 Maritime Liens and Mortgages Conventions and of the 1952 Arrest Convention was considered first by the CMI and then by the IMO/UNCTAD Intergovernmental Group of Experts and was in both instances turned down. It was felt, in fact, that it would have been significantly more difficult to obtain a wide international consensus on all issues covered by such conventions if they were dealt with together in one global convention only.

Such attempt is now made, even on a much larger scale, by the Unidroit Draft, in which not only the substance of security rights is regulated (reference is made in this respect to the very detailed rules on default remedies), but a much larger area is covered, both from the standpoint of the type of security and of the objects. At the same time an area of great importance in maritime law, that of the securities arising out of operation of law, is left out because maritime liens are not registrable.

3. *The rationale of the Conventions*

The rationale behind the MLM Convention has been to unify those aspects of the securities on which common rules were more likely to be accepted by a large number of maritime nations and in respect of which, at the same time, uniformity is much needed. The approach has been, therefore, pragmatic and not academic.

It was thus thought that in respect of registrable (and registered) charges it was important to ensure this recognition by as large a number of maritime countries as possible, rather than to attempt to regulate the substance of the different types of charges. It was then considered that in order to create an incentive to ships financing, it was important to reduce as much as possible the number of secret charges (the maritime liens) taking priority over mortgages and "hypothèques". Lastly, it was thought that uniform rules were required in order to prevent that a ship may be deregistered from one country's register and re-registered in another country's register without the prior satisfaction of the claims secured by registered charges and that a minimum of uniform rules on the forced sale of ships, its effects on the securities and on the distribution of the proceeds of sale would be very useful.

The rationale behind the Arrest Convention has been to reach uniformity in respect of the claims for which a ship may be arrested, of the ships that may be arrested and on the jurisdictional issues.

The rationale behind the Draft Convention is much more ambitious: to lay down uniform rules applicable to a variety of mobile objects, to regulate substantive matters in relation to securities and to create an international registration system.

4. *The relationship between national and international registration*

The Draft Convention does not consider the interrelationship between registration of mobile objects and registration of "interests" therein. Nor does it consider registration of mobile objects and rights thereon at a national level. Since it is unreasonable to think that States would abandon their national registration systems, because registration – at least in so far as ships are concerned – is required not only for private, but also for public purposes, the effects (so far somewhat nebulous) of an international registration system on the national systems should be seriously considered. It is thought that the following questions, inter alia, need to be answered:

- (i) would registration of ships in the International Registry be voluntary or compulsory?
- (ii) should title to the ship be registered in the International Registry?
- (iii) if so (and it must be so in order to enable registration of charges), how would a conflict between

registrations be solved? Would the status of registration in the International Registry prevail over that in the national registry?

- (iv) should judicial orders affecting property be registered also in the International Registry?
- (v) would charges (i.e. mortgages and "hypothèques") be considered as effectively registered if registered only in the International Registry or would national registration also be required?
- (vi) would the order of registration of several "interests" in the International Registry prevail over the order of registration in the national registry, if different?
- (vii) what evidence should be supplied to the Registrar?
- (viii) could a ship be deleted from the International Registry whilst it continues to be registered in the national registry and viceversa?
- (ix) what is the effect of registration of a ship in the International Registry on nationality, if any?

It may be said that all these and other questions should be answered by appropriate provisions of the relevant protocol. Those in charge of the preparation of such protocol would have a very difficult task indeed.

Suffice it to say that within the European Union the project of creating an European ships registry has been abandoned.

5. *The relationship between registered charges (mortgages and "hypothèques") and secret charges (maritime liens).*

In the laws of all maritime nations there are charges – the maritime liens – that arise out of operation of law and are secret, in the sense that they are normally unregistrable and in any event their effectiveness does not depend on registration. Some – if not all – such charges take priority over registered charges. In the Draft Convention maritime liens come under the expression "non-consensual rights and interests". Article 38(2) of the Draft Convention provides that in proceedings before the courts of a Contracting State a (non-registrable) non-consensual right or interest which under the law of that State would have priority over an interest in the object equivalent to that held by the holder of the international interest has priority over the international interest to the extent set out by that State in any instrument deposited with the depositary prior to the time when the registration of the international interest takes effect and to the extent that the non-consensual right or interest would under the national law of that State have priority over a registered interest of the same type as the international interest.

Let us assume that France, Italy and Spain (all of which are at present parties to the 1926 MLM Convention) will ratify the 1993 MLM Convention and that such Convention will come into force.

If the Italian holder of a Convention maritime lien on a Spanish ship will enforce the lien by arresting that ship in France, in case of forced sale of the ship he will be entitled to payment of his claim with priority over a registered "hypothèque". If France will ratify the future Convention on International Interest on Mobile Equipment and its protocol relating to ships but will neglect to deposit with the depositary of such Convention the instrument mentioned in article 38(2)(a) of the Draft, the Italian claimant will not obtain the satisfaction of his claim, since the "hypothèque" will have priority over it. There would arise, therefore, a conflict between the two Conventions. But the situation would be even more complicated if the State where the ship is arrested is only a party to the future Convention on International Interest on Mobile Equipment. In such a case that State could not give the notice required by article 38(2)(a) and, if by its private international law rules its courts would apply the law of the State where the maritime lien has arisen⁽²⁾, they would not be able to apply it.

In any event it is difficult to assess the practical benefits of the system created by article 38. The fact that the depositary is notified by Contracting States that certain maritime liens take priority over mortgages and "hypothèques", even if made known (how, it is not clear) to holders of international interests would not yield any practical advantage to them. In fact, exactly as at present, it would not be possible to predict where a maritime lien will be enforced. Therefore holders of international interests, no matter what the Convention will say, will – as mortgagees and holders of "hypothèques" do at present – take into account that maritime liens may take priority.

Attention must then be paid to the fact that article 38 is confined to priorities between holders of securities and does not deal with another feature of maritime liens: the right of the holders thereof to enforce the lien also after the ship has been sold to a bona fide purchaser for value. This fundamental character of maritime liens is in conflict with article 38(3) of the Draft Convention, according to which the buyer of an object acquires its interest in it free from an unregistered interest (even if it has actual knowledge of such an interest).

6. *The enforcement of claims*

Chapter III of the Draft Convention, titled "Default Remedies" regulates the enforcement of claims. Article 9 provides that in the event of default in the performance of a secured obligation, the chargee may (a) take possession or control of any object charged to it, (b) sell or grant a lease of any such object, (c) collect or receive any income.

Article 15 provides that a Contracting State shall ensure that an obligee who adduces prima facie evidence of default by the obligor may, pending final determination of its claim, obtain speedy judicial relief in the form,

(2) This is so in the United States.

(3) In the French text of the 1952 Arrest Convention arrest (saisie) is defined as "l'immobilisation d'un navire".

inter alia, of an order of "immobilisation of the object". "Immobilisation" is a term which should, it is thought, include arrest⁽³⁾. If this is the case, the requirement of a "prima facie evidence of default" is almost certainly in conflict with the provision of article 1(4) of the 1952 Arrest Convention which defines "claimant" as a person "who alleges that a maritime claim exists in his favour"⁽⁴⁾.

7. *Jurisdictional issues*

Article 15(3) of the Draft Convention provides that a Court of a Contracting State has jurisdiction to grant judicial relief under paragraph (1) when the object is within the territory of that State, one of the parties is located within the territory, or the parties have agreed to submit to the jurisdiction of that Court. Since paragraph (1) includes, amongst the types of judicial relief, the immobilisation of the object, the second and third links mentioned in paragraph (3) are in conflict with article 4 of the 1952 Arrest Convention and with article 2(1) of the Draft Articles, according to which the Courts of the Contracting State in which the arrest is made have exclusive jurisdiction to grant the arrest.

8. *Is there any need for a global convention?*

It is difficult to understand for which reasons there should be a global convention containing the basic rules on matters as different from one another as charges, leases and sales in respect of objects as different from one another as aircraft and helicopters, ships, oil rigs, containers, railway rolling stock, space property and any other object. This entails the necessity of very substantial special rules for each single category of objects as the draft protocol "on matters specific to aircraft equipment" shows.

Globalisation is very fashionable nowadays, but it is felt that, at least in this case, it would only create confusion and would hardly succeed.

Of course it may be objected that by mentioning ships (and oil rigs) as one of the categories to which the Convention would apply no harm would be caused, because the Convention would enter into force as regards ships (and oil rigs) only if and when the relevant protocol will have been agreed and will enter into force. But the very fact of including ships could prevent – or render more difficult – future efforts of unification of maritime law in the areas covered by the Draft Convention.

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