



**JOINT SESSION OF THE UNIDROIT GENERAL
ASSEMBLY AND THE UNIDROIT COMMITTEE
OF GOVERNMENTAL EXPERTS
FOR THE FINALISATION AND ADOPTION OF
A DRAFT MODEL LAW ON LEASING
Rome, 10/13 November 2008**

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J.S. Leasing/W.P. 2
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DRAFT AGENDA:

EXPLANATORY NOTE

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

The text of the draft model law on leasing laid before the Joint Session is the text of the preliminary draft model law on commercial leasing established by the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing at the conclusion of its second session, held in Muscat from 6 to 9 April 2008 (reproduced as Appendices XVII and XVIII to the summary report on that session prepared by the UNIDROIT Secretariat in Study LIXA – Doc. 13), as reviewed by the UNIDROIT Governing Council at its 87th session, held in Rome from 21 to 23 April 2008.

At that session the Governing Council was invited by the UNIDROIT Secretariat to give its advice and consent regarding the most appropriate follow-up action to be taken in respect of the preliminary draft model law established by the Committee of governmental experts in Muscat.

In the event, the Governing Council decided to authorise transmission of what thus became a draft model law to Governments and Organisations for finalisation and adoption, subject, though, to the Secretariat first making certain amendments to the text designed to bring the English and French language versions more closely into line. Moreover, the Governing Council passed a Resolution addressed to those who will be called upon to finalise the draft model law at the Joint Session.

The Secretariat believes that those who participated in the Muscat session will find it helpful to see and understand how the text that came out of that session was amended as a result of the Governing Council's review. It also believes that it is not only important for those participating in the Joint Session to become acquainted with Resolution (87)1 passed by the Governing Council but also helpful for them to appreciate the background behind the passing of this Resolution. More generally, the Secretariat believes that it will be found helpful by all participating in the next round of negotiations to appreciate the logic behind the decision to refer the finalisation and adoption of the draft model law to a joint session of the General Assembly of UNIDROIT member States and the Committee of governmental experts. And, finally, the Secretariat believes that participants in the

Joint Session will appreciate a reminder as to the issues flagged for further consideration during the Committee of governmental experts' review of the amendments to the preliminary draft model law effected by the Drafting Committee following the Committee of governmental experts' second reading of the text.¹

This Explanatory note to the draft Agenda, and in particular item No. 4 thereon, is designed to serve these different purposes. In addition, the Secretariat has seized this opportunity to give advance notice of its intention to lay a proposal concerning the title of the future model law before the Joint Session.

II. GOVERNING COUNCIL'S REVIEW OF COMMITTEE OF GOVERNMENTAL EXPERTS' WORK

In the course of its review of the preliminary draft model law established by the Committee of governmental experts in Muscat, the Governing Council, while taking note with satisfaction of the important work accomplished by the Committee of governmental experts, noted a number of points where, in its opinion, the English and French texts of the preliminary draft model law were not entirely in line with one another. In particular, it was noted that, whereas the English text used the same terms "lessee" and "lessor" in the context of both leases and financial leases, notably in Article 2, the French text employed different terms depending on whether the context was a lease or a financial lease, employing the terms "locataire" and "locateur" to denote "lessee" and "lessor" respectively in the context of a lease and the terms "preneur" and "bailleur" to denote the same terms in the context of a financial lease. The Governing Council furthermore expressed reservations regarding the use of an English expression in the title of the French text, which at that time used the term "*leasing commercial*" to render the English term "commercial leasing".

In authorising the UNIDROIT Secretariat to transmit the draft model law to Governments and Organisations for finalisation and adoption, the Governing Council, accordingly, instructed the Secretariat to bring the two texts more closely into line and to find a more appropriate title for the French text.

The Secretariat's proposals for bringing the texts more closely into line were essentially based on following the technique employed in the English text, namely employing the same terms "preneur" and "bailleur" to denote "lessee" and "lessor" in respect of both leases and financial leases under the draft model law, which seemed all the more justified in that any risk of confusion had already been eliminated by the relevant provisions of the draft model law always specifying whether the context was one of a financial lease (for instance, in Article 12(1)) or one of a "lease other than a financial lease" (for instance, in Article 12(2)).

The Governing Council endorsed these proposals.

In seeking, on the other hand, to respond to the Governing Council's concerns regarding the title of the French version, the Secretariat found no better solution than to take the term "location", as the term employed throughout the text of the draft model law to refer to the core transaction covered, namely the lease (the French equivalent for financial leases employed in the draft model law being "location-financement"), with the English term universally employed in business jargon, leasing, being added in brackets, by way of clarification, and in italics, in recognition of the fact that it was not a French term, afterwards.

One complication of this process, however, was the realisation that qualifying the term "location" by the adjective "commerciale" would be to introduce, at the very least, an element of

¹ Cf. Section IV of the summary report on the Muscat session (Study LIXA – Doc. 13).

ambiguity, calling, therefore, for a definition. Moreover, the concern was expressed that it would have the effect of appearing to limit the sphere of application of the draft model law, given that, in a number of countries, members of professions (such as lawyers, doctors, notaries and architects) and artisans were not, *a priori*, considered for legal purposes to be “commerçants”, that is operators subject to the special regimen of the Commercial code of such countries.

The Governing Council, accordingly, decided to go along with the Secretariat’s suggestion for replacing the French title of the draft model law by the words “projet de Loi type sur la location (*leasing*)” and, so as to ensure consistency between the two language versions, also to delete the word “commercial” from the English title, which, consequently, now reads “draft model law on leasing”. The deletion of the word “commercial” and “commerciale” from the English and French titles respectively was considered to be less of a problem by virtue of the fact that the delimitation of the substantive sphere of application of the proposed model law by reference to commercial transactions was already made clear in the definition of “asset” contained in Article 2 (“Asset means all property used in the trade or business of the lessee ...”).

The text of the draft model law on leasing marked up to show the amendments made pursuant to the Governing Council’s instructions in relation to the text of the preliminary draft model law is set out in Appendix I to this note.

III. RESOLUTION PASSED BY GOVERNING COUNCIL

At the same session the Governing Council took note of the concerns that had been brought to its attention regarding the sphere of application of the draft model law in relation to that of the regimen installed by the Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001. The Governing Council invited the Secretariat to deploy the necessary efforts to find an amicable solution to these concerns, involving the parties concerned. A meeting has already been arranged between the Secretariat and the parties concerned to find such a solution.

With a view, though, to guaranteeing the planned model law maximum coverage in those developing and transition economies for which it was specifically intended, the Governing Council passed a resolution (Resolution (87)1, the text of which is reproduced in Appendix II to this note) calling upon the States taking part in its finalisation to respect its particular purpose, namely to increase the availability of lease finance for developing and transition economies, and, therefore, to ensure that it applied to as broad a range of assets as possible while safeguarding the application of the Cape Town regimen to the extent necessary.

IV. GOVERNING COUNCIL’S DECISION TO ENTRUST FINALISATION AND ADOPTION OF DRAFT MODEL LAW TO JOINT SESSION OF GENERAL ASSEMBLY AND COMMITTEE OF GOVERNMENTAL EXPERTS

At the suggestion of the Secretariat, the Governing Council at its 87th session decided to entrust the finalisation and adoption of the draft model law on leasing to a joint session of the UNIDROIT General Assembly, meeting in extraordinary session, and the Committee of governmental experts. The adoption of this extraordinary procedure has commended itself to the Secretariat and the Governing Council for a number of reasons.

First, the Secretariat and the Governing Council do not have their hands tied in the matter of the choice of the body responsible for the adoption of draft model laws drawn up under the auspices of UNIDROIT in the way that they do for draft Conventions drawn up under UNIDROIT auspices. Whereas such a draft Convention, once judged ripe for submission for adoption by the Governing Council, is invariably transmitted to a diplomatic Conference, hosted by a member

State,² the practice in respect of draft model laws is still in the process of development. The first and only draft model law prepared by UNIDROIT prior to the draft model law on leasing, a draft Model Franchise Disclosure Law, also prepared by a UNIDROIT Committee of governmental experts, was placed at the disposal of the international community, as the Model Franchise Disclosure Law, by the Governing Council, at its 81st session, held in September 2002.

Secondly, the circumstances surrounding the development of the draft model law on leasing are quite exceptional in that, on the one hand, it has been developed with the needs of developing countries and countries in transition specifically in mind and, on the other, given the limited number of such countries amongst UNIDROIT'S membership, it has, therefore, been judged appropriate to broaden participation in the UNIDROIT Committee of governmental experts responsible for its preparation to those non-member States that may be considered to be either developing countries or countries in transition, in particular with a view to ensuring that the end-product be sufficiently responsive to the genuine needs of those countries rather than the needs attributed to such countries by others. In fact, the representatives of developing countries and countries in transition have played an extremely active part in the negotiations to date; all the 12 non-member States representatives of which have served on the Committee to date are, moreover, essentially developing countries. Indeed, the important involvement of developing countries and countries in transition in the development of the draft model law led the Committee of governmental experts in Muscat to call for this to be adequately reflected in the preamble to the draft model law.³

Thirdly, the Secretariat is, at the same time, naturally sensitive to the need to ensure the maximum transparency of the procedure employed for the finalisation and adoption of the draft model law vis-à-vis UNIDROIT member States, especially given the fact that the two sessions of the Committee of governmental experts held to date have been held away from the seat of UNIDROIT, again specifically with a view to enhancing the ability of developing countries and countries in transition to take a full part in the negotiation of an instrument primarily designed for their needs.

For all these reasons, the Governing Council endorsed the Secretariat's proposal that the draft model law be finalised and adopted at a joint session of both the General Assembly, bringing together all UNIDROIT member States, and the Committee of governmental experts, thus permitting the participation of those non-member developing and transition countries that have so greatly enriched the work of the Committee to date.

V. ISSUES FLAGGED BY COMMITTEE OF GOVERNMENTAL EXPERTS IN MUSCAT AS REQUIRING FURTHER CONSIDERATION

Two issues, as already announced, were flagged as requiring further consideration by the Committee of governmental experts during its review of the amendments to the preliminary draft model law effected by the Drafting Committee on the last day of the Muscat session.

The first such issue concerns Article 3(3), and in particular the proposal tabled by some States that the sphere of application of the future model law should not include aircraft, aircraft engines, helicopters, railway rolling stock, ships and space assets.⁴

² The examples of such diplomatic Conferences are legion: to quote merely the most recent, in 2001 the Government of South Africa hosted the Conference which saw the adoption of the draft Convention on International Interests in Mobile Equipment and the draft Protocol thereto on Matters specific to Aircraft Equipment prepared jointly by UNIDROIT and the International Civil Aviation Organization (ICAO) and in 2007 the Government of Luxembourg hosted the Conference which saw the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock.

³ Cf. Study LIXA – Doc. 13, p. 3.

⁴ Cf. Study LIXA – Doc. 13, p. 9.

A second such issue concerns Article 13, and in particular the enquiry made in Muscat as to the reasons for including the concept of “acceptance” in the preliminary draft model law. Whilst an explanation of the reasoning behind the inclusion of this concept was given, it was agreed that this matter could be considered further at the Joint Session, as necessary.⁵

VI. TITLE OF FUTURE MODEL LAW

As is customary, the text of the draft model law submitted for finalisation and adoption includes a preamble but, as explained elsewhere,⁶ this preamble essentially reflects nothing more than the thoughts of the Secretariat and is in no way intended to encroach on the prerogatives of the Joint Session in this regard.

It will, though, be noted that, whereas the current title of the draft model law reads simply “Draft model law on leasing”, the last clause of this preamble talks about the approval of a “UNIDROIT Model Law on Leasing”. Far be it from the Secretariat to seek to overstate its involvement in this project, which has been constructed on the back of numerous individual and indefatigable contributors, not least the Governments, Organisations and experts without whose advice it would not have been possible. However, with one or two exceptions,⁷ it has for some time been UNIDROIT practice for its instruments to be promulgated with the name UNIDROIT in the title; this is notably the case with the UNIDROIT Convention on International Financial Leasing, opened to signature in Ottawa on 28 May 1988, as also the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, opened to signature in Rome on 24 June 1995.

It is, the Secretariat believes, no exaggeration to suggest that the name of UNIDROIT has become a by-word for excellence and quality. This, it believes, argues very much in favour of the name UNIDROIT appearing in the title of the future model law, not least as a guarantee of its quality in the eyes of those contemplating implementing it. Moreover, as a project which has been taken forward uniquely under the auspices of UNIDROIT, the Secretariat believes that such a decision would be very much in line with UNIDROIT practice. A proposal along these lines will be submitted by the Secretariat in due course to the Joint Session.

⁵ Cf. Study LIXA – Doc. 13, p. 10.

⁶ Cf. J.S. Leasing/W.P. 4, p. 4.

⁷ The Convention on International Interests in Mobile Equipment was given the popular name of the “Cape Town Convention” in recognition of the significant role that the venue of the diplomatic Conference at which it had been adopted and brought to signature had played in its final shape; also that Convention, as mentioned earlier, was the fruit of the joint efforts of both UNIDROIT and ICAO. Likewise, the Protocol to that Convention on Matters specific to Railway Rolling Stock was adopted and opened to signature as the “Luxembourg Protocol”, again in recognition of the important role that Luxembourg had played in the determination of its final shape; moreover, again, that Protocol was not simply the result of work by UNIDROIT but rather of the joint efforts of UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail.

APPENDIX I

**TEXT OF THE DRAFT MODEL LAW ON LEASING MARKED UP TO SHOW THE CHANGES
MADE BY THE GOVERNING COUNCIL TO THE TEXT OF THE PRELIMINARY DRAFT MODEL
LAW ESTABLISHED BY THE COMMITTEE OF GOVERNMENTAL EXPERTS AT THE
CONCLUSION OF ITS SECOND SESSION**

~~PRELIMINARY~~-DRAFT MODEL LAW ON ~~COMMERCIAL~~-LEASING

(as reviewed and authorised for transmission to Governments for finalisation and adoption by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008 following the second session of ~~established by~~ the Committee of governmental experts ~~at its second session,~~ held in Muscat from 6 to 9 April 2008)

[PREAMBLE

THE GENERAL ASSEMBLY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), IN JOINT SESSION WITH THE UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT MODEL LAW ON LEASING, IN ROME ON...

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 many States, and in particular those with developing economies and economies in transition, require a legal framework that will foster the growth of a nascent or non-existent leasing industry and that other States, whilst already having a well-developed leasing industry, may nevertheless be interested in adopting this Law;

Convinced accordingly as to the usefulness of proposing a model law on ~~commercial~~-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 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 an important reference 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 aspects of ~~commercial~~-leasing other than its fiscal and accounting aspects;

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;

Taking account of the important contribution made by developing countries and countries in transition which, though not members of UNIDROIT, served on the Committee of governmental experts in the preparation of this Law;

HAS APPROVED THE FOLLOWING TEXT OF THE UNIDROIT MODEL LAW ON ~~COMMERCIAL~~ 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 centre of main interests of the lessee 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 the trade or business of the lessee, including real property, capital goods, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. No asset shall cease to be an asset for the sole reason that the asset has become a fixture to or incorporated in real property.

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 registered office of the person, or habitual residence in the case of an individual, is presumed to be the centre of main interests of the person.

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 or do not take into account the amortisation of the whole or a substantial part of the investment of the lessor.

Lease means a transaction in which a person grants a right to possession and use of the 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 the 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 the 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 the asset or the right to possession and use of the asset for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires the asset or the right to possession and use of the asset for lease under a financial lease.

Article 3 – Other laws

1. This Law does not apply to a leasing agreement that creates a security right or an acquisition security right, as defined in the UNCITRAL Legislative Guide on Secured Transactions.

2. 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.

[3. This Law does not apply to a lease of aircraft, aircraft engines, helicopters, railway rolling stock, ships or space assets if the lease is governed by another law of [the State] or an international agreement to which [the State] is a party.]

Article 4 – Interpretation

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(3), 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: EFFECTS OF LEASING AGREEMENT

Article 6 – Enforceability

Except as otherwise provided in this Law:

(a) a leasing agreement is effective and enforceable according to its terms between the parties; and

(b) the rights and remedies of such parties are enforceable 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 duties of the supplier 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 a contract between the lessee and supplier prevents the lessee from enforcing the duties of the supplier 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 the duties of the supplier.

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

3. The parties may not derogate from or vary the effect of the provisions of paragraphs 1 and 2.

4. 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 rights and remedies of the parties to the leasing agreement and cannot attach any interest arising under the leasing agreement.

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

Article 9 – Limitation of liability of the lessor

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 duties of the parties 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 their duties 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 the performance or non-performance of any other party, unless the party to whom the duty is owed terminates the leasing agreement or otherwise explicitly agrees.

Article 11 – Risk of loss

1. (a) 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.

(b) In a financial lease, 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, the lessee, subject to paragraph 1 of Article 18, may treat the risk of loss as having remained with the supplier from the beginning.

2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.

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 option of the lessee either accept the asset with due compensation from the supplier for the loss in value or, subject to Article 10, seek such other remedies as are provided by law. The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.

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 option of the lessee 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. The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.

(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 – Remedies

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 acceptance by the lessee was induced by the assurances of the lessor.

(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 of rights and duties

1. (a) (i) The rights of the lessor under the leasing agreement may be transferred without the consent of the lessee.

(ii) The leasing agreement may provide that the lessee shall not raise against a transferee any of its defences or rights of set-off against the lessor [other than those arising from the incapacity of the lessee].

(b) The duties of the lessor under the leasing agreement may be transferred only with the consent of the lessee, which may not be unreasonably withheld.

2. The rights and duties of the lessee 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 quiet possession of the lessee 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.

(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 quiet possession of the lessee 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.

3. The sole remedy for a disturbance of the quiet possession of the lessee under sub-paragraph (a) of paragraph 1 and under paragraph 2 is an action for damages against the lessor.

Article 17 – Warranty of acceptability and fitness for purpose

1. In a financial lease, the supplier warrants 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. Subject to sub-paragraph (c) of paragraph 1 of Article 7, the warranty is enforceable only against the supplier.

2. In a lease other than a financial lease, the lessor warrants 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 if the lessor regularly deals in assets of that kind.

Article 18 – Duties of the lessee 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.

(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 use of the asset, the compliance by the lessee 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 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 – Notices

An aggrieved party shall give a defaulting party notice of 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 fundamental default by the lessor or the supplier 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

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

APPENDIX II

RESOLUTION (87) 1

(passed by the Unidroit Governing Council at its 87th session, held in Rome from 21 to 23 April 2008)

THE GOVERNING COUNCIL,

MINDFUL of the fact that the draft model law on leasing to be finalised and adopted at a joint session of the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing, due to be held in Rome in late 2008, has been conceived primarily for the benefit of developing countries and economies in transition to a market economy, leasing providing such countries with an important source of capital for the development of infrastructure and small- and medium-sized enterprises, and that the draft model law has excited wide interest in developing and transition economies,

CONSIDERING at the same time the considerable strides that have already been made in implementing the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment, both opened to signature in Cape Town on 16 November 2001, and the hopes entertained for both the implementation of these instruments in yet more States and implementation of the Protocol to the Convention on Matters specific to Railway Rolling Stock, opened to signature in Luxembourg on 23 February 2007, and such other Protocols to the Convention as are already under preparation by UNIDROIT or may be undertaken in due course,

WHEREAS it is necessary to ensure that the draft model law on leasing realise its special purpose of increasing the availability of lease finance for developing and transition economies in respect of as broad a range of assets as possible while safeguarding the application of the regimen introduced for high-value mobile assets by the Cape Town Convention,

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those States participating in the aforementioned joint session of the UNIDROIT General Assembly and the Committee of governmental experts to respect the particular purpose of the draft model law, namely to increase the availability of lease finance for developing and transition economies, and, therefore, to ensure that it apply to as broad a range of assets as possible while safeguarding the application of the Cape Town regimen to the extent necessary.