



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONALE POUR L'UNIFICATION DU DROIT PRIVE

BACKGROUND TO THE PREPARATION OF THE UNIDROIT MODEL LAW ON LEASING

Recent developments, whether it be in relation to the UNIDROIT Convention on International Financial Leasing (hereinafter referred to as the *UNIDROIT Convention*), or the Cape Town Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Cape Town Convention*), have highlighted the special need that developing countries and countries engaged in the transition to a market economy have for the introduction of modern legal rules governing the financing of equipment, of every level of value, in order to develop their economic infrastructure. In particular, those engaged in running the projects of the International Finance Corporation (I.F.C.) for the development of leasing industries in such countries have invariably taken the rules contained in the UNIDROIT Convention as the model for the leasing laws to underpin such new leasing markets. On occasions, the UNIDROIT Secretariat has been approached by Governments seeking UNIDROIT's assistance in the development of leasing legislation. The States Parties to the UNIDROIT Convention are, moreover, almost all either developing countries or countries in transition.

A similar pattern has emerged with the Cape Town Convention. In particular, not only was the diplomatic Conference that saw the adoption of this Convention attended by an unusually high proportion of developing economies but the majority of the States that have to date become Parties to that Convention and the Protocol thereto on Matters specific to Aircraft Equipment are also developing countries.

These considerations led the UNIDROIT Governing Council to recommend and the General Assembly to decide that it would be appropriate for UNIDROIT to draw up a model law on commercial leasing, in particular targeted at just such developing countries and countries in transition. It was considered that this would be a more efficient way of developing basic leasing laws in developing countries and countries in transition than to reinvent the wheel each time a new leasing industry was being established, in particular since it would be primarily on the basis of the aforementioned UNIDROIT Convention, as, in effect, the latest expression of the international legislators' will in this area, and through making use of UNIDROIT's unique expertise in this area.

In recommending the preparation of the model law the Governing Council indicated that it should not impinge on the Institute's Budget.

Before embarking on the preparation of such a model law, the UNIDROIT Secretariat considered it expedient to consult some of the potential key economic stakeholders in such a project, in particular the World Bank, the I.F.C. and the Equipment Leasing Association of the United States of America (E.L.A.). The idea behind this consultation was to ascertain both the economic and legal expediency of the project, as exemplified by such Organisations' willingness to contribute thereto. The favourable outcome of this consultation, significantly, reflected the undoubted enthusiasm of such potential stakeholders to be able to avail themselves, at the earliest possible opportunity, of

the use of such a model law. In particular, it was pointed out that the countries of Africa stood to benefit enormously from the sort of contribution that leasing might be expected to give to the overcoming of their serious infrastructure financing shortcomings. In addition, the model law was considered to be a particularly helpful tool for those countries currently engaged in the drafting of leasing legislation.

From the beginning, therefore, the parameters of the project were clearly delimited by reference to the needs of developing countries and countries in transition, the end product of the Institute's work in this area being perceived as a particularly apposite and efficient method of ameliorating the inadequate investment capacities of such countries. In the first place, the UNIDROIT Secretariat, in establishing the composition of the Advisory Board to which the preparation of a preliminary draft model law was entrusted, had especial regard to the need to reflect adequately those legal and economic systems that were intended to be the essential beneficiaries of the project amongst its membership: in addition to a minimum number of experts from Europe and North America, the Advisory Board thus included experts from North Africa and the Arab-speaking world, sub-Saharan Africa, the People's Republic of China, Latin America and countries of the Former Soviet Union. The members of the Advisory Board were Mr A. Albensi (European Federation of Equipment Leasing Company Associations), Mr E.M. Bey, UNIDROIT correspondent (France/Tunisia), Mr R. Castillo-Triana (Colombia), Mr R. Clarizia (European Federation of Equipment Leasing Company Associations), Mr C. Dageförde (Germany), Mr R.M. DeKoven, UNIDROIT correspondent (United Kingdom), Mr. R. Downey (E.L.A.), Ms R. Freeman (I.F.C.), Ms A. Normantovich (Russian Federation), Chief Mrs T. Oyekunle, UNIDROIT correspondent (Nigeria), Mr F. Peter, UNIDROIT correspondent (Switzerland), Ms Y. Shi (People's Republic of China) and Mr M. Sultanov (I.F.C.). Ms Freeman being unable to attend the second session of the Advisory Board, she was represented by Ms M Ndonde. Mr Downey being unable to attend the third and final session of the Advisory Board, the E.L.A. was represented at that session by Ms I. Cassidy and Mr R. Petta. The Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) was represented as an observer on the Advisory Board by Mr R. Sorieul and Mr S. Bazinas.

Chief Mrs Oyekunle was elected Chairman of the Advisory Board. In the light of the unique expertise that he had acquired as the Reporter on Article 2A (Leases) of the Uniform Commercial Code of the United States of America, in addition to serving on the UNIDROIT Study Group that prepared the preliminary draft version of what was to become the aforementioned UNIDROIT Convention, Mr R.M. DeKoven was elected Reporter to the Advisory Board.

In view of the aforementioned decision by the General Assembly that the preparation of the model law should not impinge on the Institute's Budget, all members of the Advisory Board participated in sessions thereof either at their own expense or by arranging for their expenses to be met otherwise.

The Advisory Board met in Rome, at the seat of UNIDROIT, on three occasions, on 17 October 2005, on 6 and 7 February 2006 and from 3 to 5 April 2006. Its first session was devoted to a consideration of the issues to be encompassed by the preliminary draft model law. On the basis of these indications, the Reporter prepared a first draft which, after being submitted to members of the Advisory Board for comment, was considered by the latter at its second session. In the light of this first reading and the proposals for the amendment of the preliminary draft agreed at the second session, the Reporter prepared a second version of the preliminary draft model law, which was again submitted to members

of the Advisory Board for comment prior to its third and final session. This last session permitted a final reading of the preliminary draft as well as its revision and refinement by a drafting committee, composed of the Reporter, Mr Bey and Mr Sultanov.

The text of the preliminary draft model law as established by the Advisory Board on the last day of its third session was submitted to the UNIDROIT Governing Council, at its 85th session, held in Rome from 8 to 10 May 2006, for advice as to the most appropriate follow-up action. Subject to a number of amendments proposed by members of the Council, which were duly implemented by the UNIDROIT Secretariat, the preliminary draft model law was authorised for transmission to Governments for finalisation. It was agreed that, given the urgency attached by key economic stakeholders, in particular the I.F.C. and the E.L.A., to having the future model law available for implementation at the earliest possible opportunity, every effort should be made to complete the intergovernmental consultation process in respect of the preliminary draft as quickly as possible.

In summary, the Model Law focusses on the private law aspects of leasing, thus steering clear of its fiscal, accounting and supervision aspects. It applies only to commercial leases and, therefore, does not extend to consumer leases, thus focussing on the transactions judged to be most critical to economic development. The Model Law applies to an extended range of assets, in short encompassing all those categories of asset used in the trade or business of the lessee (and, in particular, plant, land, capital goods, equipment, future assets, specially manufactured assets, plants and living and unborn animals). It covers a broader range of leasing transactions than the UNIDROIT Convention, the idea being, while recognising that financial leasing is the most powerful engine of growth in this field, to avoid channelling the development of the industry into any particular category of transaction: it, therefore, applies to both financial leases and non-financial leases.

Two sessions of a UNIDROIT Committee of governmental experts responsible for converting the preliminary draft into a draft model law were held in Johannesburg from 7 to 10 May 2007 and in Muscat from 6 to 9 April 2008. They were attended by representatives of the Governments of Angola, Australia, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Chile, the People's Republic of China, Colombia, Gambia, Germany, India, Indonesia, the Islamic Republic of Iran, Ireland, Japan, Kuwait, Latvia, Oman, the Islamic Republic of Pakistan, Poland, Portugal, Qatar, Russian Federation, Rwanda, South Africa, Sudan, Tanzania and the United States of America as well as by observers representing the Commonwealth Secretariat, the International Chamber of Commerce, the International Finance Corporation and the United Nations Commission on International Trade Law, as well as the Equipment Leasing & Finance Association of America and the Latin American Leasing Association. South Africa was elected Chairman of the Committee: Mr I.S. Thindisa chaired the Committee in Johannesburg and Mr N.J. Makhubele chaired it in Muscat. Mr DeKoven again acted as Reporter.

The text of the preliminary draft as it emerged from the Muscat session of governmental experts was laid before the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, for advice as to the most appropriate follow-up action. The Governing Council decided, subject to a certain number of amendments, designed in particular to bring the French text into line with the English, to authorise transmission of what thus became a draft model law to a joint session of the UNIDROIT General Assembly, meeting in extraordinary session, and the UNIDROIT Committee of governmental experts for finalisation and adoption.