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PRELIMINARY DRAFT MODEL LAW ON LEASING

(as established by the UNIDROIT Advisory Board for the preparation of a model law on leasing at its third session (Rome, 3-5 April 2006) and as authorised for transmission to Governments for finalisation by the UNIDROIT Governing Council at its 85th session (Rome, 8-10 May 2006))

[PREAMBLE

THE GENERAL ASSEMBLY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), meeting at its 60th session in Rome on 30 November 2006,

Recognising that leasing provides developing countries and countries in transition in particular with an important source of capital for the development of infrastructure and small- and medium-sized enterprises;

Aware that, while many States already possess leasing legislation and a well-developed leasing industry, many other States, and in particular those States with developing economies and economies in transition, require a legal framework that will foster the swift growth of a nascent or non-existent leasing industry;

Convinced accordingly as to the usefulness of proposing a model law on leasing for consideration by national legislators, which may adapt it to meet their specific needs;

Committed to the purpose of harmonising legal regulations of leasing on a global basis in order to facilitate international trade in capital goods;

Finding that the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) has not only removed certain legal impediments to the international financial leasing of equipment while maintaining a fair balance of interests between the different parties to the transaction for States Parties thereto, but has also frequently served as a model for States drafting their first leasing laws;

Considering the legal regimen enshrined in the aforementioned Convention as a useful starting point for the development of a comprehensive model law governing such transactions;

Being of the view that in the preparation of such a model law priority must be given to the establishment of rules governing the civil and commercial law aspects of leasing,

Mindful of the proven usefulness of the UNIDROIT Principles of International Commercial Contracts as a model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing,

*HAS APPROVED THE FOLLOWING TEXT OF THE UNIDROIT MODEL LAW ON LEASING:]**

CHAPTER I: GENERAL PROVISIONS

Article 1 Sphere of application

This Law applies to any lease of an asset, if the asset is within [the State], the lessee's centre of main interests is within [the State] or the leasing agreement provides that [the State's] law governs the transaction.

Article 2 Definitions

In this Law:

Asset means all property used in trade or business, including plant, capital goods, equipment, future assets, specially manufactured assets and living and unborn animals. The term does not include money or investment securities but no asset shall cease to be an asset for the sole reason that the asset has become a fixture to or incorporated in land.

Centre of main interests means the place where a person conducts the administration of its interests on a regular basis. In the absence of proof to the contrary, the person's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the person's main interests.

Financial lease means a lease, with or without an option to purchase, that includes the following characteristics:

- (a) the lessee specifies the asset and selects the supplier;
- (b) the lessor acquires the asset or the right to possession and use of the asset in connection with a lease and the supplier has knowledge of that fact; and
- (c) the rentals or other funds payable under the leasing agreement take into account the amortisation of the whole or a substantial part of the lessor's investment.

* The preamble to the preliminary draft Model Law as reproduced herein was prepared by the UNIDROIT Secretariat, in line with the decision taken by the Advisory Board at its second session. It is designed simply to demonstrate the fundamental objectives of the preliminary draft Model Law and is in no way intended to prejudice the decision on this issue to be taken by Governments.

Lease means a transaction in which a person grants a right to possession and use of an asset to another person for a specific term in return for rentals. Unless the context indicates otherwise, the term includes a sub-lease.

Lessee means a person who acquires the right to possession and use of an asset under a lease. Unless the context indicates otherwise, the term includes a sub-lessee.

Lessor means a person who grants the right to possession and use of an asset under a lease. Unless the context indicates otherwise, the term includes a sub-lessor.

Person means any legal, private or public entity or an individual.

Supplier means a person from whom a lessor acquires an asset for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires an asset for lease.

Article 3 Other laws

A leasing agreement subject to this Law is also subject to any law of [this State] applicable to real property or public notice with respect to a leasing agreement or an asset subject to a leasing agreement. Failure to comply with such law has only the effect specified therein.

Article 4 Interpretation of this Law

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5 Freedom of contract

Except as provided in Articles 7(1), 16(1)(a), 16(2) and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a leasing agreement.

CHAPTER II: EFFECT OF LEASING AGREEMENT

Article 6 Enforceability

Except as otherwise provided in this Law, a leasing agreement is effective and enforceable according to its terms between the parties, against purchasers of the asset and against creditors of the parties, including an insolvency administrator.

Article 7 Lessee under financial lease as beneficiary of supply agreement

1. (a) In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

(b) The extension of the supplier's duties to the lessee under the preceding subparagraph does not modify the rights and duties of the parties to the supply agreement, whether arising therefrom or otherwise, or impose any duty or liability under the supply agreement on the lessee.

(c) Where the absence of privity of contract between the lessee and supplier prevents the lessee from enforcing the supplier's duties under the supply agreement, the lessor shall be bound to take commercially reasonable steps to assist the lessee. If the lessor does not take such steps, the lessor is deemed to have assumed such duties.

(d) The parties may not derogate from or vary the effect of the provisions of this paragraph.

2. The lessee's rights under this Article shall not be affected by a variation of any term of the supply agreement previously approved by the lessee unless the lessee consented to that variation. If the lessee did not consent to such variation, then the lessor is deemed to have assumed the duties of the supplier to the lessor that were so varied to the extent of the variation.

3. Nothing in this Article shall entitle the lessee to modify, terminate or rescind the supply agreement without the consent of the lessor.

Article 8 Priority of liens

1. A creditor of the lessee and the holder of any interest in land or personal property to which the asset becomes affixed take subject to the leasing agreement and cannot attach any interest belonging to the lessee.

2. Except as otherwise provided by the law of [this State], a creditor of the lessor takes subject to the leasing agreement.

Article 9 Liability for death, personal injury or property damage caused to third parties

In a financial lease, the lessor shall not, in its capacity of lessor, be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset.

CHAPTER III: PERFORMANCE

Article 10 Irrevocability

1. (a) In a financial lease, the lessee's duties to the lessor become irrevocable and independent when the leasing agreement has been entered into.
(b) In a lease other than a financial lease, the parties may agree to make any of the lessee's duties to the lessor irrevocable and independent by specifically identifying each duty that is irrevocable and independent.
2. A duty that is irrevocable and independent must be performed, regardless of any other party's performance or non-performance, unless the party to whom the duty is owed terminates the leasing agreement or otherwise explicitly agrees.

Article 11 Risk of loss

1. In a financial lease, risk of loss passes to the lessee. If the time of passage is not stated, the risk of loss passes to the lessee when the leasing agreement has been entered into.
2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.
3. When an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement and the lessee invokes its remedies under Article 14, then the lessee, subject to Article 18(1), may treat the risk of loss as having remained with the lessor or, in a financial lease, the supplier from the beginning.

Article 12 Damage to the asset

1. In a financial lease, when an asset subject to a leasing agreement is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and at the lessee's option either accept the asset with due compensation from the supplier for the loss in value but without further right against the supplier or, subject to Article 10, seek such other remedies as are provided by law.
2. In a lease other than a financial lease, when an asset subject to a leasing agreement is damaged without fault of the lessee or lessor before the asset is delivered to the lessee,
 - (a) if the loss is total, the leasing agreement is terminated; and
 - (b) if the loss is partial, the lessee may demand inspection and at the lessee's option either treat the leasing agreement as terminated or accept the asset with due allowance from the rentals payable for the balance of the lease term for the loss in value but without further right against the lessor.

Article 13 Acceptance

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after a reasonable opportunity to inspect it or uses the asset.
2. (a) Once a lessee in a financial lease has accepted an asset, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement.
(b) Once a lessee in a lease other than a financial lease has accepted an asset, the lessee is entitled to damages from the lessor if the asset does not conform to the leasing agreement.

Article 14 Rejection

1. In a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement, the lessee may demand a conforming asset from the supplier and seek such other remedies as are provided by law.
2. (a) In a lease other than a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement, the lessee has the right to accept the asset, to reject the asset or, subject to this paragraph and Article 23, to terminate the leasing agreement. Rejection or termination must be within a reasonable time after the non-conforming delivery.
(b) In a lease other than a financial lease, once a lessee has accepted the asset, the lessee may reject the asset under the preceding sub-paragraph only if the non-conformity substantially impairs the value of the asset and either
 - (i) the lessee accepted the asset without knowledge of the non-conformity, owing to the difficulty of discovering it, or
 - (ii) the lessee's acceptance was induced by the lessor's assurances.
(c) In a lease other than a financial lease, when the lessee rejects an asset in accordance with this Law or the leasing agreement, the lessee is entitled to withhold rentals until the non-conforming delivery has been remedied and to recover any rentals and other funds paid in advance, less a reasonable sum corresponding to any benefit the lessee has derived from the asset.
3. If the lessee rejects an asset in accordance with this Article and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.

Article 15 Transfer

1. The lessor's rights under the leasing agreement may be transferred without the consent of the lessee. The lessor's duties under the leasing agreement may be transferred without the consent of the lessee except when a transfer would impair the lessee's rights in the asset.
2. The lessee's rights and duties under the leasing agreement may be transferred only with the consent of the lessor, which may not be unreasonably withheld, and subject to the rights of third parties.

3. The lessee, lessor and third parties may consent to such transfers in advance.

Article 16 Warranty of quiet possession

1. (a) In a financial lease, the lessor warrants that the lessee's quiet possession will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor. The parties may not derogate from or vary the effect of the provisions of this sub-paragraph.

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- (b) In a financial lease, a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement or the like that arises out of compliance with the specifications.

2. In a lease other than a financial lease, the lessor warrants that the lessee's quiet possession will not be disturbed by a person who has a superior title or right, who claims a superior title or right and acts under the authority of a court or who makes a claim by way of infringement. The parties may not derogate from or vary the effect of the provisions of this paragraph.

Article 17 Warranty of acceptability and fitness

1. In a financial lease, a warranty that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used is implied in the supply agreement and is enforceable only against the supplier.

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2. In a lease other than a financial lease, a warranty that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used is implied in a leasing agreement if the lessor regularly deals in assets of that kind.

Article 18 Lessee's duties to maintain and return the asset

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the light of the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to fair wear and tear.

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- (b) When a leasing agreement sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the asset's use, the lessee's compliance with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.

2. When the leasing agreement comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.

CHAPTER IV: DEFAULT

Article 19 Definition of default

1. The parties may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in this Chapter.
2. In the absence of agreement, default for the purposes of this Law occurs when one party fails to perform a duty arising under the leasing agreement or this Law.

Article 20 Notice

Except as otherwise provided in the leasing agreement, an aggrieved party shall give a defaulting party notice of default, notice of fundamental default, notice of enforcement, notice of termination and a reasonable opportunity to cure.

Article 21 Damages

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this Law or the leasing agreement, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

Article 22 Liquidated damages

1. When the leasing agreement provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.
2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.
3. The parties may not derogate from or vary the effect of the provisions of this Article.

Article 23 Termination

1. (a) Subject to sub-paragraph (b), a leasing agreement may be terminated by operation of law, by operation of Article 12, by agreement of the parties or by an aggrieved party upon fundamental default by the lessee or lessor.
(b) The lessee in a financial lease may not terminate the leasing agreement upon another party's fundamental default but is entitled to such other remedies as are provided by the agreement of the parties and by law.
2. Subject to Article 10, on termination all duties under the leasing agreement that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

Article 24 Possession and disposition

1. After the leasing agreement comes to an end or is terminated, the lessor has the right to recover possession of the asset.
2. After the leasing agreement comes to an end or is terminated, the lessor has the right to dispose of the asset.