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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

REPORT

on the

CONTRACT OF LEASING ("CREDIT-BAIL")

prepared by the Secretariat

Rome, March 1975

I INTRODUCTION

A Terms of Reference

1. At its 53rd. session (February 1974) the Governing Council of UNIDROIT was seized of a proposal from the Secretariat (1) concerned with the drawing up of uniform rules on what the French law of 1966 terms the "contrat de crédit-bail", generically referred to in the English language as leasing (2). This proposal aroused a high level of interest, especially in view of the sizeable rôle now played by this institution in international commercial dealings (3) and the doctrinal controversies and practical difficulties arising through inadequate intervention by the legislator. The Council accordingly gave the subject priority for the 1975-1977 triennium and empowered the President of UNIDROIT to convoke a working committee, if possible for the beginning of 1975. The assignment of this committee, the composition of which was left to the presidential discretion, was described as "the study of an international unification of the applicable rules on this subject", a task which was to be preceded by the preparation of a preliminary report by the Secretariat (4). The present report seeks to give effect to those instructions.

B Origins of leasing, its growth and the reasons therefor.

2. Several authors (5) mention 1877 in connection with the first appearance of leasing. In fact, it was in that year in the United States that the Bell Telephone Co., instead of selling its telephones, began leasing them to users. However, even if there is thus a century-old tradition behind the industrial leasing of equipment, the real stepping-off point is rather to be found in 1952 with the incorporation of the United States Leasing Corporation (6). Still the largest of over 300 leasing corporations in business in the United States, it is uniquely concerned with leasing out goods, from small machines to jet aircraft (7). To quote from the address given by Mr. L. Rochwarger, Chairman of the American Association of Equipment Lessors, to the first working session of the European Federation of Equipment Leasing Company Associations, "Leaseurope", held in Zurich (17-18 June 1974): "In the first three years of this decade we have witnessed several fluctuations in the U.S. economy and financial circles...Long-term debt financing has come and gone - yet throughout all of these gyrations, the leasing industry in the United States has continued its phenomenal growth. The 1970's are witnessing the coming of age of leasing as a major form of equipment financing. It is estimated that 16% of all capital equipment purchases in the United States are financed through leasing..." (8).

3. The reasons generally given for the rapid expansion of leasing in the United States are four-fold: first, the limited availability of medium-term capital; secondly, the particularly strict revenue laws as to deductions against income; thirdly, the prosperity of the national economy with high profit-levels; fourthly, the overriding need felt by firms to replace rapidly and regularly equipment rendered obsolete by the swift tide of technological progress, the alternative usually being uncompetitiveness. Fiscal advantages played a major rôle: in particular, lessors could take an investment tax credit on certain equipment purchased for leasing (10).

4. It was not long before the rapid rate of expansion generated by the leasing corporations in the United States took them into other markets, where they created subsidiary companies or took shareholdings in already-existing companies. The 1960's thus saw the arrival of leasing in Europe: the incorporation of a British subsidiary of the United States Leasing Corporation, Mercantile Credit Co., took place in 1960; in Italy the A.I.L. Corp. was created in 1961; Locatel S.A. in Belgium is a subsidiary of Lease Plan International whilst Eurolease, also in Belgium is a joint subsidiary of the Hudson Leasing Corporation and the Société Générale de Belgique. The rate at which these companies multiplied, once established, can be seen in the fact that the first leasing company to be created in the Federal Republic of Germany was incorporated in 1962 and by 1971 there were already about 100 leasing firms in that country (11). The growth in the number of leasing firms has, naturally enough been paralleled by a rapid and constant rise in the number of leasing contracts made in the countries to which these new operations have been exported from the United States. For example, each year sees a 50% increase in the number of leasing contracts made in the Federal Republic of Germany, a 40% increase in France and one of between 40% and 50% in Japan (12). According to the calculations of the Stanford Research Institute, the total value of leasing operations will by 1980 have reached the proportions of $ 15 billion in Western Europe alone (13).

5. Undoubtedly, as in the United States, one of the major factors which has militated in favour of the rapid expansion of leasing in Europe has been the fiscal and accounting advantages accruing therefrom (14). Nowhere have these been more favourable than in the United Kingdom where the lessor of equipment is entitled to the benefit of any capital allowances which the acquisition of the leased goods attracts, and in certain circumstances can also claim an investment grant. Such allowances and grant increase the lessor's yield on a leasing transaction and facilitate the development of its business by enabling it to pass on the whole or part of the benefit of the allowance and/or grant to the lessee, for instance in the form of reduced rentals. In the United Kingdom in the last few years the value of tax allowances has increased progressively to the present level of 100%, which can be taken in the first year (15).

6. On the Continent, however, notwithstanding the absence of any special capital allowance for the lessor, the latter is still able to claim tax deductions for depreciation against the income he receives in rentals (16) and the lessee can deduct the entirety of his rental payments from his taxable profits (17). Above all the lessee can obtain

a more flexible policy of capital investment by leasing since his rental obligations arising under the leasing contract do not appear in his balance sheet. In addition, in a business world where economic competitivity and access to the latest technological inventions and perfections go hand in hand, it is imperative that the moment equipment is superseded the possessor of the old equipment should be able to replace it with the new model, and this is just what the leasing contract enables firms to do, the average duration of these contracts, depending on the nature of the goods leased, varying from three to five years.

7. "Prospects for the industrial leasing business are good, even very good. Medium and long-term requirements are growing, particularly in the light of high inflation rates and new pressure on investment programmes from the environmental-control sector. Although leasing undertakings have in some cases experienced a slight slowing down of their growth (due to measures limiting money supply and capital flows), expansion in capital-goods and real estate leasng is nothing like at an end so that no 'turnover worries' are expected by lessors" - such was the picture presented by the delegates to the first working session of Leaseurope held in June 1974 as reported by a British journalist (18). The same journalist pointed out that the funding of leasing transactions seemed to be raising no major problems and it was noted that in the United Kingdom borrowing takes place in co-operation with a 48-bank consortium, in the Federal Republic of Germany most leasing firms are affiliated to banks which provide them with the necessary funds and U.S. companies use banks and insurance companies and, where necessary, foreign banks and the Euromoney market.

C Definition of the various types of operations in connection with which the generic term "leasing" is used (19)

8. While the essential operation involved in leasing always remains more or less the same in the various countries where it is practised, the different variants on the basic leasing operation that have developed over the years require some brief explanation.

9. First of all, a distinction has to be drawn between equipment leases and real estate leases. For reasons which are explained below (20), the leasing of real estate has been excluded from the scope of the present study which has concentrated instead on the leasing of movables, commonly known as equipment leasing. Real estate leases follow much the same form as equipment leases save that there is a much longer rental period, the average length being 20 years (21). Equipment leases, on the other hand, although concluded in different guises under different names - financial leasing and operating leasing - generally present certain constant characteristics (22), notably the guarantee given to the lessee that he will have the use of the equipment for a fixed period lasting longer than one year - agreements concluded for periods shorter than one year are mere renting agreements. In addition, these leasing operations regularly display a considerable number of the characteristics of hire contracts: one should also mention that, with the notable exception of the United Kingdom - where such a provision would turn the operation into a hire-purchase agreement subject to the rigours of the hire-purchase legislation

enacted in that country (23) - the average leasing agreement contains an option to purchase the goods at the end of the fixed period of the lease in return for what is usually a nominal consideration (24). The third feature which is characteristic of all the different types of leasing operations is the financial nature of the transaction: it is above all designed as a means of obtaining credit. Thus, in financial leasing it is the finance house and in operating leasing the manufacturer or the distributor which act as the suppliers of credit. In return for giving the lessee the use of industrial equipment for some part of its economic life, they receive periodic rentals which, taken as a whole, cover the cost incurred by them in terms of capital (amortization) and interest.

10. The term "equipment" lease covers both financial and operating leasing, although the latter type of transaction is perhaps more important for consumer goods, whereas financial leasing is restricted to capital equipment goods. With financial leasing neither party, lessor or lessee, contemplates that the equipment will have more than a nominal residual value at the end of the fixed period of the lease, and the reservation of title to the lessor, apart from its fiscal implications, amounts in truth to a form of security interest in just the same way as the reservation of title under a conditional sale or hire-purchase agreement. The duration of a financial leasing contract, which runs normally from three to six years, is normally worked out in relation to the time it will take to amortize the goods leased. Such contracts are concluded for fixed periods and cannot be terminated unilaterally, save on the payment of very stiff penalties Further use of the equipment leased is generally not contemplated. The rentals are calculated in such a way that the total sum paid by the end of the contractual period exceeds the goods' purchase price and also provides for the lessor's costs as well as a profit margin.

11. Operating leases, on the other hand, usually last for a shorter time than the economic life of the equipment leased - "the lessor contemplates that it will be let to two or more lessees in succession" (25) - so that the residual value of the equipment at the expiry of the lease is generally quite considerable. Operating leases, unlike financial leases, will often be accompanied by the provision of ancillary services, such as maintenance, by the owner: the explanation for this would seem to lie in the fact that the lessor in operating leases is usually the manufacturer or distributor of the equipment in question and, therefore, from a technical point of view, fully in a position to provide such services, whereas the lessor in the financial lease situation is a finance house with no facilities for such services. Whereas the procedure involved in concluding a financial lease is virtually unvariable, the mechanics of operating leases vary considerably. It has already been mentioned that operating leases are frequently granted by the manufacturers or distributors of equipment: alternatively the latter will sell the equipment to a finance house to be let out on lease, the finance house having a right to require the manufacturers to buy back the equipment after a given period at a reduced price.

12. The essential differences between these two forms of equipment lease are first, then, that whereas the financial lease is a full pay-out lease, the operating lease is a non-full pay-out lease, with the goods being leased to the lessor for a period shorter than their actual working life; and secondly that whereas, the United Kingdom apart, a financial lease will contain an option to purchase the goods leased at the expiry of the fixed period of the lease, an operating lease does not envisage any opportunity to effect any transfer of the property in the goods to the lessee. The operating lease is thus, to use the terminology coined in the United States, a true lease, unlike the financial lease. This term, true lease, however, has developed another more important connotation in the fiscal field, and, thus, so as to avoid the United States Revenue Department classifying the leasing operation as a financial lease or a lease-or-purchase, potential lessors have tended to have more frequent recourse to the operating lease type of operation with the result that leasing transactions have lost their peculiar hybrid qualities and have tended to revert more to the classical type of hiring contract.

13. Before leaving the matter of definitions, one should also mention the operation known as the sale and lease-back (26). In short all that is involved is that the owner of goods or real property sells them and then hires them back from the purchaser under a leasing agreement. Once again the essential feature of the whole operation is its credit-raising rôle. It amounts to a kind of mortgage to the extent that the firm parting with the ownership of its property, on fully paying back the capital it received when selling its property, still has the opportunity to buy back its erstwhile property at minimal cost. Leasing and sale and lease-back are very similar operations, the main difference between the two lying in the fact that in the latter there is a realisation of the capital involved prior to the actual leasing. The end-point, nevertheless, remains the same: we have a lessor, a finance house, and a lessee, an industrial concern. The leasing contract between the two of them is the same in both types of operation.

14. Closely allied with the subject of definitions is that of classification. In what has been said already, we have seen that leasing transactions are classified according to whether the object of the transaction is real property or personal property, known respectively as real-estate leases and equipment leases. Then there is the further classification of equipment leases into financial leases and operating leases.

15. In addition, legal writers in their eternal search for classifications and the identifications they seem to see in these classifications have individuated still further categories. Foremost among these is the division made according to whether, in the case of leases of personal property, the goods are capital equipment goods or consumer goods (27). In the latter type of operation, the goods involved generally go to private individuals and in many ways the contract concluded bears many similarities with hire-purchase contracts. Capital equipment leasing, in the opinion of some writers, represents the more specific type of leasing operation in that it offers a firm that has decided to invest an alternative solution to purchase (28).

16. Then there is the distinction between direct leasing and indirect leasing(29), the former involving just two parties, the manufacturer and the person actually interested in using the manufacturer's goods, whereas the other, indirect leasing, considered by some authors to be the only true leasing, involves three parties, the manufacturer or the distributor of the goods leased, a finance house and the lessee interested in obtaining use of the aforesaid goods. The originator of the chain of action involved in indirect leasing is the prospective lessee who indicates to the finance house the goods that he would like them to purchase for him from the manufacturer. This operation, unlike direct leasing, is thus removed from the classical type of hire contract by the interpolation of the finance house between the manufacturer or distributor of the goods and the person seeking use of them.

D Attempts at harmonisation

17. Given the somewhat primitive state of the law with regard to leasing operations - for example, in the United Kingdom the term "leasing" is essentially part of the commercial vocabulary and this usage is not as yet supported by any legal terminology - it is not surprising that attempts at harmonisation in this field have been very few indeed (30).

18. The only attempt in this direction specifically concerned with leasing arose out of the first working session of Leaseurope held in Zurich in June 1974. Discussions included the possible harmonisation of the status of leasing undertakings. A special liaison committee is therefore following developments in Brussels in connection with the E.E.C.'s planned guidelines for credit institutes. At present it is not clear whether leasing companies will be covered by a general guideline or a separate ruling under which the status of these companies would not be regulated at all for the time being. For their part, the leasing companies see enormous difficulties in achieving a harmonisation of their status owing to the variety of legal and fiscal rules prevailing in the various countries. Initially the Leaseurope associations foresee national-level harmonisation and the finding of a common denominator within the international federation (31).

19. At a European level work is underway within the Commission of the European Communities on a consumer credit directive which would, however, exclude the leasing of industrial equipment and has as a result only limited interest for leasing operations.

20. In a related field, that of codification, legislators have also been busy. Thus not only is leasing given specific provisions in the U.S. Uniform Consumer Credit Code but the U.K. Consumer Credit Act 1974 has led the field somewhat in Europe by unifying the basic legal treatment of consumer sale credit and consumer loan credit. However, in both cases the specific ambit of the legislation was such that its provisions have been framed in such a way as to exclude its application to the typical equipment leasing agreement.

21. Hitherto, then, the problems associated with the general nature of leasing agreements are such that international legislators have fought shy thereof (32), and, as will be shown later, the situation is not much clearer at the national level (33).

II DELIMITATION OF THE SUBJECT

A Field of application of uniform legislation: international relationships or only internal relationships?

(1) Uniform law or model law?

22. This is essentially a question of methodology which can be regarded as being of greater or lesser urgency. However, the comparative paucity of national legislation specifically treating of leasing might lead one to view favourably the case for a model-law in this field. On the other hand, the importance of leasing operations on an international plane, especially as this has come to be practised through international finance houses working as the subsidiaries of international banking groups, would perhaps militate rather in favour of wholesale unification. One should not overlook, however, another alternative, namely the harmonising possibilities of international model contracts and standard-term clauses. One distinguished author has pointed out that the accelerating movement towards acceptance of model contracts and standard practices is leading to the rediscovery of the international character of commercial law and the emergence of an autonomous law of international trade based on the will of the parties (34). Although the potential of a model contract could not cover all the matters which might seem to be of interest to a future working committee, namely, for example, the definition of its specific legal nature, it would undoubtedly benefit as a possible solution from the considerable number of model contracts, a selection of which is annexed to the present report, already drawn up by the various leasing companies.

(2) Significance of leasing on the international plane

23. We have already noted the vast range of objects which furnish the subject-matter of leasing operations. These now include ships, aircraft and motor vehicles of all descriptions, all of which may bring an international element into the picture, since it is more than probable that examples of at least the first two craft will have cause to cross national frontiers as a result of the situation of the parties to the particular leasing contract.

24. In fact, the essence of an international leasing operation lies in the fact that two of the parties involved are resident or have their principal place of business in different countries (35). Clearly with

the triangular relationship present in financial leasing it is quite possible that all three parties to such an operation might be resident or have their principal place of business in quite different countries. This raises the problem of the criteria to be adopted for determining the internationality or otherwise of the leasing operation. One problem which merits particular consideration in this light is that the courts in some countries have recognised the subsistence of a right of action in the lessee to go against the original manufacturer of the goods he has leased from a finance house, for example, for defects present in the goods (36). Clearly the position of the manufacturer in the framework of the leasing operation retains a certain importance even after he has sold his goods to the prospective lessor and the latter has then leased them to the lessee.

25. However, it is submitted that the essential relationship to bear in mind in calculating the internationality of the individual leasing transaction is the actual leasing concluded between the owner as lessor and the user as lessee. It is here, in this relationship, that the international element of an international leasing is usually crystallised, in the sense that possession of the goods is held normally under a different legal order from that where the proprietary interest in them is vested. International leasing usually serves either as a means of exporting or as a last resort when all other forms of credit prove to be either unavailable or inadequate for a given operation (37). In the first-mentioned form, international leasing usually entails that two of the parties to the operation are resident or have their places of business in different countries: thus the manufacturer or distributor of goods sells them to a prospective lessor, a finance house, which will then conclude a contract of leasing with a user in a foreign country. Where such a contract contains an option to purchase, the lessee's intentions to purchase at the expiry of his lease must be sufficiently clear that the lessor does not run the risk of having to stand the cost of repatriating his equipment.

26. The other type of international leasing referred to above would involve all three parties being resident or having their place of business in different countries. The essential difference between this form of international leasing and that just described is that the finance house, which is in this case a subsidiary of international banking groups and given over uniquely to the collection of the necessary finance for the mounting of particularly large leasing operations, is based in a different country from either the manufacturer or the ultimate user. For example, a Swiss finance house might purchase equipment from a French manufacturer destined for use by a lessee based in the United Kingdom.

27. The situations which bring about recourse to these operations should perhaps be illustrated by a few examples. For instance, suppose that an American company has a subsidiary in a country where exchange restrictions are so severe that the said subsidiary finds itself unable to borrow capital in the currency of the country where it is based. However, to meet market demand, the subsidiary must perforce expand its production capacity but to this end cannot expect any immediate help, in the way of capital, from its parent company. It is at this moment that an international leasing transaction might be contemplated.

28. In the reverse situation, a parent company based in a country imposing considerable restrictions on investment abroad may feel the need to conclude such an international leasing operation in order to supply one of its subsidiaries which has insufficient capital with the equipment it needs.

29. Again, an industrial firm based in a country the Government of which has placed a restriction on imports has no other choice but to obtain the equipment manufactured abroad which it needs by means of an international leasing operation.

30. Taking one last example, suppose that a firm in one country acquires a market abroad and to meet the demands of this market must obtain equipment which is manufactured abroad. Rather than raise the finance needed in its own country, it may be better for the firm in question to conclude an international leasing operation, as this will have the dual effect of enabling it to adapt its working overheads to the incomings attracted from this market whilst only taking an exchange risk on its working profits (38).

31. International leasing is concluded at the confluence of different legal systems and as such presents all the associated problems as to which legal system governs the rights and duties arising out of the contract. Different systems offer different solutions, according to whether the operation involves movable property or immovables.

32. Independently of the leasing contract having an international origin, it may also develop international significance, for example, where the debtor under the contract is insolvent and owes debts to foreigners as well as to the nationals of his own state.

B Field of application of uniform legislation: movables and immovables or only movables?

(1) Movables or immovables?

33. Leasing operations as practised at present cover both movable and immovable property: the respective operations are generally known as equipment leasing and real-estate leasing. However, it is the intention of this report to limit itself to a study of the implications of the former, that is, equipment leasing, in the belief that, first, the rules affecting the different types of property, real or personal, are so marked as to militate in favour of their separate treatment and, secondly, because, whereas real-estate leasing is now expanding at a considerable pace, it is rather equipment leasing that has made most of the running hitherto and can be considered as having broader international implications, in general, than real-estate transactions. On this matter, the Secretariat would naturally appreciate some guidance from the Governing Council as to the need to embrace real-estate leasing in the scope of its research. For the moment it would simply point out that it has been found convenient to concentrate attention on equipment leasing, given the vastness of this subject alone.

(2) Equipment leasing in general or financial leasing?

34. As has been pointed out above, equipment leasing usually takes one of two forms, namely financial or full pay-out leases or operating or non full pay-out leases (39). It has also been noted above that some authors consider the former to be the only true leasing in that operating leasing normally represents nothing more than the classical form of lease known as a contract of hire, with no option to purchase at the expiry of the lease being normally envisaged. Financial leasing, on the other hand, represents something quite far removed from the classical schémas and can safely be regarded as something of a legal hybrid: hence the difficulties experienced by legislators in supplying a definition for what is generally termed financial leasing, but which in effect has much more to do with the financial world of which it is the offspring than with the legal world which has no ready-made classification into which it can conveniently be pigeon-holed. The efforts of national legislators have conspicuously tended to focus on this more difficult aspect of leasing and the Governing Council itself at its 53rd. session was called upon to consider the question of the contract of "crédit-bail" rather than the much broader, general topic of leasing - in this context, one must point out that the French law of 2. July 1966, by the terms of its very provisions, referred to what is usually encompassed by a financial leasing transaction as "crédit-bail".

35. For all these reasons, but above all for the originality of the transaction known as financial leasing, with the very special problems raised by the novel triangular relationship between the parties involved therein, the Secretariat would submit that it would appear desirable to treat the transaction known as financial leasing separately from other forms of leasing, and intends accordingly to concentrate its attention in the present report on the very special problems particularly associated with financial leasing. This need not preclude the Governing Council from empowering the Secretariat at some future date to initiate further studies on the other types of leasing, which, it is also pointed out, are in any case covered by the present study to the extent that they involve the same triangular relationship and option to purchase at the expiry of the lease as financial leasing.

36. As a final warning, one might usefully quote the words of a delegate to the first working session of Leaseurope mentioned earlier: "I think none of us any longer - and certainly not in Britain - know what leasing is". (40). This arises from the variety of operations all masquerading generically under the term "leasing" and calls, it is respectfully submitted, for the specific approach advocated above.

III LEGAL NATURE OF LEASING CONTRACT

37. Before embarking on a discussion of the doctrinal controversies that have surrounded the exact legal nature of the leasing contract, it would be as well to give an outline of the operation which constitutes a leasing contract, or more specifically a financial leasing contract.

A Sequence of operations making up leasing contract known as financial leasing

38. Above all, it must be remembered that leasing contracts are financial operations both in spirit and purpose. The sole aim of the procedure involved is to supply vital equipment for the use of firms. The fact that one of the results of the operation is the transfer of property in the equipmnet is merely one of the advantages of the technique employed but is nothing more than a secondary aspect which ensures the distinction between a pure contract of hire and a leasing contract.

39. The first step (41) in the operation is taken by the prospective lessee: this is his choice of the equipment he wishes to have the use of. He chooses according to his production needs the equipment which is the best adapted to his needs, the most durable and the performance of which will give him the best cash flow as against his initial capital costs in the shape of the rents he will have to pay. Only the prospective user is in a position to make this choice with the least margin of error as to the trend of his future production. It is not a choice, on the other hand, which can be made by the finance-lessor the technical role of which stops at the financing of the operation and which cannot claim to interfere in any decision regarding a firm's investment policy.

40. The prospective user then fixes the price, the conditions of payment, the time, conditions, method and place of delivery with the supplier of the equipment. The finance house plays no part in these negotiations, first, because, at this early stage, it is quite possible that the firm wishing to use the equipment may seek some alternative means of financing and, secondly, because, even if the choice of financing has fallen on leasing and the prior agreement of the future lessor been obtained, there could be no question of the future lessor interfering with the decision of the future lessee to deal with such and such a supplier.

41. Once the equipment has been selected and the supplier chosen, the prospective user goes to a finance-house which, after examining the application, will normally draw up a contract for signature by the future lessee. One should mention here that it is at this point that the French (42), in particular, see the creation of a veritable agency relationship, with the lessor as principal undertaking to effect the purchase of the equipment specified in the contract, from the supplier

likewise named in the contract. Those favouring this agency thesis argue that as from the date when this contract is signed, the future lessee is the only person endowed with the authority, as agent, it is alleged, to carry out certain operations of a technical nature, the object of the agency. Instances provided to illustrate this agency are mainly concerned with heavy equipment delivered in stages which must be checked upon receipt and with the delivery of the adjuncts necessary to the functioning of equipment. Also used in this context is the fact that, where the withholding of a certain deduction from the purchase price (generally of the order of 10%) is provided for in the contract of sale, by way of guarantee, the lessee will be the only person qualified to judge whether the equipment functions satisfactorily enough for this sum subsequently to be paid to the supplier. It is submitted, however, that these factors simply reinforce the case for viewing the entire operation in terms of the credit-raising initiative which is all it really represents, with the lessor fulfilling no other role than the supplier of the required credit, which goes a long way to explain the otherwise disproportionate-looking distribution of the risks attaching to the equipment leased, nearly all of which are under financial leasing incumbent on the lessee.

42. A slight variation on the above-mentioned procedure is involved when the lessor and lessee sign only a preliminary contract: this happens when, even though it has been decided to enter into a leasing agreement and the supplier has been selected, the future user cannot specify details of the equipment at once. In this case the lessee acts as an ordinary buyer, having the equipment delivered to him and then settling the bill for which he sends an invoice to the finance-house.

43. It is at this stage then, once the equipment has been purchased and placed at the disposal of the user that the actual leasing commences, initially at least for a fixed period determined in the contract between lessor and lessee. This period is calculated in such a way that the finance-house may by the rents it will receive from the lessee over the said period recoup the investment it had made in purchasing the said equipment, as well as its expenses and a profit margin, whilst ensuring that at the expiry of the fixed period the equipment will still have a residual value, generally no more than 5% - 6% of its original worth, which will normally be the price at which the lessee may exercise the option to purchase generally included in the standard financing lease. Given the swiftness with which the pace of technology ensures the obsolescence of equipment nowadays, the lessor will calculate the rentals which the lessee is to be charged in the light of the particular equipment's depreciation and this usually means that the said rentals are very high which in turn, from a practical point of view, leaves little doubt that the lessee will exercise the option to purchase at the expiry of his lease (43). The rights and duties accruing to the parties to the leasing contract are dealt with in the next chapter of this study.

44. At the expiry of the period fixed in the contract for the duration of the lease, the lessee has three options: first, he is entitled to seek renewal of his lease for a further period, generally at much reduced rentals (calculated on the basis of the equipment's residual value at the end of the fixed period); secondly, he may return the equipment to the lessor which brings the contract to an end, although naturally he will be expected to hand it back in a good state of repair and working order; thirdly, the lessee may exercise the option usually included in his original contract to purchase the equipment leased at its residual value fixed at the time of making the contract.

45. However, of these three options, there is a strong incentive, financially-speaking, for the lessee to exercise the third, that of purchase for a minimal consideration. The reason for this is that, in view of the relatively short working life of most of the equipment taken in leasing, the lessor, to recoup his capital, is obliged to charge relatively high rentals with the result that, at the expiry of his lease, the lessee has in effect almost paid the purchase price and will normally desire to have the ownership of the equipment to show for the considerable investment already made by him. This is not always the case, however: where the equipment has during the currency of the lease become obsolete or it would be difficult for the lessee, having exercised the option to purchase, to procure a future second-hand purchaser for the said equipment, he may prefer to return the equipment to the lessor. The finance houses usually have a network of specialised second-hand agents through whom they can dispose of such equipment. However, as the expense involved in returning the equipment is the responsibility of the lessee and is usually no less than the residual value thereof, the option to return the said equipment will clearly only be exercised as a last resort.

46. As will be dealt with later, breach by the lessee of his contractual obligation not to resile from the leasing contract during the initial fixed period specified in the said contract gives rise to the payment by the lessee of penalties often described as leonine in their severity. However, experience has shown the need to provide a temperament to this role which amounts to a kind of fourth option, namely the possibility for the lessee to resile from his contract at the end of the first year of the lease, where the economic circumstances which motivated the lessee in his choice have changed (that is, where the lessee has seen the mistake of his choice only once the equipment was in use or where technical progress has rendered the equipment out-of-date before it could reasonably have been foreseen at the time of making the contract). In this situation the lessee is permitted to buy the equipment for a price equivalent to the rentals remaining to be paid and, in addition, the residual value as estimated at the date of resiliation. The lessee may then resell his equipment either to a third party in immediate need of such equipment or to the original supplier in exchange for a newer, more efficient piece of equipment.

B. Legislative intervention in the field of leasing

47. At the outset it should again be stressed that leasing has not yet earned complete legal recognition, as, for instance, in the United Kingdom. However, some countries, and notably France, have enacted legislation which specifically sets out to regulate leasing contracts. Still others, notably the United States, have had recourse to revenue rulings, reflecting the essentially fiscal nature of the legal problems which have arisen in connection with leasing, namely to distinguish whether what is termed by the parties to be a lease is in reality a lease or rather a conditional sale. This does not mean that the legislator has been inactive in this field in the United States.

48. Thus the Uniform Commercial Code would generally treat the phenomenon that has come to be known as financial leasing as a security interest, and accordingly subject to the filing requirements of Article 9 of the said Code. The Code provides that "the inclusion of an option to purchase does not of itself make the lease one intended for security" but goes on to provide additionally that "an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security" (44). If the lease is adjudged to be a security interest, then the lessee will become the full owner of the leased equipment on payment of such a nominal consideration and his creditors will be able to lay claim to the said equipment unless he has perfected his security interest in accordance with Article 9.

49. Whether a lease is in fact a security interest is a question of the intent of the parties, which is to be determined on the facts of each case. There is authority, however, that this must be determined from the face of the lease alone when the lease purports to be complete (45). When a lease is ambiguous as to whether it is a lease or a secured transaction, parol evidence is admissible to show the true nature of the transaction (46). The character of a lease as a lease or a security agreement must be determined on the basis of facts existing at the time the lease was entered into and subsequent defaults by the lessee cannot be made to alter the character of the original relationship (47). Hence the fact that non-payment of rentals may destroy or bar the exercise of the lessee's option to purchase does not remove the existence of the option from the determination of the nature of the agreement, so that it is immaterial that the lessee may in fact lose the right to exercise the option because of non-payment of rentals (48).

50. What might at first sight seem to be a difference between the size of the respective considerations exacted by the American and continental lessors for the exercising of the option to purchase by the lessee proves to be simply a difference in vocabulary. Whereas the European legal systems talk of the residual value of the goods, this, while decidedly minimal in relation to the actual purchase price, might appear to represent something more substantial than the nominal consideration mentioned in the U.C.C. Nominal consideration is defined

by one notable authority as "any amount which is trivial compared with the value or the purchase price of the goods" (49). By contrast, where the lessee must pay a substantial consideration, regardless of the rentals he has already paid, the transaction would simply be regarded as a lease with an option to purchase and not a security interest. Thus, where the lessee had to pay 25% of the list price regardless of the rentals he had already paid, the option to purchase was held to involve the payment of a substantial consideration and accordingly the lease could not be regarded as a security interest (50).

51. However, the mere fact that a substantial option price is demanded does not necessarily preclude the court from finding that the transaction was genuinely intended to create a security interest in favour of the lessor so long as other elements of the case justify such a conclusion (51).

52. One writer has suggested that the real question to be decided in distinguishing between a true lease and a security interest is whether the lessee is acquiring an equity in the property, equity here meaning a capital investment in such property by one who has not yet obtained full ownership (52). The distinction to be made is one between payments for the use of the property and payments for the property itself.

53. However, to return briefly to the question of the option price, whereas the term "nominal consideration" would seem normally to be interpreted by the courts in the United States to mean $ 1.00 or some other small amount (53), this amount does not in fact differ much from the residual value figure used on the continent. Thus usually credits of 80 - 85% of rentals paid are given against the purchase price, leaving only nominal sums to be paid for the ownership of the asset. Indeed some courts have adopted a rule of thumb that when the option price is less than 25% of the list price the lease is a security interest (54).

54. Passing from strictly private law legislation enacted in the United States regarding leasing, one should also look at the efforts of the fiscal authorities in the same field. In this connection, there is the U.S. Internal Revenue ruling 540 (55), giving some indicia of intention which are to be regarded as prima facie evidence that the purported lease is nothing other than a concealed instalment sale. These are as follows:

(a) Portions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee.

(b) The lessee will acquire title upon the payment of a stated amount of "rentals" which under the contract he is required to make.

(c) The total amount which the lessee is required to pay for a relatively short period of use constitutes an inordinately large proportion of the total sum required to be paid to secure the transfer of the title.

(d) The agreed "rental" payments materially exceed the current fair rental value. This may be indicative that the payments include an element other than compensation for the use of the property.

(e) The property may be acquired under a purchase option at a price which is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when compared with the total payments which are required to be made.

(f) Some portion of the periodic payments is specifically designated as interest or is otherwise readily recognisable as the equivalent of interest.

55. This Revenue ruling has had repercussions throughout the leasing world. Thus leasing companies, to the extent that they wished to retain the advantages associated with being lessors as opposed to sellers, have in fact been obliged as a result to turn their contracts into true leases which are simple contracts of hire. However, this must be contrasted with the undoubted desire of leasing companies to protect themselves against a possible bankruptcy of their lessee by use of the filing facilities provided for by the U.C.C. in the case of lessors with a "retained security interest" (56).

56. This tendency for leasing operations to draw closer to the classical contract of hire means also that the average leasing operation becomes more and more just a contract of bailment, which is the situation prevailing in the United Kingdom. However, whereas, as has been noted earlier United Kingdom law would treat a lease containing an option to purchase at the expiry of its term as a hire-purchase operation and not as a simple contract of hire, the United States courts continue to recognise that a bailment lease may contain a provision permitting the lessee or bailee to purchase the goods leased, always by the payment of an additional nominal sum (57).

57. Equipment leases have, however, been virtually ignored by the legislator in the United Kingdom, save to the extent that it was seen fit to exclude them from the scope of the specifically Consumer Credit Act 1974. In fact, the term "lease" is not generally used in United Kingdom law to denote the creation of a temporary interest in moveable property. Such a transaction would instead normally be called a hiring or bailment. This simply means that financial leasing in the United Kingdom has not yet achieved the autonomy as a legal species conferred on this creature of the financial world by the French legislature. As one noted authority remarks, "the reservation of title to the lessor, apart from having certain tax implications, is in truth, a form of security interest in just the same way as the reservation of title under a conditional sale or hire-purchase agreement. As yet, however, English law has not advanced to the stage of recognising that such types of agreement are in truth secured transactions" (58).

58. The earliest legislation specifically devoted to leasing would seem to be the French law of 2.VII.1966. In Article 1 of this law, leasing transactions are defined as follows:

"les opérations de location de biens d'équipement, de matériel d'outillage ou de biens immobiliers à usage professionnel,

spécialement achetés en vue de cette location par des entreprises qui en demeurent propriétaires, lorsque ces opérations, quelle que soit leur dénomination, donnent au locataire la faculté d'acquérir tout ou partie des biens loués moyennant un prix convenu tenant compte au moins pour partie des versements effectués à titre de loyers". (59).

59. Given that we have excluded real-estate leasing from the scope of the present study, we shall restrict our remarks to the provisions of the article specifically treating of the leasing of movables.

60. The operations covered by this French law are called "crédit-bail", reflecting the operation's intrinsically credit-raising function and its use of the legal mechanism known as the lease. However, as has been pointed out, this fails sufficiently to draw attention to the originality of this particular form of lease, namely the antecedent sale contract concluded between supplier and finance-house acting for the prospective user. The other major criticism levelled at the term "crédit-bail" is its failure to denote the special subject-matter of this contract, namely capital equipment (60).

61. The two major criteria established by the law for identifying a "crédit-bail" operation are, first, the purpose for which the property is intended - it must be for professional use - and, secondly, the notion of an option to purchase, an option which must be present in every contract of "crédit-bail" from the moment it is concluded and the price for exercising which option must be set out in every contract of "crédit-bail" from the moment it is concluded.

62. The definition of leasing arrived at in France does not differ very greatly from that set out in Article 1 of the Belgian arrêté royal of 10.XI.1967. This characterises leasing operations as follows:

(a) the transaction must involve capital equipment which is used by the lessee exclusively for professional purposes;

(b) the goods must be purchased by the lessor with a view to their being leased according to the specifications of the future lessee;

(c) the duration of the lease as fixed in the contract must correspond to the presumed economic working life of the goods;

(d) the instalments to be paid must be worked out in such a way as to amortise the value of the goods leased over the period of use fixed in the contract;

(e) the contract must give the lessee the option to become the owner of the goods leased, at the expiry of its term, for a price fixed in the contract which must correspond to the presumed residual value of these goods (61).

63. It will be noted that the Belgian definition, while showing considerable similarity to that selected by the French legislature, is at the same time more complete in its reflection of the true nature of leasing transactions (62). Thus, unlike the French law, it mentions the idea of the goods' presumed economic working life, their amortisation and residual value. The Belgian arrêté royal also mentions that the goods leased are acquired according to the "specifications" of the

future user: this emphasises the credit-raising nature of the operation still further.

64. Both these definitions limit the use of leasing to capital equipment acquired for professional use. It is not, however, clear whether this means a total ban on the use of leasing by private individuals, although numerous arguments have been lined up against such an extension, largely based on the tight regulation of consumer credit, a subject where criteria of public policy also become involved in the protection of the consumer and money.

65. The influence of the French law on the definition adopted by the Belgian legislature is nowhere more evident than in the compulsory inclusion of an option to purchase at the expiry of the lease. The French "doctrine" and case-law had been unanimous in arguing that such a clause was of the essence of leasing, whereas the United Kingdom, as has been mentioned earlier, would consider a lease containing such a clause nothing less than a hire-purchase agreement. However, even in Belgium the presence of an option to purchase clause has been questioned in doctrinal circles (63). It has been argued that, on the one hand, the firm leasing the equipment is generally in no way interested in the question of title to the equipment, but solely by being guaranteed the use thereof over a certain period. Furthermore, it has been argued, the exercising of such an option at the expiry of the lease would in effect hardly have any sense, as the price to be paid on exercising this option being either nominal or non-existent, the lessee in fact has no real choice and no financial calculation to work out. In these circumstances, it is debatable according to this current of opinion whether this is any real option to purchase at all. In fact, it should be noted in this connection that German revenue case-law has admitted the purely nominal nature of such an option to purchase (64).

66. A factor mentioned in the French definition but absent from that set out in the Belgian arrêté royal is the idea that the price to be paid on exercising the option to purchase should take account of the instalments already paid during the course of the lease. It will be recalled that the presence of such a factor in a leasing contract would in the United States constitute prima facie evidence for the fiscal authorities of that country that the operation presented as a leasing transaction is merely a concealed sale. (65).

67. No specific legislation has yet been directed at leasing in the Netherlands, although it would seem that the term "afbetalingstransactie" as defined by the law of 13.VII.1961 is broad enough to embrace all the operations generically known as leasing. This Dutch law broke free of the iron-collar imposed by the categories of sales and leases so as to promote a single set of rules.

68. In the Federal Republic of Germany regulation of leasing has not advanced beyond the stage of fiscal regulations (66).

69. The Italian Camera dei Deputati was seized of a "proposta di legge" by Messrs. D'Arezzo and Speranza on 25.X.1973; this is limited in scope to a regulation of what has hitherto been described as financial leasing.

70. Thus Article 1 of this bill reads as follows:

"The following are financial leasing operations if the lessor is a company incorporated in accordance with Article 2 of the present Law:

(1) the leasing of moveables, even if these are entered on public registers, acquired or had made by the lessor on the indications of the lessee, with an option for the latter to become the owner of the moveables leased, at the expiry of the term agreed for the lease, against payment of a fixed price, except in so far as is provided by Article 5 of the present Law;

(2) the leasing of immoveables, for industrial or commercial use or for use in the public interest, acquired by the lessor on the indications of the lessee or, on his behalf, had built by the former, with an option for the lessee to become the owner of the immoveables leased at the end of the period agreed for the lease, against payment of a fixed price, except in so far as is provided by Article 5 of the present Law.

If the particular financial leasing operation bears on machinery or equipment, these, even if physically affixed, joined to, or incorporated in an immoveable, are subject, for all purposes, to the legal regime governing moveables, the lessor being authorised to have them separated from the immoveable to which they may be affixed or joined or in which they may be incorporated". (67)

71. The last paragraph, while providing an interesting solution to the eventual problems that may arise in the event of the insolvency of a firm which, as the lessee of moveables, has, in order to use them, been obliged to affix them to or incorporate them in the immoveable which is its plant, can, however, for the moment be left to one side. What is interesting in the context of this chapter is rather to compare sub-paragraphs (1) and (2) with the French definition of "crédit-bail". Like the French law it extends to the leasing of both equipment and real-estate, sets out the triangular relationship between the parties to such operations, indicates the credit-raising purpose of the operation in its mention of the "indications of the lessee" and also contains the option to purchase at the expiry of the lease. Whereas the French definition only covers leasing for professional use, the Italian bill makes no such restriction in the case of equipment leasing, which must be presumed to mean that it embraces consumer leasing too under sub-para. (1) and, with regard to real-estate leasing, speaks not only of industrial and commercial use but also makes the bill applicable to leasing operations conceived in the public interest. Unlike the French definition, it makes no reference to the price to be paid on exercising the option to purchase at the expiry of the lease taking account of the instalments already paid over the course of the lease and unlike the

Belgian definition makes no mention of the goods' presumed economic working life or their amortisation. Regarding the relation of the option price to a hypothetical residual value the goods may still possess at the expiry of the lease, it should be noted that whereas Article 1 only speaks of " a fixed price", Article 5 clearly relates this to the residual value of the property as fixed by the parties in their original contract.

72. Article 2 of the same bill goes on to define the only firms which may carry on the activity of finance-lessor: these firms must be incorporated as limited companies with a capital of not less than one billion lire (L. 1,000,000,000) (68).

73. Article 5 of the same bill provides for the situation where the finance-lessor company goes into liquidation or is wound up: in this case the lessee would be entitled to become the owner of the property leased even before the expiry of the term of the lease, against payment of the remaining instalments, minus the company's profit, and the residual price as fixed in the contract (69).

C Legal nature of leasing contract

74. Many are the authors who have in recent years had occasion to exert their analytical skills in dissecting the legal nature of the leasing contract (70). Before embarking on some of the main classifications put forward, one might perhaps be permitted to make one or two general observations regarding the nature of this very special and original contract, on which most authors would be in agreement (71).

75. First, it is of paramount importance to remember that leasing is above all else a financial operation, something which the lawyer approaching this subject must never lose sight of. Therein is to be found its specific nature, the source of its difficulties and the key to a solution of the contractual structure used to clothe the credit-raising operation which is really involved.

76. Secondly, leasing emerges as an institution which is completely part of what the French call "droit des affaires" and what might in English be loosely referred to as business law. This explains the predominant part played by the financial world, rather than lawyers, in modelling legal rules for this new contractual technique. It underlines the originality of leasing as a complex, modern contract. One of the most distinguished authors in this field has pointed to it as a fundamental social, economic and legal phenomenon of our age in respect of the renaissance of the contractual phenomenon (72). It also must influence decisively the methods of interpretation and reasoning to be applied to the subject, so that these can no longer be those which would traditionally be employed by lawyers.

77. The third of these general ideas concerns the apparent basic economic disparity of the parties involved. In many respects, leasing is a contract of adhesion. The lessee is usually far less in a position to discuss the clauses contained in the contract as, leasing being expensive, he will only use it where it is dictated by necessity. The seller of the equipment is concerned simply with selling his wares and, although he has often played a considerable part in persuading the lessee to use leasing, he will normally consider that, once the contract of sale has been concluded, his part in the operation is at an end and any difficulties that may arise for the lessee do not concern him. It is the leasing company which, finally, imposes its will, modelling the contract in such a way as to multiply the guarantees of its credit and its exemptions from liability (73).

78. Lastly, one notes that leasing owed its origins in Europe to its usefulness in circumventing those legal problems which arose in connection with other financial operations aiming otherwise in the same direction: that is, it started out as a means of circumventing the law. This sometimes gives the impression of fraud and that it was used to deprive traditional institutions of their substance and their consequences.

79. These preliminary general observations having been made, it should immediately be pointed out that the doctrinal controversies about the legal nature of the leasing contract rage almost uniquely in continental Civil law countries, the attitude of the Common law countries being reasonably stable vis-à-vis the legal nature of this new contract. In the United States, as we have already expounded earlier (74), the courts distinguish between a security interest and a true lease, while the revenue authorities distinguish rather between a true lease and a concealed sale. The criteria governing these distinctions have already been set forth, so that here it suffices simply to repeat that, for the practical reasons mentioned earlier, such as avoiding fiscal classification as a concealed sale, leasing operations have tended in the United States to revert more and more to the classical bailment contract, which, after all, is how leasing operations began.

80. In the United Kingdom, as has also been expounded above (75), a leasing contract, to the extent that it is recognised as having a distinct legal significance, is a contract of bailment qua contract of hire. The inclusion of an option to purchase at the expiry of the lease, as has become the rule with financial leasing on the continent, would be regarded as turning the operation into a hire-purchase agreement.

81. In fact, the financial leasing contract as it has evolved can be regarded as something akin to a hire-purchase or instalment sale and in this connection it is useful to remember that in the United Kingdom the same finance companies usually handle both leasing and hire-purchase transactions. However, what is most important is to bear in mind the origins of the leasing operation, as, no matter how many characteristics of other institutions have been added to it since its export to Europe, it is the bailment/contract of hire situation which lies at the root of all leasing contracts, whether they are practised in Civil or Common law countries.

82. Leasing must be seen, above all, as a creature of the law of personal property (notwithstanding its subsequent extension to real-estate), and its relationship to the law of obligations is necessarily secondary to this (76). Leasing is nowadays defined in the Anglo-American legal field as the conveyance of an interest (77), giving the lessee rights of an almost proprietary nature, so that he holds the goods at his entire risk and responsibility. This emphasises the proprietary nature of leasing, Anglo-American law attaching the greater importance to the duration of the right rather than the personal relations between lessor and lessee (78).

83. The different legal minds of the different countries belonging to the Civil law family have all contributed more or less differing interpretations of the legal nature of the leasing contract. It is proposed to deal with the major of these suggestions country by country.

84. In France, first of all, the triangular relationship at the root of leasing operations has given rise to several definitions. Some, and it might be added some of the most distinguished authorities on this new contract, see a "mandat" or agency situation, although there is little unanimity on the exact ordering of the relations involved within this suggested contractual framework (79). Others see the creation or execution of several "mandats" or agencies fitting into one another and completing each other (80). Several authors claim that what is involved is rather a"stipulation pour autrui" (81). All these theses find some substance in the sequence of operations making up the classical financial leasing contract. Thus a "mandat" situation is seen in the lessor's engagement in the leasing contract he concludes with the future user to purchase the goods as described in the said contract from the supplier equally mentioned in the contract (82). A different "mandat" is claimed, and has been even sustained in the courts (83), in the future user's negotiations with the future seller in the name of the subsequent purchaser/lessor (84). Once the contract has been signed the lessee is argued to act as an agent for the lessor in receiving the goods leased ("mandat accessoire ou administratif dit de réception ou de recette de la chose donnée à bail") (85) and in exercising the latter's rights to bring actions for damages against the supplier (86). This last fact is also seen as evidence for the exisence of a "stipulation pour autrui", as an accessory to the sale contract between supplier and finance house, the lessor usually leaving it to the lessee to go against the supplier for any possible defects in the goods supplied (87).

85. One learned author (88) has concluded that what, in fact, lies behind all the analyses put forward in the various theories and what explains and justifies them all is the fact that the leasing companies have tried to transfer to the lessee those rights and obligations, privileges and duties which would normally pass to the lessor but which, in the special case of leasing, where the lessor is nothing more than the means of raising the necessary credit to secure the use of the desired equipment, cannot be expected to attach to a simple "bailleur de fonds". As a result of this complex and original situation,

the law has had to harness techniques to produce some of the effects of ownership as well as "usus" in the person of the lessee. In this situation, the author sees the creation of a "mandat imparfait," the lessee only leaving to the lessor those rights and obligations necessary for the exercise and protection of its purpose as a source of credit, while reserving for himself those which a simple credit-source could not be expected to fulfil.

86. It would seem that all the Civil law countries recognise the compound, hybrid nature of the leasing contract as a mixture of a contract of hire and a contract of sale. The French and Belgians talk of a "contrat de louage de choses avec promesse unilatérale de vente" (89) and the Germans of "Mietkauf." (90) Both these terms are broad enough to embrace more than just the typical financial leasing situation, as they ignore the complexity brought about by the third party to the operation known as financial leasing. However, in Germany as in France it is recognised that for the original, modern, complex contractual operation known as financial leasing something more than just "contrat de louage de choses avec promesse unilatérale de vente" or "Mietkauf" is involved. Thus many French- and German-speaking writers feel that leasing contracts are better explained by the particular clauses contained in this new contractual form, and thus press for its recognition as an innominate, sui generis contract (91). The same solution has been advocated by the Italian doctrine (92).

87. However, before discussing this, one should examine some of the proposed classifications to be found among German-speaking writers on the subject. Some of the most eminent authorities see it as just another "Mietvertrag" or hire-contract, albeit under a different guise and with certain special characteristics (93). Others subscribe to the thesis that it is a sui generis contract ("Vertrag eigenen Charakters") containing elements of both hire and sale (94). Others still advocate that it is rather a mixed contract ("gemischter Vertrag") containing elements of "Pacht," "Darlehen" and sale (95). Another school of thought proposes the qualification of "Rechtskauf", with the lessee buying from the lessor a right to use which is limited in time and falls under the law of obligations rather than the law of personal property (96).

88. There is also a strong German advocacy for its definition as an agency contract ("Geschäftsbesorgungsvertrag"), on the ground that the leasing company acts as the agent of the lessee in obtaining the equipment desired by the latter, having it handed over to the lessee for use and in supplying the necessary finance (97). However, this "agency" thesis has been much criticised on the ground that it mislays the emphasis of the leasing operation which should rather centre on the "cession d'usage" coupled with the option to purchase (98).

89. Another authority (99) argues that the only link which leasing has with "Pacht" and hire is the moment of handing over of the goods and that where a leasing contract incorporates an option to purchase, the whole operation might perhaps best be regarded as a special form of instalment sale. This conclusion has also been proposed by an important contribution to Swiss doctrine (100).

90. There is an echo of the United States revenue authorities' reaction (101) to the genuine financial leasing operation in the definition suggested by some German writers, namely that the purported leasing is in reality nothing other than a disguised sale. In support of this thesis it is pointed out that in financial leasing operations incorporating an option to purchase the total sum of the instalments plus the option price cover the cost of acquiring the property in the goods (102).

91. Several writers (103) have pointed to the striking similarity which exists particularly in Austria and Switzerland between the distribution of the rights and obligations under the leasing contract and usufruct. Thus under both the ABGB (104) and the Swiss Code civil (105) all the risks and charges of the usufruct are the responsibility of the beneficiary who is also responsible for keeping the object of the usufruct in a good state of repair. However, any attempt to assimilate leasing contracts to usufruct is doomed from the start by virtue of the fact that, on the one hand, the parties to a leasing operation never intend to create a right in rem with the different and particular contractual framework that would entail (106) and, on the other hand, the aim of leasing does not require "Dinglichkeit" (107).

92. The Bundesfinanzhof of the Federal Republic of Germany has in a now famous judgment (108), already referred to above, that of 26. 1.1970, held that in the vast majority of cases financial leasing contracts should be treated as sale contracts and the lessee should, for fiscal purposes, be treated as the economic owner of the equipment in his possession. This decision held that financial leasing should be treated as a sale contract in all cases where the basic duration of the leasing contract represents 90% of the equipment's normal economic working life and, where the basic duration of the leasing contract is shorter than 40% of the equipment's usual economic working life, only in those cases where the lessee is given an option to renew (109). However, it must be borne in mind that this qualification of leasing as a sale, in exactly the same way as in the United States, as we sought to show earlier, is only valid for the purposes of revenue law and has little substantial influence on the classification to be given leasing for private law purposes. And a leasing contract, whilst it may contain elements of sale, particularly as a result of the option to purchase, is something much more complex than a sale contract as this is understood under private law, and does not even contain the essential of all sale contracts, namely the seller's duty to transfer property in the goods (110).

93. However, it quickly becomes clear that holes can be picked in nearly all the classifications put forward (111). Hire as this is normally understood hardly squares with the distribution of risks in leasing. Against the thesis of a "Rechtskauf" it has been pointed out that the law treats the granting of a right to temporary use under the law of obligations as "Miete", "Pacht" or "Leihe". As we have remarked earlier, the "Geschäftsbesorgung" or agency thesis fails to take account of the predominant purpose of leasing operations, namely the "cession d'usage", "Gebrauchsüberlassung" or the use of the equipment (112).

94. The all-important factors to be borne in mind in seeking out the legal nature of the leasing contract remain the purpose for which the operation is entered into, namely to procure for the lessee use of otherwise very expensive equipment, the means resorted to in achieving this purpose, namely the credit facilities of finance-houses, thereby giving leasing its distinctive characteristic as a paramountly credit-raising operation, and the purely financial nature of the rôle played by the lessor whose sole interest subsequent to the drawing up of the leasing contract is in amortising his property over the course of the lease which must accordingly correspond to the presumed economic working life of such property. All these three factors distinguish the leasing contract from those other two institutions of credit law to which leasing is often likened, the hire-purchase agreement (113) and instalment sales (114): the overriding purpose of the last two operations is sale, albeit on a deferred basis, whereas sale only comes into leasing as an optional subsidiary element to the essential purpose of procuring the use of the particular item of property desired by the prospective lessee.

95. From all these attempts to fit leasing into pre-existing legal classifications, it emerges quite clearly that, whilst it is true that leasing contains elements of all these institutions, none really does justice to its quite original, complex, hybrid nature and it is for this reason that recent years have witnessed a growing doctrinal movement towards recognising leasing as an innominate, sui generis contract (115), to be recognised by its own special clauses (116). This course has not only been advocated by an influential corpus of both French- and German-speaking doctrine (117) but has also earned judicial approval in the first decision of the Italian courts to discuss the precise legal nature of this contract (118): this notwithstanding the existence of an equally-divided, if less voluminous doctrine (119).

96. It is submitted that it would accordingly be more profitable to abandon the sterile approach of attempting to make leasing fit into ready-made contractual schémas and to treat it instead as an innominate, sui generis contract which, to an extent and proportion that will vary from contract to contract, embodies elements of many existing legal institutions but which in substance can only really be explained by reference to its economic finality, namely the raising of the necessary credit to procure for the lessee use of the equipment needed by him. As such it transcends the boundaries dividing the Common law realm of personal property - being essentially concerned with the creation of a temporary right to use moveables which results in the user bearing in respect of those moveables virtually all the risks which would normally be associated with ownership - from the Civil law realm of the law of obligations, the leasing contract being to the civilist tradition essentially a consensual contract cemented by an "accord de volontés". This overlapping simply reflects the technique's exportation from the United States to essentially civilist Europe and the inevitable change of emphasis brought about in the legal framework to correspond to the operation's economic finality. However, it is submitted that the only difficulties this raises are mainly of an academic nature and that a suitable regulation of the leasing contract can be modelled by reference to the individual clauses that generally make up such contracts (120).

97. As a postscript, one should mention the very interesting approach to the question of a legal framework for leasing to be found in the suggestion of one noted British authority on credit-law (121): he suggested that what is really called for is the creation of a uniform security interest applicable to all forms of security in personal property in the same way as Article 9 of the Uniform Commercial Code of the United States (122). A uniform security interst would represent an enormous step in the harmonisation of the equally enormous proliferation of heterogeneous security devices currently each governed by its own special rules and each requiring a distinct procedure to secure its perfection. Thus the single term "security interest" as employed in the U.C.C. covers the whole variety of separate credit devices that had hitherto been allowed to develop independently of one another, that is, conditional sales, chattel mortgages, trust receipts, charges, pledges, hypothecations, etc., and Article 9 of the said Code accordingly classified these interests not according to the pre-existing legalistic distinctions but by reference to the functional differences in the purpose and effect of the security. Such a system would also serve to harmonise the Civil law and Common law theories of security in personal property. Whilst it is evident that the scope of this suggestion is far broader than the ambit of the present report (123), it nevertheless represents a line of positive thought for future harmonisation which should not be lost sight of in preparing uniform rules for leasing and points above all to the practical, overall usefulness of the security interest as a well-tried model for a uniform regulation of the leasing contract.

IV RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THE LEASING CONTRACT

98. The rights and obligations of the three parties to the typical financial leasing operation are much the same in all countries; this similarity reflects the broad similarity of the terms and conditions contained in the average leasing contract which can be regarded as an adhesion contract with all the associated economic disparity between the situations of the different parties thereto, the lessee usually having little or no choice in signing the said contract to alter the often very harsh terms being imposed upon him.

A Obligations of Supplier

99. The supplier or his agent must:

1) Consign the equipment ordered by the lessor as a result of the leasing contract. He must also instal the said equipment. This would normally fall to the lessor but in the special circumstances of the leasing contract, the lessor, fulfilling a purely financial function as a source of credit, discharges himself of this obligation in favour of the supplier or his agent, even though the latter is not a party to the actual contract. The supplier or his agent must accordingly respond for any delay in delivery to the lessee directly.

2) Respond for any defects which might affect the lessee's use of the equipment. This covers not only what the French term "la garantie du matériel," i.e. the guarantee that the equipment delivered conforms in all ways to that specified by the lessee in the leasing contract, but also what the French term "la garantie des vices cachés," the guarantee that the equipment has no hidden defects which may render it unfit for the use for which it was intended or which would reduce this use to such an extent that the purchaser would never have acquired it.

100. These duties incumbent on the supplier would normally fall on the lessor who in the special circumstances of the leasing contract avoids these with the agreement of the lessee, for the following reasons:

(a) he has played no part in the choice of the equipment, which has rather been selected (sometimes even conceived) by the future user;

(b) given his uniquely financial competence, he has no desire to assume any responsibilities of a technical nature;

(c) the guarantee which he owes at law is broader than that generally owed by a supplier or manufacturer whose "guarantees" are in fact guarantee-limits;

(d) as a finance company involved in a great deal of business, the leasing company cannot take on these potential legal risks which would weigh down its business appreciably, and for which it is ill-prepared as a result of the multiple technical problems that would be involved (124).

101. Various efforts have been made, expecially in French doctrine, to explain and justify this transfer of what would normally be the obligations of the lessor to the manufacturer or supplier. It should also be pointed out that the Common law jurisdictions would not seem to recognise as yet any such right and obligation relationship directly subsisting between the lessee and the supplier, first, because of the rule of privity of contract and, secondly, as a direct consequence of what has just been said, because such obligations under a contract of hire - which is the way in which Anglo-American law considers the new legal species known as equipment leasing - can only arise between lessor and lessee.

102. French doctrine on this subject is split between the adherents of a "mandat" or agency (125) - by virtue of which the supplier or manufacturer acts as agent for the lessor as regards everything concerning delivery and the technical questions connected with the guarantees attaching to the goods leased - and those who favour a "stipulation pour autrui" (126) concluded between manufacturer or supplier of the equipment and the lessor-to-be in favour of the future user. Both these explanations, and also that of a "délégation" (127), have attracted the attention of the courts both in France and in Belgium. The French Cour de Cassation (128) in an important decision preferred to have recourse to the theory of a general "mandat" conferred on the lessee by the lessor to exercise all the rights and actions of the lessor, and held that this general "mandat" could be set up against the original supplier of the equipment, provided that he knew of it and had agreed to it. It is interesting to note that, in reaching this decision, the Cour de Cassation recalled the very real interdependence existing between the contract of sale and the contract of hire, which between the two of them provide the substance of the complex leasing operation, going on to remark that this interdependence meant the subordination of the existence of the one to that of the other and a confusion of the parties' rights and obligations such that each of them may exercise them or be bound by them.

103. A similar general agency thesis has been advanced in the United Kingdom between the dealer and the finance company in the case of hire-purchase agreements (129), with the former being recognised by the courts to be agent for the finance company for the purposes of delivering the goods and, as a result, it being thought that the finance company will by reason of its duty to deliver become responsible for lack of care by the dealer in relation to the state of the goods, i.e. for defects which mean that the goods are not delivered in conformity with the hire-purchase contract. It is suggested by one reputable authority in the field that the finance company would probably not, however, be liable for such lack of care where the defects did not vitiate delivery - e.g. because the obligation to deliver is qualified by the terms of the agreement (130).

104. There are even some writers who believe that all these difficulties are solved by the exemption clauses which the leasing companies incorporate in their contracts with the lessee, by virtue of which they purport to exclude any guarantee on their part and to transmit to

the lessee any rights and actions relating to such guarantees against the supplier (131). However, when all is said and done, as the authors of this report have been seeking to show all along, what really lies behind and justifies these guarantee exemption clauses is the fact that, on the one hand, the leasing company is playing more the rôle of a "bailleur de fonds" than that of a lessor of moveables, and, on the other hand, that the lessee has had complete freedom in choosing the equipment he wishes to use, has discussed the means of delivery and installation and is a professional who is able to make his own assessment of the worth and robustness of the equipment subsequently to be acquired by the finance company. The second of these reasons would appear to be the more important in this particular connection, as it lays the stress on the special part played by the lessee in this special type of hire operation and thus further underlines the originality of the operation. Then one should also ask oneself whether it is not in fact fair that the lessee should support a degree of responsibility more in proportion to the extraordinary position he enjoys by comparison with the normal legal situation of a lessee. It is submitted, therefore, that this points in favour of recognising, in the special circumstances obtaining in the context of a leasing operation, the existence of a nexus of rights and obligations as to delivery and guarantees between supplier and user, to the consequent exclusion of the lessor's liability in respect of these matters.

B Obligations of lessor

105. The leasing contract is, in economic terms, concerned with the furnishing of credit and, in legal terms, with a hiring. As a result of the economic side of the operation, the more important aspect of leasing, we locate the main burden of the lessor, namely his supporting of the risk of the lessee's creditworthiness, against which he has, however, a sound security in his actual ownership of the equipment (although, as we have remarked earlier, this may raise enormous problems where the lessor and lessee are in different countries (132)) plus the quite severe penalty clauses incorporated in leasing contracts. The legal facet of the operation for the lessor is to conclude the contract of sale with the supplier named by the future user and to have the equipment delivered to the user by the said supplier. Here we see once again the characteristic features of an agency relationship, regarding which reference is made to our remarks under A) Obligations of supplier, above. It should also be noted in this connection that the lessor can never escape his liability to pay the price of the equipment stipulated in the contract of sale between the supplier and itself. This is a liability which for once is perfectly consonant with the lessor's purely financial rôle and is not open to exemption.

106. In addition, the lessor must fix the duration of the lease, in the calculation of which he will have to bear in mind the average estimated economic working life of such equipment in the face of the rate of technological progress, the type of equipment being leased, and his overriding need to amortise his equipment over the course of the said lease.

107. Apart from the United Kingdom, where such a term would turn the agreement into a hire-purchase operation, subject to the rigours of that country's hire-purchase legislation, the lessor will also normally stipulate in the leasing contract a unilateral, irrevocable undertaking to sell the equipment at a price fixed in the contract upon the expiry of the lease - this is the option to purchase which we have discussed earlier and for which the reader is referred to earlier chapters (133). However, as has also been indicated earlier, the option to purchase the equipment is not the only solution available to the lessee on the expiry of his lease - he can also elect to renew his contract, usually at a reduced rate of rentals, or simply to return the equipment. The reasons militating in favour of the option to purchase being exercised have also been set out in preceding chapters (133).

108. The lessor does not normally undertake to guarantee the lessee's use of the equipment for the entire duration of the lease, but where he does so, the service costs will be taken into acccunt in computing the amount of the leasing rentals.

109. Under the Common law, the lessor would also be liable to ensure the lessee's quiet possession of the equipment, given the classification of equipment leasing as a contract of hire under these systems (134). This is a normal incident of all hire contracts and envisages interferences not only by the lessor but also by third parties (135). However, leasing contracts will usually reserve to the lessor the right to enter and inspect the equipment leased (136). This is also a normal incident of hire contracts.

C Obligations of lessee

110. Reflecting the all-important part played by the lessee in the complex financial operation which has come to be known as leasing, the lessee is obliged to support a far broader spectrum of obligations than would normally fall to a lessee under a hire contract. This is as a result of the purely financial, credit-raising rôle played by the lessor and the special position enjoyed by the lessee, both initially in being completely free to select the equipment according to his needs and in the light of his professional knowledge and secondly in his owner-like possession of the equipment during the currency of the lease. These matters have already been touched on more than once in this report but merit particular emphasis.

111. The obligations of the lessee are wide-ranging, then, in respect of the equipment in his possession and correspond to his almost owner-like position in respect of that equipment, enhanced, let it be remembered, by the lessor's transmission of virtually all his rights and actions in respect of the said equipment to the lessee. These obligations are as follows:

1) Payment of rentals

112. This is undoubtedly the primary duty of the lessee, failure to comply with which will render him liable to pay severe penalty clauses and cause the ipso facto avoidance of the contract. The rentals, as we have already explained, are computed by the lessor in such a way as to amortise the equipment over the course of the lease, covering his costs and allowing him a profit margin. These instalments are payable monthly to ensure the lessor a regular inflow of the money invested by him in his purchase of the equipment.

113. The lessor's reservation of the property in the equipment means that, on the lessee's failure to pay the rental therefor, he has essentially the remedies of a hypothecation (137). Interruption of the lessee's rentals means that the lessor may retake possession of the equipment, which will generally entail the discontinuance of the lessee's business which will normally depend on the use of the said equipment. The intransigent use made of the strict clauses of the leasing contract in this regard stands usually to bring disaster falling around the lessee, especially as the clauses providing for the lessee to retake possession are accompanied by penalty clauses which have more than once attracted the attention of writers as being draconian or leonine.

114. These penalty clauses usually provide that the lessor is entitled either to liquidated damages to cover the cost to him (the "damnum emergens") plus his loss of profits (the "lucrum cessans") brought about by his having to take repossession of the equipment or to a sum of compensation equivalent to the sum of the rentals still to be paid, or to both.

115. Quite naturally, the lessee and his creditors in the event of his bankruptcy have contested the validity of these clauses in the courts. In France and Belgium, first of all, a synthesis of the decisions given on this subject (138) would indicate that the validity of these clauses is in general admitted. The claims for their "nullité" on the grounds of public order based on their draconian character, i.e. the lessor's abusing the economically powerful position in which he finds himself vis-à-vis the lessee and leasing's similarity to an adhesion contract, have thus been rejected. Equally, however, it would seem that the judges will not invoke Article 1231 of the Code civil, which empowers them to reduce the sums fixed as liquidated damages, where the principal obligation has been partially performed, against these penalty clauses, arguing that this article is not applicable where the parties to the leasing contract have excluded its application by themselves providing what sanction should follow partial non-performance of the obligation incumbent on the

lessee (139). In support of this line, they have pointed out that the parties were completely free to regulate as they chose the burden of risks and the modalities of avoidance of the contract (140), and they have noted that the phases of the operation are linked by a tie of interdependence, that the parties have chosen an indivisible obligation and that the leasing contract cannot be partially performed.

116. To be noted in this respect are, however, the words of the authors of the Rapport on the 1972-1973 "Année judiciaire" of the French Cour de Cassation (141). They esteem that French law is oversevere in this subject and call for an amendment to Article 1152 of the Code civil which would permit the judge to check on the excessive sums fixed in some penalty clauses and to reduce such sums in the light of the actual extent of the damage suffered by the lessor and of the seriousness of the default committed by the lessee.

117. One writer (142) has called for legislative action to fix a limit to the compensation that may be laid down in the leasing contract in the event of such breach. A Belgian writer (143) argues that the French and Belgian courts have been mistaken in considering Article 1231 of the Code civil to be only of a suppletory nature, and argues that it raises rather a question of public order, as Article 1231 is only an application of Article 1229, so that the main article being a question of public order, its subsidiary article must also do so. He invokes a decision of the Belgian Cour de Cassation (144) which held that Article 1152 should not be applicable where it emerges from the evidence that the penalty clause cannot be an agreed estimate of the damage. He points also to the draft Convention prepared by a BENELUX working group for the unification of the law relating to penalty clauses, which provides that the judge should have a general power to temper penalty clauses according to equity (145).

118. The situation with regard to these clauses in Common law jurisdictions is quite different. First of all, in the United Kingdom it is commonly provided in the minimum payment clause inserted in leasing contracts that the lessor, subsequently to his repossession of the equipment leased, will then proceed to its sale with a view to determining the exact size of the minimum payment to be exacted from the defaulting lessee. However, the sum for which the lessee has to be given credit in computing this compensation is not the full proceeds of this sale but only the amount by which this exceeds what would have been the value of the equipment at the expiry of the lease (146). To the extent to which this makes prior estimation of loss by the lessor more difficult, the courts have had a tendency to view such minimum payment clauses in contracts of hire with more favour than would have been the case, say, with the equivalent clause embodied in a hire-purchase agreement. However, the guiding principle of the Common law in these matters is to determine whether the sum fixed in such a clause is limited to the loss actually suffered by the lessor. Given the difficulty of the time which would have to elapse before the amount of the lessor's loss could be accurately quantified, one leading judge commented:

"The courts would be doing an ill-turn to those whom the rule about 'penalty clauses' is designed to protect if they were to apply it so as to make it impracticable for parties to agree at the time when they enter into a contract on a fast and easily ascertainable sum to become payable by one party to another as compensation for the loss which the latter will sustain as a consequence of its breach. It is good business sense that parties to a contract should know what will be the financial consequences to them of a breach on their part, for circumstances may arise when further performance of the contract may involve them in a loss. And the more difficult it is likely to prove and assess the loss which a party will suffer in the event of a breach, the greater the advantages of both parties of fixing by the terms of the contract itself an easily ascertainable sum to be paid in that event" (147).

119. Thus, in the case where that comment was made the court upheld a minimum payment clause as a genuine pre-estimate of liquidated damages where it provided for payment, on termination of the contract, of 50% of the total rentals remaining to be paid. The court held by a majority that the lessor's loss was to be taken as the discounted value of the future rentals less the amount by which the value of the equipment exceeded what would have been its residual value at the end of the hiring period. It was further held that the lessor's loss was not diminished by his ability to re-let the equipment, since facilities for supply exceeded demand. However, it should be remembered that in the Common law countries the decision in each case, especially in this field, will turn on its particular facts.

120. A decision of the High Court of Australia (148) upheld a minimum payment clause which provided for payment by the lessee (in addition, of course, to all rent instalments then accrued and due, but not paid) of the total future rentals rebated to reflect their then value.

121. In the United States (149) the rights of the lessor on the default of the lessee are traditionally determined by the law of bailments. The usual remedies provided by state law are the repossession of the leased equipment, and a claim for damages determined by subtracting from the total amount of the rentals still remaining to be paid the costs of any unperformed covenants and the value of the equipment to the lessor on repossession (150). The lease itself may provide for additional remedies. A common provision is a minimum payment clause that not only is the lessor entitled on the lessee's default to repossession but also to all rent due for the unexpired term of the lease. Such clauses may be held void, however, as inflicting a penalty, since it is established in the United States too that remedies stipulated by contract must bear a reasonable relation to the damage sustained in order to be judicially enforceable (151).

122. Where a lease is a security instrument as defined by the U.C.C., after repossession the position of the secured party differs from that of the lessor (152). The secured party, where the collateral is not consumer goods, may propose to retain the collateral in satisfaction of the lessee's obligation. The lessee, however, can, by objecting, force a sale (153). In addition, the lessee has the right to redeem the equipment by paying his debt at any time before the secured party has disposed of the collateral or entered into a contract to dispose thereof (154).

123. However, it has been pointed out that, economically, there is no real difference between the lessor's absolute right of retention and the secured party's limited power of retention, since only if there is an excess of proceeds on the sale of the collateral would there be a difference, in a Code transaction any excess going to the debtor (155). Such a situation would arise but rarely because, assuming normal supply and demand, the asset would have to appreciate in value for there to be any excess. Such an appreciation goes against the obsolescence inherent in most equipment, and if appreciation has taken place, the lessee would probably not permit a default (156). The fair value of whatever disposition the lessor makes of the repossessed collateral will be deducted from his actual damages.

124. It will be observed that the situation in the Common law jurisdictions presents a fair degree of uniformity between the different systems examined but that what is upheld in these jurisdictions as a genuine and fair pre-estimate of the damage sustained by the lessor on the lessee's default differs considerably by reason of the judges' concern to go into all the circumstances of the case from the approach of the representatives of the civilist tradition examined, which evince a total unwillingness to examine the fairness or otherwise of the minimum payment clauses figuring in continental leasing contracts. It is respectfully submitted that, expecially in view of the opinion voiced by so august an authority as that embodied in the Rapport of the Cour de Cassation of France on the 1972-73 "année judiciaire", dealt with above, the approach of the Common law is more in keeping with the commercial realities of leasing contracts concluded in the mid-1970's, particularly bearing in mind the extraordinary economic disparity in the respective situations of lessor and lessee deriving from the adhesion contract-nature of the contract which determines their respective rights and obligations.

2) Obligation to maintain, repair and meet all charges connected with use of equipment

125. The lessee here in the incidents of his use of the equipment approaches more closely the obligations normally associated with ownership rather than mere use. The reasons for this strange reversal of the charges attaching to the equipment leased have already been set out above, namely, above all in the finance house's exclusively credit-raising and non-technical function and the lessee's professional skill and the special and original position he enjoys from the beginning of the complex operation known as leasing.

126. Under all systems, then, the lessee has an obligation to take all care with the equipment and accordingly to keep it in a good and serviceable condition, fair wear and tear obviously excepted, and to proceed, at his own expense, to the repairs which become necessary over the course of the lease, replacing "all missing damaged or broken parts with parts of equal quality and value" (157). The lessee must equally meet all charges connected with the use of the equipment.

127. These obligations are in reality just one reflection of the fact that from the conclusion of the leasing contract all the risks attaching to the equipment are, regardless of the true ownership thereof, transferred to the lessee. The same is true for the next group of obligations incumbent on the lessee:

3) Obligation to insure and liability for loss, theft, destruction or damage of equipment

128. It is equally a common feature of all leasing contracts that the lessee is made responsible for any loss, theft, destruction or damage to the equipment. This is so regardless of the cause of the accident, even if brought about by a third party or by an employee of the lessor. The occurrence of such events does not free the lessee from the obligation to pay his rental instalments (158).

129. From the outset the lessee must use the equipment in conformity with the use for which it was intended by the contract - to this end, as has been mentioned before, the lessor always has a right to enter and inspect - and, moreover, in conformity with technical requirements and with the customs of the profession, following, in this regard, the instructions provided, in particular, by the supplier.

130. In the event of the equipment being damaged, the lessee must have it repaired at his own expense, as we have remarked under 2) above. In the event of its loss, theft or destruction, partial or otherwise, the lessee must replace it with another of equal value or it is sometimes stipulated that he shall forthwith pay the lessor all the still outstanding rental instalments by way of compensation (159). By way of justification of this considerable liability, the lessors point to the fact that they are obliged to do nothing during the course of the lease which might hinder the lessee in his use of the equipment (159). Above all, the actual equipment represents, let it be remembered, the lessor's sole concrete security for the credit he advanced to the lessee at the outset of the leasing operation.

131. Closely involved with this question is the lessee's obligation to take out a comprehensive insurance policy in respect of the equipment immediately the leasing contract is signed (160). This insurance must be kept up throughout the currency of the lease. It shall be in favour of the lessor, and cover all the risks which the equipment could be exposed to. This would accordingly include vis major or Act of God, third-party acts or an inherent defect of the equipment

itself, but not war or the fraud of the policy holder (161). The amount of the insurance-policy will always be the equipment's full replacement value, taking account of its age and allowing for transport, installation and any other costs (162). It is generally provided that the insurance monies shall be applied to making good damage sustained by the equipment during the currency of the lease and, in the event of the equipment's loss, theft or destruction during the lease, shall be applied in so far as possible in replacing the said equipment or in compensating the lessor (163).

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D Rights of Lessor against third parties

132. Having dealt with the rights and obligations of the parties to the leasing operation inter se, we must now look at the question of third party claims in respect of the lessor's collateral. The rights of third parties, either creditors of or innocent purchasers from the lessee, may also clearly be affected by the lessee's default. The obvious solution here is an effective system of publicity which will advertise the lessor's title to all who may come into contact with the equipment.

133. The Common and Civil law systems have approached the problem in different ways, but their solutions are not that divergent in practice. It was quickly realised that the mere affixing of an identification plate, indicating the owner's name, on the equipment leased offered the lessor a wholly inadequate protection and indeed in the countries which tried this expedient it proved to be singularly ineffective on the practical level (164).

134. In the United States, the common law rules already offered the lessor a considerable measure of protection, to the extent that one may transfer that which one has but no more, and one's creditor may accordingly take only that which their debtor has and no more. As a result, the lessee cannot transfer free from the lessor's interest who is generally protected accordingly against third-party claimants. However, a lessor may be estopped from asserting his title as against creditors of or purchasers from the lessee if it can be shown that the lessee has been clothed with apparent ownership (165). This requires more of course than the mere possession and control given to all lessees: there must in addition be conduct by the lessor either actively or by acquiescence in the lessee's conduct which is inconsistent with ownership resting in the lessor. This is typically the case where goods are leased for resale in the ordinary course of business (166).

135. Some policing by the lessor is therefore clearly required to prevent lessees from dealing freely with the leased equipment to the detriment of third parties. In the United States this has been provided in the U.C.C. which provides that, in the case of a lease which is a security instrument as defined by the Code and which has been perfected, the terms of the lease can be enforced against purchasers of the collateral and against creditors of the lessee (167). The corollary of this rule is, of course, that an unperfected security interest is not enforceable against third parties (168). The Code permits a lessee to transfer his interest in the collateral despite a contractual term to the contrary, but a provision making such a transfer a default is also valid (169).

136. The conditional sale, which is regarded in the United States as the comparable financing transaction to a lease (170), creates, in Code terminology, a purchase money security interest. These purchase money security interests have been accorded several advantages by the Code. Thus the need for filing is eliminated in certain cases (171). Delays in filing are permitted (172) and they are given priority over other security interests (173). The Code also recognises, however, that the secured party, i.e. the lessor, may be unable to reclaim his collateral from innocent third parties if the debtor or lessee has been clothed with apparent ownership, and protects a buyer in the ordinary course of business even though he knows of the existence of the security interest (174). The secured party is protected by the Code upon a conversion of the collateral, since a perfected security interest follows the collateral and also attaches to the proceeds (175). A ten-day limit is placed on the perfected security interest in the proceeds unless the previously filed statement is explicit in its coverage of the proceeds or unless a new security interest in the proceeds is perfected during the said ten-day period (176).

137. In France (177) the law of 2.VII.1966, as modified by the ordonnance of 28.IX.1967, which instituted the legal regulation of the contract of leasing in that country, also provided that the leasing operation should be given publicity (178), and that the modalities of this publicity would be specified by a subsequent decree. Prior to the entry into force of the decree of 4.VII.1972, French case-law already recognised the lessor's right to set up his title against all third-party claimants (180), even where he had not carried out the steps regarding publicity which it was usual to take then (181). The aforementioned decree changed this situation by stipulating two steps to be taken regarding publicity in the case of the leasing of moveables.

138. The first of these is the registering of the leasing contract at the "greffe" of each "tribunal de commerce" or each "tribunal de grande instance" in its commercial capacity, on the application of the leasing company (182). The decree also stipulates that the companies which have resort to leasing in order to obtain the use of equipment must also enter details of the operation in a separate part of their balance-sheet, indicating the rental instalments paid and those remaining to be paid in respect of such operations (183). We are clearly for the purposes of this study more interested in the first of these steps regarding publicity.

139. The registration of the leasing contract must in this case be made at the "greffe" of the court within the jurisdiction of which the lessee has his principal place of business as recorded in that court's "registre de commerce." In cases where the lessee is not registered on the "registre de commerce," registration for the purposes of the publicity of the leasing contract must be effected at the "greffe" of the "tribunal de commerce" or the "tribunal de grande instance" acting in a commercial capacity within the jurisdiction of which he has his place of business and for the needs of which he has concluded the particular leasing contract (184). This registration, where duly carried out in accordance with the afore-mentioned provisions, takes effect immediately as from the date on which it is made (185).

140. The sanction laid down for failure to take the steps with regard to publicity prescribed by the said decree is that the lessor is estopped thereby from setting up his title to the moveables as against creditors of or purchasers for value from the lessee, ~~even if~~ unless he succeeds in showing that such creditors or purchasers for value had knowledge of the existence of his title to the moveables (186).

141. These provisions achieve the same result as the U.C.C. provisions we have examined earlier. Thus the effect of the French decree is that the efforts of the lessor to repossess his equipment on the lessee's default in the case of his insolvency will no longer come up against the counter-claim of the lessee's trustee in bankruptcy that the equipment in question must be retained to satisfy the general body of the lessee's creditors, since all that the lessor will have to do in such a case is to send the trustee an extract from the registration entry made in respect of his equipment. Secondly, in just the same way as we have demonstrated earlier under the U.C.C., the leasing companies, as a result of complying with the publicity requirements of the said decree, can follow their collateral even when it has come into the hands of a bona fide purchaser.

142. As with the U.C.C., what is really involved in the publicity requirements laid down by the French decree of 4.VII.1972 is not an obligation to register the actual leasing contract but rather to register the owner/lessor's right of property which he reserves to himself at the moment of concluding the contract. Thus in both systems failure to comply with their formally different registration procedures will adversely affect not the leasing contract itself but the lessor's reserved right of property. The names used by the two systems are quite different, namely security interest and "droit de propriété" but the end served is identical. The reason why the publicity measures adopted in the two countries appear to relate to the actual contract but in actual fact refer rather to the person who made the contract possible, that is, the finance-lessor, is that, while the evident aim of the publicity procedure must be to let third parties know the real legal standing of their co-contractant, the only item that can be registered to this end is the leasing contract itself, whereas what is really being protected is the owner/lessor's right of property.

145. The Italian draft law on leasing, referred to earlier, provides a similar, if simpler registration procedure in respect of equipment leased so as to inform third parties of the lessor's title thereto (187). As with the French decree, the registration must, for obvious reasons of convenience for third parties dealing with the lessee in respect of the equipment leased, be effected at the competent "registre de commerce" for the lessee's place of business.

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146. One question which might arise as a result of the lessee's insolvency is the lessor's right to repossess his collateral where the equipment leased has been affixed to realty. Most leasing contracts contain some reference to this question and provide that the equipment is to remain a moveable notwithstanding such affixation (188). The draft Italian law on leasing specifically provides that, in the case of financial-equipment leasing where the equipment has been affixed to realty, the equipment shall remain nevertheless subject to the legal regime of moveables and the lessor shall remain authorised to have it separated from the realty (189).

147. The winding-up of the lessee's business usually provides for the lease's automatic termination (190), although the mere insolvency of the lessee will not usually affect the lessor-lessee relationship, apart from the fact that the bankrupt lessee's trustee in bankruptcy will assume the lessee's obligations under the leasing contract, that is, unless the lease specifically provides that the lessee's insolvency will entitle the lessor to terminate and repossess. The lessee's trustee in bankruptcy has the power to reject a lease but, it is submitted, will usually have an interest in continuing it especially where a large proportion of the lease has already run its course and, given the manner in which the rental instalments reflect the lessor's desire to amortise his property over the course of the lease, there is an incentive to exercise the option to purchase. Where there is a rejection of the lease by the trustee, however, in the United States at least, the liability is only for the fair value of the use of the equipment between the date of rejection and its return to the lessor (191).

148. The Italian draft law provides that, in the event of the lessor's insolvency, the lease subsists but with the lessor's trustee in bankruptcy assuming the lessor's rights (192). In the event of the lessor's being wound up, the draft law provides that the lessee has the right to become the owner of the equipment leased, even though the lease has not yet come to an end, against payment of the remaining rentals, minus the lessor's profit, as well as the residual value fixed in the contract, rebated at the discount rate current at the moment of exercising the option to purchase (193).

NOTES

(1) cf. UNIDROIT Programme of Work for Financial Years 1975-1977, at pp. 34-36.

(2) However, in this connection, cf. infra, at § 34.

(3) cf. infra, at §§ 23-32.

(4) cf. Minutes of 53rd session of Governing Council (C.D. 53rd. session), at p. 19.

(5) LWOWSKI: Erwerbsersatz durch Nutzungsverträge. Eine Studie zum Leasing, Thesis Hamburg 1967, p. 2 et seq.; SCHUBIGER: Der Leasing-Vertrag nach schweizerischem Privatrecht, St. Gallen 1970, p. 9 et seq.; GÄFGEN: Leasing in den U.S.A., in Leasing-Handbuch, Frankfurt 1965, p. 110.

(6) LAUZUN: Acheter ou Louer, "Fortune", Service-Direction N°.95, May 1963, p. 489; COILLOT: Initiation au Leasing ou Crédit-bail, 1969, p. 10.

(7) Dixième Journée Juridique, Geneva 1970; STAUDER, Le contrat de "finance-equipment-leasing", p.11. Even whole nuclear stations are now being supplied by means of leasing, cf. Le Soir, 23. I. 1975: "Des centrales nucléaires construites en leasing avec des 'pétro-dollars'."

(8) cf. Official Account of the Proceedings of the said working session, pp. 2-3.

(9) COILLOT: op. cit. p. 11.

(10) Federal Income Tax Treatment of Equipment Lease-or-Purchase Agreements: Virginia Law Review, 1966, Vol. 52, p. 1336, at p. 1339.

(11) PAPE and RICHTER-HANNES: Nature juridique du contrat de leasing pour les navires, Le Droit maritime français, 1973, pp. 387 - 394 and 451 - 458.

(12) idem, p. 387.

(13) O.V. Erweiterung des Pacht- und Leihsystems in den Entwicklungsländern, in the bulletin Inostrannoi Kommertscheskio Informaccii of 7.VII.1970, N°. 79-80, p. 3 (in Russian).

(14) cf. PACE: Pratique et technique financière du crédit-bail (leasing), E and F; COILLOT, op. cit., pp. 110-122; THIEL: "Zivilrechtliche und steuerrechtliche Probleme des Leasings", Der Betriebs-Berater, 1967, pp. 325-327; GOODE: "Hire-Purchase Law and Practice", 2nd. edition, pp. 814-820 and 881-882.

(15) cf. Official Account of the Proceedings of Leaseurope working session.

(16) cf. PACE, op. cit., F^2 and F^3.

(17) However, a recent decision of the Federal German Finanzgericht treated the lessee under a financial leasing contract as the economic owner of the equipment - cf. Decision of 26.I.1970, BB 1970, p. 332; DB 1970, p. 424; NJW 1970 p. 1148; WM 1970 p. 184.

(18) cf. "Leasing grows more popular", Financial Times, 26.VI.1974.

(19) cf. infra, at §§47-73 for statutory definitions of leasing hitherto attempted.

(20) cf. infra, at §33.

(21) cf. PACE, op. cit., at C.

(22) cf. GOODE, op. cit., at pp. 880-883; Dixième Journée Juridique, pp. 14-18; PACE, op. cit., at A^3- A^6.

(23) cf. GOODE, op. cit., p. 880 et seq.

(24) cf. PACE, op. cit., A^4, and B^9- B^{10}.

(25) cf. The CROWTHER Report on Consumer Credit, (1971) Cmnd. 4596, para. 1.2.14.

(26) cf. COILLOT, op. cit., pp. 200-202.

(27) cf. Handbuch der Aussenhandelsverträge, Vol. II, p. 384.

(28) cf. BOOK, Maschinen kaufen oder mieten (Leasing)? Der Betrieb 1964, p. 229 et seq.; BÜSCHGEN, Das Leasing als betriebswirtschaftliche Finanzierungsalternative, Der Betrieb 1967, p. 473 et seq., 561 et seq.; LEMITZ, Maschinen kaufen oder mieten (Leasing)? Der Betrieb 1964, p. 521 et seq.; ULLENDAHL, Leasing und die unternehmerische Investitionsentscheidung. "Information" der Internationalen Treuhand AG, Bäle - Genève - Zürich, Heft 33, May 1970, p. 28 et seq.

(29) cf. Dixième Journée Juridique, op. cit., p. 14; NITSCHE, Zur Rechtsnatur des Leasing, Österreichische Juristen-Zeitung 1974, p. 29 et seq.

(30) cf. generally GOODE, "A Credit Law for Europe?" (1974) 23 I.C.L.Q. 227, especially at 247 et seq.

(31) cf. Official Account of the Proceedings of the said working session; Financial Times 26.VI.1974: "Leasing grows more popular".

(32) The United Nations Commission on International Trade Law decided, at its third session, to request the Secretary-General to obtain information from governments on security interests in goods, under their national laws and practices, that were relevant to international transactions, and to make a study of the principal legal systems concerning the conditional sale and the trust receipt (see Yearbook of the United Nations Commission on International Trade Law 1968-70, Vol. I, Part II, third session, para. 145). It was reported at the fourth session that the Secretary-General hoped to be able to submit this study to the Commission atits fifth session. One object of the study would be to provide a basis for identifying the ingredients of security devices or arrangements that would facilitate international trade.

(33) cf. infra, §§ 47 et seq.

(34) cf. SCHMITTHOFF, "The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions" (1968) 17 I.C.L.Q. 551, at 563-565.

(35) cf. PACE, op. cit., at M^1 - M^4.

(36) cf. decision of the Chambre commerciale of the French Cour de Cassation of 3.I.1972, D. 1972, 649, with note by Michel TROCHU; also reported at JCP 1973, II, 17300, with note by J.-M. LELOUP.

(37) cf. PACE, op. cit., at M^3.

(38) These examples are taken from PACE, op. cit., at M^3 - M^4.

(39) cf. supra at §12.

(40) cf. Official Account of the Proceedings of the said working session.

(41) cf. for more detailed description, PACE, op. cit., at B^2 - B^{11}.

(42) cf. E.M. BEY "De la Symbiotique dans les leasing et crédit-bail mobiliers", 1970, pp. 34 et seq .

(43) cf. J.S. BROWN "Leases: Security interests", 1964 Cornell Law Quarterly, at p. 675.

(44) cf. section 1-201 (37) of Uniform Commercial Code which is now in force in almost all the States of the U.S.A.

(45) cf. Re Wheatland Electric Products Co. (DC Pa) 237 F Suppl. 820.

(46) cf. Sanders v. Commercial Credit Corp. (CA5 Ga) 398 F 2d 988.

(47) cf. Re Vaillancourt (DC Maine Referee Bankruptcy) 7 UCCRS 748.

(48) idem.

(49) cf. Anderson: Uniform Commercial Code, Vol. 1, p. 146. (2nd. edition, 1970).

(50) cf. Re Wheatland Electric Products Co., supra, note 45.

(51) cf. Re General Assignment for Benefit of Creditors of Merkel, Inc. 45 Misc. 2d 753, 258 NYS 2d 118.

(52) cf. J.S. BROWN, op. cit., at p. 675.

(53) cf. Re Wheatland Electric Products Co., supra, note 45.

(54) cf. Re Oak Manufacturing, Inc., (DC NY Referee Bankruptcy) 6 UCCRS 1273.

(55) Rev. Rul. 540, 1955-2 Cum. Bull. 39, 41-42. This has generally been followed by U.S. courts, although cf. Western Contracting Corporation v. C.I.R., 271,F2d 1094 (8 Circ. 1959); Kearnay v. Trecker, 195, F. Suppl. 159 (D.C. Wisconsin, 1961).

(56) Indeed, many lessors, for these practical reasons, tend to adopt the practice of filing their leases in all U.C.C. states rather than run the risk of having their transaction treated as an instalment sale. Since the test laid down in the U.C.C. for the creation of a security interest turns on the intent of the parties, the filing may provide evidence of intent sufficient to treat the lease as a secured transaction subject to all the filing, priority and enforcement provisions of Article 9 of the same Code. As the definition of a security interest under the Code is broad, the courts in the United States may exercise a great deal of discretion in classifying a lease as a lease or as a security interest. The conclusions reached may well depend on whether or not a particular court believes secured credit is desirable in the particular situation (cf. J.S. BROWN, op. cit., p. 677).

(57) cf. WILLISTON on Contracts, 3rd. edition, Vol. 9, at p. 929.

(58) cf. GOODE: Hire-Purchase Law and Practice, 2nd. edition, at pp. 880-881.

(59) A slightly loose translation of this article is to be found in the report of M. Robert LAFON to the afore-mentioned working session of Leaseurope (June 1974). It is as follows:

> "The leasing of capital goods or equipment bought with leasing in mind by companies who become the owners, when these transactions, whatever their nature, give the lessee the chance to acquire all or part of the leased assets at an agreed price which, at least in part, takes into account the rents paid".

(60) cf. COILLOT: op. cit., p. 90 et seq.

(61) However, in this connection VEROUGSTRAETE ("Le contrat de leasing", la Revue de la Banque 1969, p. 610 at 615) has pointed out the apparent inconsistency of this sub-paragraph with the other sub-paragraphs, in that it is already presumed that the residual value of the equipment is nil. In laying down this last requirement, the text departs, according to the author, from the field of contracts for the hire of moveables which were in fact nothing other than sales in which the would-be lessee had virtually all the rights of an owner. In presuming that the equipment will still be worth something and, accordingly, that the lessee might have an interest in exercising an option to purchase and retains a real choice as between returning the equipment and exercising the option, the legislator, it is argued, comes back to the situation of a genuine contract for the hire of moveables.

(62) cf. CHAMPAUD: "Le leasing", Renaissance du phénomène contractuel, The Hague 1971, at. p. 206.

(63) cf. VEROUGSTRAETE, op. cit., § 615.

(64) BFH, 25.X.1963, B. St. Bl 1664, III S. 44.

(65) cf. supra, at § 54.

(66) cf. paper prepared by HOLSTEIN for first working session of Leaseurope, in Official Account of the Proceedings of the said session, op. cit.

(67) The original Italian text is as follows:

"Sono operazioni di locazione finanziaria, se parte locatrice è una impresa costituita ai sensi dell'articolo 2 della presente legge:

1) le operazioni di locazione di beni mobili, anche se iscritti in pubblici registri, acquistati o fatti costruire dal locatore su indicazione del conduttore, con facoltà per quest'ultimo di divenire proprietario dei beni locati, alla scadenza del periodo di locazione convenuto, dietro versamento di un prezzo determinato, salvo quanto disposto nell'articolo 5 della presente legge;

2) le operazioni di locazione dei beni immobili, per uso industriale, commerciale o di pubblico interesse, acquistati dal locatore su indicazione del conduttore o per suo conto dal primo fatti costruire, con facoltà del conduttore di divenire proprietario dei beni locati alla fine del periodo di locazione convenuto, dietro versamento di un prezzo determinato, salvo quanto è disposto dall'articolo 5 della presente legge.

Se la locazione finanziaria ha per oggetto macchine o attrezzature, le stesse, anche se materialmente connesse, incorporate o congiunte ad un immobile, sono sottoposte, ad ogni effetto, al regime giuridico dei beni mobili, restando autorizzato il locatore a farle separare dall'immobile al quale fossero connesse, incorporate o congiunte".

(68) Article 2 reads as follows:

"Le imprese che intendono esercitare l'attività di locazione finanziaria devono costituirsi sotto la forma della società per azioni, con un capitale, sottoscritto o versato, non inferiore ad un miliardo di lire.

Esse non potranno iniziare l'attività senza l'autorizzazione del Ministero del tesoro".

(69) Article 5 reads as follows:

"In caso di scioglimento della società locatrice, il conduttore ha facoltà di divenire proprietario dei beni locati, anche prima della scadenza del contratto, dietro pagamento dei residui canoni locativi, dedotto l'utile d'impresa, e del prezzo residuo determinato in contratto, attualizzati al tasso di sconto corrente al momento dell'esercizio della facoltà di cui al presente articolo."

(70) cf. for the United States:
"Equipment Leasing under the U.C.C.," 1965 U.C.L.A. Law Review, 125;
"Expanding the definition of "security": sale-leasebacks and other commercial leasing arrangements," 1972 Duke Law Journal, 1221;
"Lease or sale under the U.C.C. §1-201 (37)," 1971 Willamette Law Journal, 96;
Symposium on commercial leasing: 1972 University of Illinois Law Forum, 433;
ANDERSON: Uniform Commercial Code, Vol. 1, 2nd. edition;
W.L.B.: "Federal Income Tax Treatment of Equipment Lease-or-Purchase Agreements," 1966 Virginia Law Review, 1336;
BENDER's U.C.C. Service: Secured Transactions, Vol. 1, p.375;
J.S. BROWN, op. cit.;
JONES, FARNSWORTH and YOUNG: Contracts (1965);
NORDSTROM and LATTIN: Sales and Secured Transactions, Problems and Materials (1968) pp. 503-507;
J.R. PEDEN: "Treatment of equipment leases as security agreements under the U.C.C.," 1971 William and Mary Law Review, 110;
WILLISTON on Contracts, Vol. 9, 3rd. edition;
WILLISTON on Sales, Vol. 2, revised edition, § 336;

for the United Kingdom:
CROSSLEY VAINES: Personal Property (5th. edition), p. 416;
GOODE: Hire-Purchase Law and Practice (2nd. edition), p. 883;

for France:
"Le leasing," collection published by the Chambre nationale des conseillers financiers, 1965;
Nouvelles techniques contractuelles, Montpellier 1970, pp. 137 et seq.;
EL MOKTAR BEY: De la symbiotique dans les leasing et crédit-bail mobiliers, 1970;
CALON: "La location de biens d'équipement ou 'leasing'," Dalloz 1964, Chron. 97;
CHAMPAUD "Le leasing," J.C.P. 1965, 1, 1954;
COILLOT, op. cit.;
GAULLIER: "Le leasing," Rev. Banque, 1964, 751;
HENNIQUEAU: "Le leasing," Rev. Banque, 1965, 558;
MERA, R.D.C., 1966, 49;
PAPE and RICHTER-HANNES: "Nature juridique du contrat de leasing pour les navires", Droit maritime français, 1973, pp. 387 - 394 and 452 - 458;
RIPERT-ROBLOT: Traité élémentaire de droit commercial (7th. edition), §164;

for Belgium:
BIBOT: "Le leasing ou location-financement", Rev. Banque 1968, 51;
CHAMPAUD: "Le leasing", in "Renaissance du phénomène contractuel" (1971), pp. 199 et seq.;
VAN DAMME: "La location-financement, un procédé nouveau et rapide d'expansion," Rev. de la Soc. belge d'Etude et d'Expansion 1963, 589;
VAN HOLSBEEK: "Le leasing ou la location de matériel," Rev. Banque 1964, 356;
VAN HOLSBEEK: "La location-financement ou 'leasing' en Belgique", Rev. de la Soc. d'Etudes et d'Expansion 1968, 19;
VEROUGSTRAETE: "Le contrat de leasing," Rev. Banque 1969, 610;
VEROUGSTRAETE: " Privaatrechtelijke Aspecten van Finance Leasing in Belgie," Tijdschrift voor Privaatrecht 1973, 741;
VINCENT and DEHAN: "La nature du contrat de leasing," Rev. crit. jur. belge 1967, 231;
VINCENT and DEHAN: "Le statut légal du leasing," Journal des Tribunaux 1968, 75;

for the Netherlands:
KEIJSER: "Civielrechtelijke aspecten van leasing in Nederland," V.U.G.A. 1972;
OOSTERHUIS-SMITS, in BEHRENDT: "Enige juridische aspecten van leasing," Praeadvies voor het Broederschap voor Notarissen, 1971;
VEROUGSTRAETE: "Le contrat de leasing," Rev. Banque 1969, 610 at 618;

for Democratic Republic of Germany:
"Der Leasing Vertrag" in Handbuch der Aussenhandelsverträge, Vol. 2 (1974), 381;

for Federal Republic of Germany:
BINDER: "Rechtsnatur und Inhalt des Leasingvertrages," Thesis, Cologne, 1967;
BOOK: "Leasing in Deutschland" in Leasing-Handbuch, 1965,169;
ESSER: Schuldrecht, Vol. II (1971 edition), 134;
Institut "FINANZEN UND STEUERN": "Leasing," Heft 74, 1964;
FLUME: "Das Rechtsverhältnis des Leasing in zivilrechtlicher und steuerrechtlicher Sicht," DB 1972, 1;
HAGENMÜLLER, Leasing-Handbuch, 2nd. edition, 1968;
HAVERMANN: "Leasing. Eine betriebswirtschaftliche, handels- und steuerrechtliche Untersuchung" 1965;
KOCH and HAAG: "Die Rechtsnatur des Leasingvertrages, " BB 1968, 93;
KRAUSE: "Die zivilrechtlichen Grundlagen des Leasing-Verfahrens," 1967;
LANGER: Die rechtliche Ausgestaltung von Leasing-Verträgen, BB 1969, 610;
LARENZ: Lehrbuch des Schuldrechts, Vol. II (1972 edition), 350;
LWOWSKI: "Erwerbsersatz durch Nutzungsverträge," Thesis, Hamburg, 1967;
MEILICKE: "Leasing," BB 1964, 691;
MOSEL: "Leasing contra Abzahlungsgesetz," NJW 1974, 1454;
PALANDT-PUTZO: Bürgerliches Gesetzbuch, 30th. edition (1971) §535, 4b;
PLATHE: "Die rechtliche Beurteilung des Leasing-Geschäfts," Kiel thesis, 1969;
PLOETZ: "Der Leasingvertrag und seine Einordnung in das System der Vertragsverhältnisse," Thesis, Marburg, 1969;
SCHMIDT: "Rationalisierung und Privatrecht," Archiv für die zivilistische Praxis, 166, S.10;
THIEL: "Zivilrechtliche und steuerrechtliche Probleme des Leasings," BB 1967, 325;
WAGNER: "Leasing als Geschäftsbesorgung?" BB 1969, 109;

for Austria:
KLATIL: "Leasing - Miete oder Geschäftsbesorgung?" ÖJZ 1968, 376;
KOCH and HAAG: "Leasing in juristischer und wirtschaftlicher Sicht" ÖJZ 1967, 505;
NITSCHE: "Zur Rechtsnatur des Leasing," ÖJZ 1974, 29-35 and 61-68;

for Switzerland:
HAUSHEER: "Finanzierungs-Leasing beweglicher Investitionsgüter," ZBJV 1970, 209;
LÜSSI: "Das Leasing-Geschäft," Thesis, Zürich, 1966;
SCHUBIGER: "Der Leasing-Vertrag nach schweizerischem Privatrecht," St. Gallen 1970;
STAUDER: "Le contrat de 'finance-equipement-leasing'" in Dixième Journée Juridique, Geneva, 1970, 7 et seq.;

for Italy:
DI AMATO: "Profili giuridici del contratto di leasing," Giur. civ., 1973, I, 1795;
GARGIULLO: "Aspetti giuridici del contratto di 'leasing'," Foro italiano, 1971, V, 38;
MIRABELLI: "Il leasing e il diritto italiano," Banca Borsa e Titoli di Credito 1974, I, 228;
TABET: "La locazione-conduzione" in Trattato di diritto civile e commerciale, by CICU and MESSINEO, 1972, 265;
TABET: "La locazione di beni strumentali (leasing)," Banca Borsa e Titoli di Credito 1973, II, 287;
VAILATI: "Aspetti giuridici del leasing finanziario," Dir. econ. 1969, 594, and in Riv. notar. 1973, I, 211;

for Portugal:
MOITINHO DE ALMEIDA: "A locação Financeira (Leasing)," Boletim do Ministero da Iustiça, N°. 231, 5;

for Brazil:
WALD: "A introdução do 'leasing' no Brasil," Revista de Direito, 1970, 84;
WALD: "Noções básicas de leasing," Revista do Instituto dos Advogados Brasileiros, ano VI, n°. 16, 83;

(71) cf. CHAMPAUD: "Le leasing," in "Renaissance du Phénomène contractuel," op. cit., at 202.

(72) idem, at 203.

(73) In this connection, the reader's attention is drawn to the group of leasing contracts set out in Annexes I - V of this Report.

(74) cf. supra, at §§ 48-56.

(75) cf. supra, at § 57.

(76) cf. NITSCHE, op. cit., at 33.

(77) cf. Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A 464 (1935), in JONES, FARNSWORTH and YOUNG: "Contracts" (1965), 851.

(78) cf. LAWSON: "Der Zeitablauf als Rechtsproblem," Archiv für die zivilistische Praxis 159, 97 (103).

(79) cf. CHAMPAUD: "Le leasing," J.C.P. 1965, I, 1954 ('mandat' given by future lessor to future lessee); Chambre nationale des conseillers financiers, "Le leasing, nouvelle formule d'équipement, C.N.C.F." 1965.

(80) cf. BEY: "Pour une défense de l'efficacité du leasing," J.C.P. - C.I., 1969, 86 634, where he recognises the existence of four 'mandats': selection of equipment; receipt of equipment; completion of formal requirements; authority to bring actions.

(81) cf. LELOUP in his notes to VERVINS, 18.IV.1967, J.C.P., 1968, 15291, and App. Amiens, 20.XII.1967, J.C.P. 1968, 15504; cf. also CALAIS-AULOY: Rapport général - "Le contrat de leasing," in Nouvelles techniques contractuelles, op. cit., at 139.

(82) cf. PACE, op. cit., at B3.

(83) cf. unreported decision of Cour d'Agen, 15.I.1969, cited in CHAMPAUD: "Le leasing" in "Renaissance du Phénomène contractuel," op. cit., at 209.

(84) cf. CHAMPAUD, op. cit., at 209; also BEY: Notes to Paris, 5e Ch. 8.I.1973, J.C.P. 1973, II, 17503 and to Cass. com. 20.II. 1973, J.C.P. 1974, II, 17754.

(85) cf. BEY; De la Symbiotique dans les leasing et crédit-bail mobiliers, Dalloz 1970, p. 34 et seq.

(86) idem.

(87) cf. Nouvelles Techniques Contractuelles, at p. 139, and note by LELOUP to Cass. Com. 3.I.1972, J.C.P. 1973, II, 17300.

(88) cf. CHAMPAUD, op. cit., in Renaissance du phénomène contractuel, at 209-210.

(89) cf. decision of the Cour d'Appel de Gand, Gand, 27.VI.1966, R.C.J.B., 1967, 229; cf. al o decisions of Paris, 5e Ch., 8.I. 1973, J.C.P. 1973, II, 17503 and of Cass. com. 20.II.1973, J.C.P. 1974, II, 17754. However, VEROUGSTRAETE (Le contrat de leasing, Rev. Banque 1969, 610 at 616) points out that the "promesse unilatérale de vente" is in no way a sine qua non of leasing, the essential element of which is, in his opinion, the "garantie de l'usage du bien" and not title thereto.

(90) cf. LARENZ, op. cit. at 350.

(91) cf. COILLOT, op. cit.; LEENEN: Typus und Rechtsfindung, § 14, 4a; NITSCHE, op. cit., at 68; ENDERLEIN: Der Leasing Vertrag, in Handbuch der Aussenhandelsverträge (op. cit.) at 401-402; BINDER: op. cit., at 39; KRAHL and SCHULZE: Leasing als Absatz- und Finanzierungsmethode in den nichtsozialistischen Ländern, Kammer für Aussenhandel der DDR, Berlin 1969, at 47.

(92) cf. decision of Tribunale di Vigevano, 14.XII.1972, reported at Giustizia civile 1973, I, 1795, with note of DI AMATO, and in Banca Borsa e Titoli di Credito 1973, II, 287, with note of TABET.

(93) cf. PALANDT-PUTZO, op. cit., at § 535, 4b; BOOK, op. cit., S.194.

(94) cf. references contained in note 91.

(95) cf. SCHMIDT, op. cit., S.10.

(96) cf. LWOWSKI, op. cit.; PLATHE, op. cit.

(97) cf. KOCH and HAAG, at BB 1968, 93 et seq.; WAGNER, op. cit.

(98) cf. STAUDER, op. cit., at 24-25; cf. also infra, §93.

(99) cf. ESSER, op. cit., § 74, 4.

(100) cf. STAUDER, op. cit., pp 28 at seq. However, cf. also LARENZ, op cit., at 353, where he concludes that the leasing contract may be characterised as aiming at achieving the economic purpose of an instalment sale by means of a "Gebrauchsüberlassung" for a period of time without any change in the vesting of property, that is, in cases where the lessee is not given an option to purchase.

(101) cf. THIEL: Das Leasing - steuerlich gesehen, in Die Information 1964, p. 121 et seq. and MEILICKE: op. cit., p. 691 et seq.

(102) cf. PAPE and RICHTER-HANNES: op. cit., at p. 451.

(103) cf. HAUSHEER: op. cit., at p. 222; PLOETZ: op. cit., at p. 94; SCHUBIGER: op. cit., at p. 127 et seq.; LWOWSKI: op. cit., at p. 90 et seq.; KLAAS: Die Risikoverteilung bei neueren Finanzierungs methoden, NJW 1968, 1502, at 1507.

(104) cf. §§ 511-513 of the ABGB.

(105) cf. Articles 752, 764, 765 and 767 of the Swiss Code civil.

(106) cf. STAUDER: op. cit., at p. 27.

(107) cf. SCHUBIGER: op. cit., at p. 127 et seq. Contra LWOWSKI, op. cit., at p. 98.

(108) cf. BB 1970, 332.

(109) cf. NITSCHE, op. cit., at p. 62.

(110) cf. LARENZ, op. cit., at p. 353.

(111) idem.

(112) cf. supra, §88.

(113) cf. GOODE: A Credit Law for Europe? (1974) 23.I.C.L.Q. 227 at 287.

(114) idem.

(115) cf. references contained in Note 91.

(116) cf. COILLOT, op. cit.

(117) cf. Note 91.

(118) cf. Note 92.

(119) cf. especially note of DI AMATO to decision of Tribunale di Vigevano, 14.XII.1972, as reported in Giustizia civile 1973, I, 1795, at 1797-1798.

(120) cf. specimen leasing contracts contained in Annexes to present Report.

(121) cf. GOODE: A Credit Law for Europe? op. cit., at 252 et seq.; cf. also the same author in his Hire-Purchase Law and Practice (Second Edition) at 881.

(122) The U.C.C. has been adopted in every State of the Union except Louisiana; and Article 9 has been transplanted in Canada in one Province (Ontario, in the Personal Property Security Act), whilst others are studying it with a view to its adoption. The Crowther Committee, in its already-mentioned Report on Consumer Credit, recommended the adoption by the United Kingdom's legislators of the basic concepts of Article 9 (cf. Chap. 5.7. and Appendix III thereof). Cf. also CARON: "L'article 9 du Code uniforme de Commerce. Peut-il être exporté? Point de Vue d'un Juriste Québecois" in Aspects of Comparative Commercial Law (ed. ZIEGEL), at p. 378.

(123) cf. §35 of the present Report.

(124) cf. CHAMPAUD: Le leasing, in Renaissance du phénomène contractuel, op. cit. at p. 214.

(125) cf. BEY: De la symbiotique dans les leasing et crédit-bail mobiliers, Dalloz, 1970; Notes by same writer to decisions of Paris, 5^{e} Ch., 8.I.1973, J.C.P. 1973, II, 17503 and of Cass. com. 20.II.1973, J.C.P. 1974, II, 17754; Note by TROCHU to decision of Cass. com. 3.I.1972, D. 1972, 649 at 650; cf. also advocates of "Geschäftsbesorgungsvertrag" thesis in Germany cited at Note 97.

(126) cf. especially notes by LELOUP to decisions of Vervins, 18.IV. 1967, J.C.P. 1968, II, 15291; App. Amiens, 20.XII.1967, J.C.P. 1968, II, 15504; Cass. com. 3.I.1972, J.C.P. 1973, II, 17300.

(127) cf. COILLOT: op. cit. pp. 164 et seq.

(128) cf. decision of Cass. com. 3.I.1972, reported at D. 1972, 649, with note of TROCHU, and at J.C.P. 1973, II, 17300 with note of LELOUP.

(129) cf. GOODE: Hire-Purchase Law and Practice (Second edition), at pp. 286 et seq. However, contra, cf. Annex II to present Report, in §13 of specimen U.K. equipment lease (which purports to exclude the possibility of any supplier or dealer being deemed to be the agent of the finance company for any purpose whatsoever).

(130) cf. GOODE: op cit. at 292.

(131) cf. CHAMPAUD: op. cit. at 215.

(132) cf. §25 above.

(133) cf. §§44-45 above of the present Report.

(134) cf. GOODE: Hire-Purchase Law and Practice (Second edition) at 885.

(135) cf. GOODE, op. cit. at 224.

(136) cf. specimen contracts contained in Annexes II (§3 (6)) and IV (§10).

(137) cf. CHAMPAUD, op. cit. at 218.

(138) cf. decisions of Comm. Versailles, 15.I.1969, Gaz. Pal. 21.III. 1969, 157; Grande Inst. Bergerac, 26.III.1969, Gaz. Pal.18. VII.1969, 67, Comm. Grenoble, 12.V.1969, J.C.P. 1970, II, 16155, with note by BOCCARA; Paris, 21.I.1970 and Cass. com. 13.XI. 1969, J.C.P. 1970, II, 16376, with note by BOCCARA; Toulouse, 8.V.1970, J.C.P. 1970, II, 16481; Rouen, 3.VII.1970, J.C.P. 1970, II, 18561; Cass. com. 14.IV.1972, Bull. civ. IV, 105; Cass. com. 10.VII.1972, Bull. civ. IV, 212; Cass com. 10.X. 1973, Bull. civ. IV, 249; cf. also decision of Belgian Cour de Cassation of 17.IV.1970, Arr. Cass. 1970, 754, and DEBACKER: "Vers plus de sécurité juridique en matière de clause pénale," Jur. Comm. Bruxelles, 1968, 37. Cf. generally comparative law study on Penalty Clauses in Private Law, prepared by UNIDROIT at the request of the Council of Europe (CCJ (72) 37).

(139) cf. decision of French Cour de Cassation of 10.X.1973, referred to in previous note.

(140) idem.

(141) Cour de Cassation - Année judiciaire. Rapport - 1972-73. J.C.P. 1974, 2653.

(142) cf. CALAIS-AULOY: op. cit. at 141.

(143) cf. DELVOIE: "Het Strafbeding in Financieringshuurcontracten (Leasing)," Jur. Comm. Belgique 1973, I, 523.

(144) cf. decision of Belgian Cour de Cassation of 17.IV.1970, cited above in note 138.

(145) cf. Article 4 of Draft Benelux Convention on Penalty Clauses, cited at p. 15 of Part II of UNIDROIT study cited above in note 138.

(146) cf. GOODE: op. cit. at 887.

(147) cf. Robophone Facilities, Ltd. v. Blank [1966] 3 All E.R. 128, at 142, per DIPLOCK, L.J.

(148) cf. I.A.C. (Leasing) Ltd. v. Humphrey, H.C. of A. 1971-1972 [126 C.L.R. 131]; cf. also same decision at 143, per WALSH, J.:

> "In my opinion, there was no principle of law which precluded the parties from making an enforceable agreement that the hirer not the owner should run the risk of the occurrence of a greater amount of depreciation than was estimated, whether this should occur as the result of the actual use of the equipment by the hirer or as the result of changes in the market value of goods of that description."

(149) cf. BROWN: op. cit. at 677-679.

(150) cf. WITHERBY: Personal Property Lease Financing - The Lender's Point of View, 1963 Duke L.J. 98, 136-39.

(151) cf. Irving Trust Co. v. A.W. Perry, Inc., 293 U.S. 307 (1934); Lamson Co. v. Elliott-Taylor Wollfenden Co., 25 F2d 4 (6th. Cir. 1928); Lamson Consol. Store Serv. Co. v. Bowland, 114 Fed. 639 (6th. Circ. 1902); cf. also COLLIER: Bankruptcy, 14th. ed. 1964, Vol. 3, §63.33 [2.4] [4].

(152) cf. HOGAN: The Secured Party and Default Proceedings under the U.C.C., 47 Minn. L. Rev. 205 (1962).

(153) cf. U.C.C. §9-505 (2).

(154) cf. U.C.C. §9-506.

(155) cf. U.C.C. §9-504 (2).

(156) cf. BROWN, op. cit. at 679.

(157) cf. § 3 (3) of Annex II and § 5 of Annex IV to the present Report.

(158) cf. LARENZ: op. cit. at 352, & § 7 (3) of Annex II to present Report.

(159) cf. ENDERLEIN: op. cit. at 408.

(160) However, it should be noted that this obligation is not always imposed: sometimes the lessor will take out the insurance policy in respect of the equipment (cf. ENDERLEIN, op. cit. at 410) and the rental instalments of the lessee will in this case reflect this additional act undertaken by the lessor.

(161) cf. ENDERLEIN: op. cit. at 410 and COILLOT: op. cit. at 175.

(162) cf. COILLOT: op. cit. at 175 and §3 (11) of Annex II to the present Report.

(163) cf. §§ 7 (1) and (2) of Annex II to the present Report. For other obligations incumbent ordinarily on the lessee, such as his obligation not to remove the equipment from the place stipulated in the contract without first obtaining the lessor's consent and his obligation to pay all taxes in respect of the equipment, the reader is referred to the specimen equipment leasing contracts contained in the Annexes to the present Report.

(164) cf. VEROUGSTRAETE: Le contrat de leasing, Rev. Banque 1969, 610 at 621; DI AMATO: Note to decision of Tribunale di Vigevano, 14.XII.1972, in Giustizia Civile, 1973, I, 1795 at 1801.

(165) cf. BROWN: Personal Property (2nd. ed. 1955), § 71 at 240 and cases cited therein.

(166) cf. 8 Am. Jur. 2d Bailments § 92, at 991 (1963) and cases cited therein.

(167) cf. U.C.C. § 9-201: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."

(168) cf. Matter of Royer's Bakery, Inc. (No. 2), 4 CCH Instalment Credit Guide 99274, at 89631 (E.D. Pa. 1963); cf. also United Rental Equip. Co. v. Potts and Callahan Contracting Co., 231 Md. 552, 191 A. 2d 570 (1963).

(169) cf. U.C.C. § 9-311.

(170) cf. BROWN: op. cit. in [1964] 49 Cornell Law Quarterly 672 at 680.

(171) cf. U.C.C. § 9-302.

(172) cf. U.C.C. § 9-301.

(173) cf. U.C.C. §§ 9-312 (3) and (4); cf. also HOGAN: Financing the Acquisition of New Goods under the Uniform Commercial Code, 3 Boston College Industrial & Commercial L. Rev. 115, 117-118 (1962).

(174) cf. U.C.C. §9-307. §1-201 (9) defines a buyer in the ordinary course of business as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind..." While knowledge of a security interest in the goods will not alone disqualify a buyer in the ordinary course of business, knowledge that the sale is in violation of a term thereof will disqualify him unless the secured party has waived such term by conduct (cf. U.C.C. §§1-201 (9) and 9-307).

(175) cf. U.C.C. §9-306; cf. also same result achieved by French décret 72-665 of 4.VII.1972 (D. 1972.415), discussed below.

(176) cf. U.C.C. §9-306 (3).

(177) cf. LUCAS DE LEYSSAC: L'obligation de publier les contrats de crédit-bail mobilier et son application dans le temps, D. 1975, I, 23; PACE: op. cit. at D^{18} - D^{19}.

(178) cf. Article 1 (3) of law 66-455 of 2.VII.1966, as modified by ordonnance 67-837 of 28.IX.1967 which provides:

> "Les opérations visées à l'art. 1er ci-dessus sont soumises à une publicité dont les modalités sont fixées par décret. Ce décret précisera les conditions dans lesquelles le défaut de publicité entraînera inopposabilité aux tiers."

(179) cf. décret 72-665 of 4.VII.1972 (D. 1972.415), which entered into force on 14.VII.1972.

(180) cf. Trib. com. La Rochelle, 26.VI.1964, J.C.P. 1965, II, 14331 bis, with note by LELOUP, and Rev. trim. dr. com. 1964, 857.

(181) cf. Montpellier, 24.I.1972, Bull. Liaison et inf. trib. com. de France, Jan. 1972, N°. 48, p. 27; also BEY: De la publicité des opérations de crédit-bail mobilier, J.C.P. ed. C.I, 1973, 10869.

(182) cf. Article 2 of décret of 4.VII.1972.

(183) cf. Article 12 of afore-mentioned décret.

(184) cf. Article 3 of this décret.

(185) cf. Article 5 of décret.

(186) cf. Article 8 of décret which provides:

> "Si les formalités de publicité n'ont pas été accomplies dans les conditions fixées aux articles 2 à 5, l'entreprise de crédit-bail ne peut, en application de l'article 1er - 3

de la loi modifiée du 2. juillet 1966, opposer aux créanciers ou ayants cause à titre onéreux de son client, ses droits sur les biens dont elle a conservé la propriété, sauf si elle établit que les intéressés avaient eu connaissance de l'existence de ces droits."

(187) cf. Article 7 of afore-mentioned draft law which provides that:

"I contratti di locazione finanziaria, stipulati a norma della presente legge, dovranno essere depositati a cura delle parti presso l'ufficio del registro competente in relazione alla sede del conduttore.

Il deposito dovrà essere annotato in apposito registro.

L'annotazione rende opponibile ai terzi i diritti spettanti al proprietario del bene concesso in locazione, ovunque il bene venga collocato."

(188) cf. § 5 of Annex II to present Report.

(189) cf. Article 1 of this draft law, cited earlier at § 70 of the text of the present Report.

(190) for penalty clauses, cf. above, under IV, C, 1 of the present Report.

(191) cf. BROWN: op. cit. in / 1964 / 49 Cornell Law Quarterly at 682.

(192) cf. Article 6 of draft law referred to above.

(193) cf. Article 5 of draft law referred to above.

LIST OF ANNEXES TO REPORT

ANNEX I: Illustrations taken from WILLISTON ON SALES, Vol. 4, Revised Edition (1948) of distinction drawn between conditional sales and leases in the United States.

ANNEX II: Equipment lease for term of years with option for renewal - United Kingdom. Taken from Appendix E to GOODE: Hire-Purchase Law and Practice (2nd. edition).

ANNEX III A: French "demande de location de matériel" of the Locafrance group, taken from PACE: Pratique et technique financière du crédit-bail (leasing) (1974).

ANNEX III B: French "convention de crédit-bail" of the Locafrance group, taken from PACE: Pratique et technique financière du crédit-bail (leasing) (1974).

ANNEX IV: Swiss "contrat de leasing" of the Auto and Equipment Leasing Co., taken from Dixième Journée Juridique (Genève 1970).

ANNEX V: Italian "domanda di locazione" and "condizioni generali di locazione di autoveicoli..." of the Sava Leasing Co. of Turin.

FORM NO. 337. Contract Deemed Conditional Sale and Not a Lease of Engine.

(Farquar v. McAlevy, 142 Pa St 233, 21 A 811, 24 Am St Rep 497.)

LEASE.

This is to certify that A, of ..... (*address*), has this day hired from B, of ..... (*address*), ... to ..... horse C Engine, on D boiler and wheels, No. ..... saw-mill,—valued at $....., upon which ..... have paid $..... advance hire, and I do hereby promise and agree to pay to him the further sum of $....., as follows: $..... in ..... months; $..... in ..... months, all with ..... per cent interest, as hire, in advance, for the use of said machinery, so long as I shall retain it. Said hire as aforesaid to be paid on the days and times aforesaid until the sum of $..... is paid. I also agree that if any installments of hire as aforesaid is not paid when due, or within ..... days thereafter, the said B, or his agents, can, without notice or process of law, take said machinery as above described away from my premises, without committing trespass or other violation of law, and I to forfeit the amount previously paid as hire; and I further agree to take good care of said machinery, and not to underlet, remove, or permit its removal from my premises without the written consent of said B.

In the event of my failure to comply with any of the above conditions, then the hire paid to be forfeited; but when I have fully complied with the conditions of the above agreement, then I am to have the privilege of buying said machinery from the said B, upon my paying to him the sum of one dollar on the ..... day of ....., ..., otherwise the title to said machinery to remain in the said B as aforesaid.

FORM NO. 338. Agreement Held a Lease and Bailment of Machine and Not a Conditional Sale.

(Lambert Engine Co. *v.* Carmody, 79 Conn 419, 65 A 141.)

Proposal for A Sewer, Portable Cableway, Hoisting and Conveying Simultaneously.

We agree to deliver f.o.b. cars, Newark, N. J., a complete cableway of the A Hoisting Engine Co. type as follows: Span, ... feet. (*Detailed description follows.*) Erection. We will erect the cableway on such part of your work as you may direct, you to furnish all necessary labor; and we will place the machine in working order by furnishing a man familiar with the working system, who will superintend the erection, and who will stay with the machine for a time after it is erected to instruct your engineer, etc. We will expect you to furnish all necessary permits, coal, water, and to dig the holes for anchorages. The price of the above cableway specified is . . . . dollars f.o.b. cars, Newark, N. J. We will rent the above machine for the sum of . . . . . dollars ($ . . . .) per month in advance, for the period of not less than . . . . . months, the rent to apply on the purchase price at any time in the aforesaid months. If the prospective purchaser does not wish to purchase this machine, it is understood that he is to pay the freight back to Newark, N. J., and to return in good condition, subject to wear and tear. The right of title to the machine herein referred to is to remain in the A Hoisting Engine Company until paid for by the prospective purchaser.

A Hoisting Engine Co.

We hereby accept the above proposition, and order from you one of these machines as specified.

B Construction Company.

FORM NO. 339. Agreement Held a Lease of Machines and Not a Conditional Sale.

(Singer Sewing Mach. Co. *v.* Independent Waist Mfg. Co., 141 NYS 488.)

A Sewing Machine Company Lease.

This certifies that we, B Mfg. Co., now residing at, ..., and doing business at ..... (*addresses*), have rented and received from the A Sewing Machine Company, (whose corporate existence for all purposes is hereby admitted), and hereinafter called the Company, through its offices, at ..... (*address*), the following chattels, to wit: ..... class ..... machines, Nos. ....., and ....., less ..... old machines; ..... class ..... machines, No. .....—with all apparatus belonging thereto, all in good order and valued at ..... dollars, which we are to use with care and keep in like good order, and for the use of which we agree to pay rent as follows: ..... dollars, ... dollars paid ..... (*date*), ... dollars paid ..... (*date*)—on the delivery of this agreement, the receipt whereof is hereby acknowledged and accepted as payment for the rent of the first month only, and then at the rate of ..... dollars per month, payable in advance, on the ..... day of each and every month thereafter, at the aforesaid office of said Company, without notice or demand. And it is further agreed that if we shall make default in any of the said payments, or in any covenant hereof, or if we shall sell, secret, pledge, mortgage, store, lease, or remove the said chattels from our aforesaid place of business, or permit or attempt to do any of said acts, or if said chattels should be subject to any levy by any officer, or come into the possession of any other person without the written consent of said Company, or if it should deem itself insecure, then, or in any of the said several events, or at the expiration of any period for which rent has been paid, we will return and deliver said chattels to the said Company, without legal process or demand, in

good order. And we do hereby authorize and empower said Company, or its agents, to enter any premises where said chattels may be and take and carry the same away without legal process, hereby waiving any action for trespass or damages therefor, and waiving all rights of residence, homestead, exemptions, and all rights under any laws heretofore passed or which may hereafter be passed requiring any public sale of said chattels in the event of repossession thereof by the said Company, and hereby agreeing that all rent paid shall belong absolutely to said Company, as compensation for the use thereof, any law to the contrary thereof notwithstanding. No agreement of sale of said chattels is implied hereby, and no sale of said chattels to us shall be valid without the written consent of the said Company. In case of damage by fire, water, theft, or other causes, we hereby agree to pay to the said Company the value of said chattels. The consent of the said Company in one or more instances shall not be deemed a waiver of future consents of the conditions herein, but the consents shall be required in every instance. And it is expressly understood and agreed that the acceptance of payments by the Company after any default hereunder on our part shall not be deemed a waiver thereof. And it is further agreed that we may at any time within said rental term purchase the said chattels and apparatus by paying the above valuation therefor, providing the terms and provisions have been punctually complied with, and then, and in that case only, the rent therefore paid shall be deducted therefrom.

FORM NO. 339A. Lease with option to purchase.

(Guerin v. Kirst, — Cal App2d —, 188 P2d 509, mod — Cal App2d —, 192 P2d 120, mod 33 Cal2d 402, 202 P2d 10.)

1. The lessor hereby agrees to lease to the lessee, and the lessee hereby agrees to rent from the lessors all of that certain personal property described as follows:

Equipment

No.	Description
17	Caterpillar Tractor, Serial No. 1H7401
28	Caterpillar Tractor, Serial No. 1H 949
12	Carryall, R. U., Serial No. S7747

2. The period of this lease shall be for ten months commencing on the seventh (7th) day of November, 1945, and ending on the seventh (7th) day of August, 1946, and receipt of payments totaling the sum of $3,500.00 is hereby acknowledged to have been received up to December 14, 1945.

3. The agreed monthly rental shall be the sum of $2,000 per month payable monthly in advance, commencing on the seventh (7th) day of November, 1945, and continuing on the seventh (7th) day of each and every succeeding month up to and including the seventh (7th) day of July, 1946, and the Balance of $1,075.00 shall be paid on the seventh (7th) day of August, 1946, and the total rentals for said period shall be the sum of $19,075.

4. The lessor hereby grants to the lessee the option to purchase said equipment at the expiration of said rental period for a price of $1,425.00 provided that the lessee shall give notice in writing of his intention to exercise said option and which notice must be given to the lessor on or before the seventh (7th) day of August, 1946, and provided further that the lessee's right to so purchase said equipment shall be conditional upon a complete and full performance of his undertakings as herein provided, and also conditional upon the full payment by him to lessor of the rental herein above provided.

5. That should lessee exercise said option to purchase said personal property, he shall pay to lessor, in addition to the other sums herein provided, interest at the rate of eight (8) per cent per annum on the sum of $21,000.00 from the seventh (7th) day of November, 1945, to and including the seventh (7th) day of August, 1946 on the basis of the monthly deferred balances, and provided further that in the event of such election, lessee will pay to lessor the amount of repairs and maintenance incurred or paid by lessor in connection with said personal property during the term of this lease.

6. Payments shall be made to the lessors at their office at ..... South San Francisco, California.

Equipment lease for term of years with option for renewal: equipment outside Control of Hiring Order 1969[11]

THIS LEASE made the . . . day of . . . BETWEEN [*lessor*] having its registered office at [*address*] (hereinafter called the lessor which expression shall where the context so admits include the lessor's successors in title) of the one part and [*lessee*] having its registered office at [*address*] (hereinafter called the lessee) of the other part — Parties.

WITNESSETH as follows:

1. The lessor hereby lets and the lessee takes on lease from the lessor upon the terms and conditions hereinafter mentioned the equipment more particularly described in the schedule hereto (hereinafter called the equipment) for the term of . . . years commencing on the . . . day of . . . — Term of lease.

2. The lessee shall pay to the lessor during the said term a rental of £ . . . per month payable in advance on the first day of each month the first rental payment to be made on the . . . day of . . . Punctual payment shall be of the essence of this lease and the lessee shall be deemed to have repudiated this lease if any rental or part thereof shall remain unpaid for more than fourteen days after becoming due. All payments of rental hereunder shall be paid to the lessor at [*address*] or at such other address as the lessor may from time to time specify and payments made by post shall be at the risk of the lessee. — Rental.

3. The lessee shall throughout the said term — Covenants by lessee:

(1) punctually pay all amounts of rental payable hereunder; — Punctual payment.

(2) pay to the lessor interest on overdue rentals at the rate of . . . per cent per annum until payment thereof such interest to run from day to day and to accrue after as well as before any judgment; — Interest on overdue instalments.

(3) keep the equipment in good and serviceable repair and condition (fair wear and tear only excepted) and replace all missing damaged or broken parts with parts of equal quality and value and in default of so doing permit the lessor to take possession of the equipment for the purpose of having repairs carried out and repay to the lessor the full cost of such repairs and the lessor shall have a lien on the equipment until such repayment but exercise of such lien shall not prevent the accrual of rental hereunder; — To repair.

(4) ensure that the equipment is operated in a skilful and proper manner and by persons who are competent to operate the same; — Operation of the equipment.

(5) punctually pay all registration charges licence fees rent rates taxes and other outgoings payable in respect of the equipment or the use thereof or in respect of any premises in which the equipment may from time to time be placed or kept and produce to the lessor on demand the last receipts for all such payments and in the event of the lessee making default under this sub-clause the lessor shall be at liberty to make all or any of such payments and to recover the amount thereof from the lessee forthwith; — To pay all charges, etc., and in default permit lessor to pay and recover.

(6) permit the lessor and any person authorised by the lessor at all reasonable times to enter upon the premises in which the equipment is for the time being placed or kept for the purpose of inspecting and examining the condition of the equipment; — To permit lessor to enter and inspect.

(7) keep the equipment at all times in the possession and control of the lessee and not remove the same from [the place where it is installed by the lessor] without the consent in writing of the lessor;[12] — To keep the goods in lessee's possession.

(8) notify the lessor of any change in the lessee's address and upon request by the lessor promptly inform the lessor of the whereabouts of the equipment; — To notify lessor of altered address or whereabouts of equipment.

(9) indemnify the lessor against loss of or damage to the equipment or any part thereof from whatever cause arising and whether or not such loss or damage results from the negligence of the lessee; — To indemnify lessor against loss of or damage to equipment.

(10) punctually pay for all servicing of and repairs and other work done to the equipment and for spare parts and accessories thereof and keep the equipment free from distress execution or any other legal process; — To keep equipment free from distress, etc.

To insure.

(11) immediately after the signing of this lease insure the equipment and keep the same insured throughout the term against loss or damage by accident fire theft and other risks usually covered by insurance in the type of business for which the equipment is for the time being used the equipment to be insured to the full replacement value thereof with some insurance company to be approved by the lessor under a comprehensive policy of insurance free from restriction or excess in the joint names of the lessor and the lessee [*or* name of the lessee bearing an indorsement recording the lessor's interest] and stating that no payment is to be made to the lessee under the policy until the lessor's interest has been discharged and in default of the lessee so doing the lessor may insure as aforesaid and recover the cost from the lessee forthwith. The lessee hereby irrevocably appoints the lessor the agent of the lessee for the purpose of receiving all monies payable under the said policy and giving a discharge therefor;

To pay insurance premiums.

(12) punctually pay all premiums payable under the said policy produce the receipts for such payments to the lessor on demand do everything necessary to maintain the said policy in full effect and not do anything whereby the said policy will or may be vitiated;

To obtain all consent, etc., for use of the equipment.

(13) obtain all necessary licences permits and permissions for the use of the equipment and not use the equipment or permit the same to be used contrary to law or any regulation or bye-law for the time being in force;

To indemnify lessor against third party claims.

(14) indemnify the lessor against all claims and demands made upon the lessor by reason of any loss injury or damage suffered by any person from the presence of the equipment or the use thereof;

To pay all legal and other expenses.

(15) in the event of default by the lessee hereunder pay to the lessor all expenses (including legal costs on a full indemnity basis) incurred by or on behalf of the lessor in ascertaining the whereabouts of taking possession of preserving insuring and storing the equipment and of any legal proceedings by or on behalf of the lessor to enforce the provisions of this lease;

To ensure that equipment affixed to realty can be removed without material damage.

(16) ensure that in so far as the equipment is affixed to any land or building such equipment shall be capable of being removed without material injury to the said land or building and that all such steps shall be taken as are necessary to prevent title to the equipment from passing to the owner of the said land or building.[13]

4. The lessee shall not

Lessee not to sell or otherwise dispose of the equipment.

(1) sell assign sub-let pledge mortgage charge incumber or part with possession of or otherwise deal with the equipment or any interest therein nor create nor allow to be created any lien on the equipment whether for repairs or otherwise and in the event of any breach of this sub-clause by the lessee the lessor shall be entitled (but shall not be bound) to pay to any third party such sum as is necessary to procure the release of the equipment from any charge incumbrance or lien and shall be entitled to recover such sum from the lessee forthwith;

Lessee not to sell, charge, etc., realty on which equipment kept without prior notice to lessor.

(2) sell mortgage charge demise sub-let or otherwise dispose of any land or building on or in which the equipment is kept or enter into any contract to do any of the aforesaid things without giving the lessor at least six weeks' prior notice in writing and the lessee shall in any event procure that any such sale mortgage charge demise sub-lease or other disposition as the case may be is made subject to the right of the lessor to repossess the equipment at any time (whether or not the same or any part thereof shall have become affixed to the said land or building) and for that purpose to enter upon such land or building and sever any equipment affixed thereto.

Equipment to remain personal property despite affixation to the realty and lessee to indemnify lessor against damage to realty.

5. As between the lessor and the lessee and their respective successors in title the equipment hereby demised shall remain personal property and shall continue in the ownership of the lessor notwithstanding that the same may have been affixed to any land or building. The lessee shall be responsible for any damage caused to any such land or building by the affixing of the equipment thereto or the removal of the equipment therefrom (whether such affixing or removal be effected by the lessor or the lessee) and shall indemnify the lessor against any claim made in respect of such damage.

Loss or destruction of or damage to equipment.

6. Where the equipment or any part thereof is lost stolen destroyed or damaged by the negligence or wrongful act of a third party the lessee shall immediately notify the lessor thereof, shall not compromise any claim without the consent of the lessor, shall allow the lessor to take over the conduct of any negotiations (except in relation to claims of the lessee for personal injuries loss of use of the equipment or loss or damage to the property of the lessee unconnected with the equipment) and shall at the expense of the lessee take such proceedings (in the sole name of the lessee or jointly with the lessor) as the lessor shall direct, holding all sums recovered, together with any monies received by the lessee under any policy of insurance taken out by the lessee pursuant to the provisions of this lease, on trust for the lessor and paying or applying as the lessor directs such part thereof as is necessary to discharge the lessee's liability to the lessor at the date of such payment and to compensate the lessor for the loss or destruction of or damage to the equipment any surplus being retainable by the lessee for the lessee's own benefit.

Application of insurance monies.

7. (1) If the equipment shall be damaged during the term of this lease and in the opinion of the insurers it is economic that such damage be made good all insurance monies payable under the said policy shall be applied in making good the said damage.

(2) If the equipment shall be lost stolen destroyed or damaged to such an extent as to be in the opinion of the insurers incapable of economic repair the insurance monies payable under the said policy shall at the option of the lessor

(a) be applied so far as possible in replacing the equipment with equipment of similar type and quality in which event the fresh equipment shall be held by the lessee under the terms of this lease; or

(b) be paid to the lessor to the extent necessary to discharge the lessee's liability to the lessor at the date of such payment and to compensate the lessor for the loss theft or destruction of or damage to the equipment[14] any surplus being paid to the lessee but if the insurance monies paid to the lessor are insufficient to discharge the lessee's said liability and to compensate the lessor as aforesaid the amount of the deficiency shall forthwith be paid by the lessee to the lessor and thereupon this lease shall come to an end.

Effect of loss, etc., of equipment.

(3) Save as provided by sub-clause (2) (b) of this clause the loss theft or destruction of or damage to the equipment shall not affect the continuance of this lease or the lessee's liability for payment of rental hereunder.

Fair wear and tear and capital allowances.

8. The lessee shall not be liable for fair wear and tear of the equipment and the burden of depreciation resulting from any such fair wear and tear shall fall upon the lessor who shall be entitled to claim from the Revenue all capital allowances in respect of the equipment.[15]

Termination by lessor by notice.

9. (1) If the lessee shall make default in payment of any of the sums payable hereunder or shall fail to observe or perform any of the other terms and conditions of this lease whether express or implied or if the lessor shall on any reasonable ground consider itself insecure the lessor may without prejudice to any pre-existing liability of the lessee to the lessor by notice in writing left at or sent by prepaid post to the above-mentioned address or at or to the registered office or any business address of the lessee or the lessee's last known business address determine this lease and upon such notice being so served sent or left this lease shall for all purposes determine and thereafter the lessee shall no longer be in possession of the equipment with the consent of the lessor and subject to the provisions hereinafter contained and any pre-existing liability of the lessee hereunder neither party shall have any rights against the other.

Automatic termination of lease in stated events.

(2) If a winding-up order shall be made against the lessee or if the lessee shall pass a resolution for voluntary winding up (otherwise than by way of amalgamation or reconstruction) or shall make any arrangement with its creditors or any assignment for the benefit of such creditors or if distress or execution shall be levied or threatened upon the equipment or upon any of the lessee's property or if any judgment against the lessee shall remain unsatisfied for more than fourteen days or if the lessee shall abandon the equipment then this lease shall automatically and without notice determine and subject to the provisions hereinafter contained and any pre-existing liability of the lessee hereunder neither party shall have any rights against the other.

Lessor may recover from lessee loss suffered by termination.

(3) Where this lease is determined or comes to an end pursuant to the provisions contained in this clause and the lessor suffers loss as a result of being unable to re-let the equipment at a rental as much as that payable under this lease for the whole period between the date of such determination or coming to an end and the date on which this lease would have expired by effluxion of time if it had not been determined or come to an end as aforesaid the lessor shall be entitled to recover the amount of such loss from the lessee.[16]

On termination lessee to deliver up equipment: lessor may repossess and may sever equipment affixed to realty.

10. Upon the expiration or earlier termination of this lease the lessee shall if required by the lessor deliver up the equipment to the lessor at the address of the lessor stated in this lease or at such other address as the lessor may specify or if not so required shall hold the equipment available for collection by the lessor or its agents and the lessor or its agents may without notice retake possession of the equipment and may for that purpose enter upon any land or buildings on or in which the equipment is or is believed by the lessor or its agents to be situated and if the equipment or any part thereof is affixed to such land or buildings the lessor shall be entitled to sever the same therefrom and to remove the equipment or part thereof so severed and the lessee shall be responsible for all damage caused to the land or buildings by such removal.

Lessee's right to renew for a further term.

11. If the lessee, having observed and performed all the covenants and conditions of this lease, shall desire to renew this lease and shall give notice of such desire not less than . . . months prior to the expiration of the term hereby granted the lessee shall be entitled to a new lease of the equipment for the term of . . . commencing on the date of expiration of this lease at a rental of £ . . . a month but otherwise upon the same terms and conditions as those herein contained including [*or* excluding] the right of renewal as aforesaid.[17]

Exclusion of conditions warranties, etc.

12. Any liability the lessor might otherwise incur and any right or immunity the lessee might otherwise possess in respect of any conditions warranties or representations relating to the condition of the equipment or its merchantable quality or suitability or fitness for the particular or any purpose for which it is or may be required whether express or implied and whether arising under this lease or under any prior agreement or in oral or written statements made by or on behalf of any person in the course of negotiations in which the lessee or its representative may have been concerned prior to this lease are hereby excluded. No liability shall attach to the lessor either in contract or in tort for loss injury or damage sustained by reason of any defect in the equipment whether such defect be latent or apparent on examination and the lessor shall not be liable to indemnify the lessee in respect of any claim made against the lessee by a third party for any such loss injury or damage.

Dealer or supplier not agent of lessor.

13. No dealer or supplier through whom this lease was negotiated or by whom the equipment was supplied nor any person in the employ of any such dealer or supplier is or is to be deemed the agent of or acting on behalf of the lessor for any purpose and no liability is to be attached to the lessor for any conditions warranties or representations made by such dealer or supplier or person in the employ of such dealer or supplier.

Lessor's rights including licence to enter, sever and repossess assignable.

14. The lessor shall be entitled to assign this lease or any right or rights hereunder including the right conferred on the lessor to enter upon land or buildings to inspect the equipment and to sever and repossess the same and any assignment of this lease by the lessor shall be deemed to include an assignment of the lessor's rights to enter sever and repossess.

Equipment to include accessions and renewals, etc.

15. In this lease 'the equipment' shall include all additions and accessions thereto and all replacements and renewals thereof whether made before or after the date of this lease.

16. The equipment shall remain the property of the lessor and the lessee shall have no right or interest therein otherwise than as lessee. Equipment to remain property of the lessor.

17. If the lessor (1) fails to obtain in respect of the cost of acquisition of the equipment an investment grant amounting to the sum of £ . . . or (2) having obtained an investment grant in respect of such cost is required to repay it wholly or in part the lessee shall pay to the lessor such additional amount as will when added to the investment grant received and retained by the lessor (if any) amount to not less than the said sum.[18] Adjustment if lessor does not obtain or has to repay investment grant.

18. Any notice required or permitted to be given to the lessee under this lease shall be validly given if served in any manner specified in clause 9 hereof and shall if sent by post be conclusively deemed to have been received by the lessee within forty-eight hours after the time of posting. Service of notices.

19. No relaxation forbearance delay or indulgence by the lessor in enforcing any of the terms and conditions of this lease or the granting of time by the lessor to the lessee shall prejudice affect or restrict the rights and powers of the lessor hereunder nor shall any waiver by the lessor of any breach hereof operate as a waiver of any subsequent or any continuing breach hereof. Lessor's rights not to be prejudiced by indulgence, granting of time, etc.

As WITNESS etc.

SCHEDULE

[*Here set out particulars of the equipment*]

[*Signatures on behalf of both parties*]

ANNEX LITA

LOCAFRANCE

AGENCE de _____

Siège Social
34, rue Marbeuf, PARIS 8e
Tél. 225-78.95
256-68.20
359-31.85
Télex Paris-Locefran 65 170

DEMANDE DE LOCATION DE MATÉRIEL

PRÉSENTÉE PAR Nom ou Raison sociale _____

Adresse _____ Tél. _____

SOCIETES	ENTREPRISES PERSONNELLES
	Prénoms _____
	Né (e) le : à _____
Forme juridique : _____ Capital : _____	Situation de famille : _____
N° d'INSEE : _____	Régime matrimonial : _____
N° du Registre de Commerce : _____	Activité : _____
Activité _____	N° du Registre de Commerce ou des métiers _____
Répartition du Capital (principaux actionnaires) (1) : _____	N° d'INSEE : _____
_____	Etes-vous propriétaire d'immeubles (terrains, constructions : OUI ☐ NON ☐ "en dehors des immeubles d'exploitations")
_____	Si oui, adresse (1) : _____
_____	Valeur assurée (1) : _____
Membres du Conseil d'Administration (SA) (1) _____	Valeur estimative (1) : _____
_____	Ces immeubles sont-ils hypothéqués : OUI ☐ NON ☐
_____	Si oui, montant (1) : _____
Noms des Gérants (SARL) (1) _____	Etes-vous assuré sur la vie : OUI ☐ NON ☐
_____	Si oui, Compagnie, montant : _____
Nom, prénom et titre de la personne habilitée à louer le matériel :	_____
_____	

Historique : (Date de création, éventuellement date de transformation en Société, modalités des dernières augmentations de capital)

_____

_____

_____

CA : prévu pour l'année en cours _____

Domiciliation bancaire _____ N° de compte _____

Agence _____ Ville _____ Tél. _____

Autres banques _____ Tél. _____

(1) Si nécessaire joindre note détaillée

020/021.005

RENSEIGNEMENTS CONCERNANT LES MATÉRIELS * / LES VÉHICULES * FAISANT L'OBJET DU FINANCEMENT DEMANDE

* Rayer la mention inutile.

Matériels d'Equipement

Désignation nature, marque, type	Prix T.T.C.	Noms et adresses des fournisseurs	Dates de livraisons prévues	Conditions de règlement

Matériels de Transport

Détails des Matériels	Marques	Prix T.T.C.	Noms des Fournisseurs & Adresses	Dates de livraisons prévues	Conditions de règlement
Chassis-Cabine					
Carrosserie					
Equipements					
	Prix Total				

Joindre dans tous les cas devis ou factures proforma de chaque fournisseur

Durée de vie économique des matériels _____

Durée minimum d'amortissement fiscal _____

Nombre d'heures d'utilisation par jour _____

S'agit-il d'un matériel de remplacement _____ OUI ☐ NON ☐

d'un matériel nouveau dans l'Entreprise _____ OUI ☐ NON ☐

a) permettant de nouvelles fabrications _____ OUI ☐ NON ☐

b) permettant d'accroître la production existante _____ OUI ☐ NON ☐

POUR LES VÉHICULES SEULEMENT

— Nature des marchandises transportées : _____

— Kilométrage annuel moyen : _____

— Transports sur route ☐ Ville ☐ Chantier ☐ Carrière ☐

— Le véhicule est-il assujetti à { la taxe à l'essieu — oui ☐ non ☐ ; la vignette — oui ☐ non ☐ }

— Le matériel est-il destiné à des Transports Privés ☐ — Transports Publics de Marchandises ☐

Transports Publics de voyageurs ☐

— Le matériel est-il destiné à une zone de camionnage — zone courte ☐ zone longue ☐

toutes zones ☐

— Nombre et valeurs des cartes de transport (Ponts & Chaussées) détenues par l'entreprise : ☐

RENSEIGNEMENTS CONCERNANT L'EXPLOITATION

1) ACTIVITE

- Nature (fabrication, services) _____
- % du chiffre d'affaires exécuté à façon : _____
- Débouchés, principaux clients _____
- Commandes, marchés en cours ou à exécuter (montants, délais) _____
- Si l'activité est saisonnière préciser le cycle de fabrication et de vente _____

2) MOYENS D'EXPLOITATION

- Effectif du personnel _____
- Surface et emplacement des terrains, usines et immeubles d'exploitation _____
- L'Entreprise est-elle propriétaire des immeubles d'exploitation ? _____ OUI ☐ NON ☐
  si oui : valeur d'assurance _____
- Montant éventuel des hypothèques _____
- Si l'Entreprise est locataire : montant du loyer annuel _____
- Le propriétaire est-il associé dans l'Entreprise ? _____
- Valeur assurance du matériel en service _____

RENSEIGNEMENTS FINANCIERS

- JOINDRE LES 3 DERNIERS BILANS ET COMPTES D'EXPLOITATION.

- Observations éventuelles sur le bilan _____
  (Plus ou moins values, Trésorerie, Fonds de roulement, Evolution du Chiffre d'Affaires, etc.)

- Régime fiscal de l'Entreprise : T.V.A. _____ Taux _____
  L'Entreprise est-elle à jour vis-à-vis du Fisc et de la Sécurité Sociale ? _____

● Emprunts contractés

PRETEURS	MONTANT DES CHARGES ANNUELLES 19	19	19	19	19	GARANTIES ACCORDEES
A la date du dernier bilan :						
Depuis le dernier bilan :						

● Contrats de location de matériel conclus

ORGANISME BAILLEUR	NATURE DU MATERIEL LOUE	CHARGES ANNUELLES DE LOYERS 19	19	19	19	19

● Avals donnés par l'Entreprise

NATURE DES OPERATIONS AVALISEES	MONTANT

● Prévisions d'investissement pour les années à venir (Nature, montant, modalités de financement)

_____

_____

ASSURANCES

Souhaitez-vous adhérez aux assurances Groupe Locafrance ? Assurance matériel ☐
Tierce crédit bail (Pour les véhicules exclusivement) ☐ **Vie ☐**

GARANTIES

Le demandeur peut-il proposer, à titre de garantie, la caution d'une personne physique ou morale : OUI ☐ NON ☐

Si oui, préciser pour la caution proposée :

PERSONNE PHYSIQUE : Nom _____ Prénoms _____

Adresse _____

Profession _____

Surface financière représentée par immeubles, propriétés, etc. _____

_____

_____ Valeur _____

Banque _____ Notaire _____

PERSONNE MORALE : Dénomination de la société _____

Forme juridique _____ Capital _____

Adresse _____

Nature de l'activité _____

Nom et prénoms du représentant qualifié à se porter caution _____

Banque _____

Joindre le dernier bilan et compte d'exploitation.

A _____, le _____

Signature

A adresser à l'Agence Locafrance dont le nom est repris en page 1 ou à défaut la plus proche de votre domicile. Les renseignements communiqués resteront strictement confidentiels.

ANNEX IIIB

Locafrance

Société Anonyme au capital de 95.258.000 F - R.C. B 3801
Siège social : 34, rue Marbeuf - 75008 Paris - Téléphone : 225-78-95

CONVENTION DE CREDIT-BAIL

Réf. 02 Secteur

Dossier n° (A rappeler sur facture et correspondance.)

Nom du locataire :

Siège social :

Fournisseur :

Adresse :

Entre le locataire, désigné, ci-contre, d'une part, et la société LOCAFRANCE, bailleur, d'autre part il est convenu et arrêté ce qui suit : aux conditions générales de la Convention de Crédit-Bail figurant au verso, et aux conditions particulières et spéciales, ci-dessous, le bailleur donne en location au locataire le matériel suivant :

Article Premier. — Adresse d'installation du matériel.

Article 2. — Prix de référence.
Pour l'application de l'article 2.2. de la convention de crédit-bail, le prix de référence du matériel, à la date de signature du bailleur figurant ci-dessous est fixé à :

H.T.
+ T.V.A.
T.T.C.

Article 3. — Livraison du matériel.
Le matériel est réceptionné au plus tard le _____. Passé ce délai, les parties décident du sort de leur convention dans la limite des accords pouvant être conclus avec le ou les fournisseurs.

Article 4. — Durée de la location.
_____ ans, payable en _____ loyers mensuels ou trimestriels terme à échoir. A l'exception du premier loyer qui est réglable par chèque, tous les loyers sont payables sur présentation par LOCAFRANCE d'avis de prélèvement, domiciliés auprès de la banque désignée par le locataire. L'autorisation de prélèvement correspondant à cet avis de prélèvement sera signée par le locataire en même temps que la présente convention de Crédit-Bail. Le locataire s'engage à maintenir ladite autorisation pendant toute la durée de la location. Tout transfert à une autre banque sera soumis à l'autorisation préalable du bailleur. Ci-joint chèque de F _____ en règlement du premier loyer.
Le deuxième loyer sera payé _____ mois à compter du 15 du mois de réception du matériel par le locataire. Dans le cas où le bailleur ne donnerait pas suite au présent contrat, le chèque serait retourné ou remboursé au locataire.

Article 5. — Option d'achat.
A l'expiration de la _____ année de location, il est consenti au locataire une option d'achat au prix de F _____

Article 6. — Montant des loyers.

Années	LOYERS (compléter par mensuels ou trimestriels)	H.T.	T.V.A.	T.T.C.
1	— Loyers de chacun			
2	— Loyers de chacun			
3	— Loyers de chacun			
4	— Loyers de chacun			
5	— Loyers de chacun			
	TOTAL de la location			

ARTICLE 7 — Assurance du matériel.
Conformément à l'article 6 b des Conditions Générales de location, le matériel, objet du présent contrat, sera garanti par une police d'assurance souscrite par le bailleur.
Les charges relatives à cette police s'élèveront, pour la première année de location, à F _____ TTC, et seront réglées sur présentation d'un avis de prélèvement, à l'échéance du premier loyer.
La quittance correspondante sera adressée par le bailleur. Ce montant sera révisable en plus ou en moins chaque année dans une proportion maximum de 25 %.

Le locataire déclare avoir pris connaissance de l'annexe assurance.

ARTICLE 8 — Etant conclu par correspondance, le présent contrat dûment signé par le locataire, obligatoirement accompagné du chèque de premier loyer et de tous documents constitutifs des garanties éventuellement exigées, doit être réceptionné par le bailleur dans un délai de trente jours à compter de la date de signature de ce dernier. A défaut, ledit bailleur cesse d'être engagé.

CONDITIONS SPECIALES :

Fait en quatre exemplaires à

le

* Le bailleur :
(signature et cachet)

* Le locataire :
(signature et cachet)

* Les parties devront faire précéder leur signature des mentions : lu et approuvé et bon pour accord.

LOCAFRANCE Siège

BFA - 46 ROUEN - LT 072 - 1000

Locafrance

Société Anonyme au capital de 85.269.000 F. - R.C. 83 B 3901
Siège social : 34, rue Marbeuf, 75008 Paris - Téléphone : 225.78.35

CONVENTION DE CRÉDIT-BAIL

Véhicules Industriels de Transport Routier

Réf. 031 Secteur

Dossier n° _____
A rappeler sur facture et correspondance.

Nom du locataire : _____

Siège social : _____

Fournisseur : _____

Adresse : _____

Entre le locataire désigné ci-contre, d'une part, et la Société LOCAFRANCE, bailleur, d'autre part il est convenu et arrêté ce qui suit : aux conditions générales de la Convention de Crédit-Bail figurant au verso et aux conditions particulières et spéciales ci-dessous, le bailleur donne en location au locataire le matériel suivant :

Type	Marque	Carrosserie	Equipement	N° d'immatriculation

Article premier. — Adresse complète d'immatriculation du matériel :

Article 2. — Prix de référence.
Pour l'application de l'article 2.2. de la Convention de Crédit-Bail, le prix de référence du matériel, à la date de signature du bailleur figurant ci-dessous est fixé à :

H.T. _____
T.V.A. _____
T.T.C. _____

+ Carte grise pour F _____

Article 3. —
Le matériel est réceptionné au plus tard le _____.
Passé ce délai les parties décident du sort de leur convention dans la limite des accords pouvant être conclus avec le ou les fournisseurs.

Article 4. — Durée de la location.
_____ ans, payable en _____ loyers mensuels ou trimestriels, termes à échoir. Le premier loyer est exigible lors du règlement du châssis-cabine par le bailleur, toutefois son échéance est fixée au 10 ou 20 du mois, selon que le paiement du châssis-cabine est effectué respectivement du 1er au 14 inclus ou du 15 au 31 inclus.
Tous les autres loyers sont payables au même quantième des mois ou du premier mois des trimestres suivants sur présentation par LOCAFRANCE, d'avis de prélèvement domiciliés auprès de la banque désignée par le locataire. L'autorisation de prélèvement correspondant à ces avis de prélèvement sera signée par le locataire en même temps que la présente Convention de Crédit-Bail. Le locataire s'engage à maintenir ladite autorisation pendant toute la durée de la location. Tout transfert à une autre banque sera soumis à l'autorisation préalable du bailleur.

Article 5. — Option d'achat.
A l'expiration de la _____ année de location, il est consenti au locataire une option d'achat au prix de F _____ correspondant à la valeur résiduelle du matériel.

Article 6. — Montant des loyers.

Années	LOYERS _____ (compléter par mensuels ou trimestriels)	H.T.	T.V.A.	T.T.C.
1	1 loyer (y compris C.G.) de — loyers de chacun			
2	— loyers de chacun			
3	— loyers de chacun			
4	— loyers de chacun			
5	— loyers de chacun			
	TOTAL de la location			

Article 7. — Assurance-Loyers.
Conformément à l'article 6 e des Conditions générales de Crédit-Bail, les loyers portés sur le présent contrat sont garantis par une police risque crédit-bail souscrite par le bailleur. Les charges afférentes à cette police s'élèvent pour une franchise de _____ % à T.T.C. _____.

Article 8. — Etant conclu par correspondance, le présent contrat dûment signé par le locataire obligatoirement accompagné de tous documents constitutifs de garanties, doit être réceptionné par le bailleur dans un délai de trente jours à compter de la date de signature de ce dernier. A défaut, ledit bailleur cesse d'être engagé.

CONDITIONS SPECIALES :

Fait en quatre exemplaires à

le

* Le Bailleur :
(Signature et cachet)

* Le Locataire :
(Signature et cachet)

* Les parties devront faire précéder leur signature des mentions « Lu et approuvé » et « Bon pour accord ».

LOCAFRANCE Siège

Locafrance

64, RUE MARBEUF 75008 PARIS TÉLÉPHONE 225 70 65 • 359 61 66 • 563 59 20 TÉLEX 65170 LOCAFRAN F/359

AVENANT N°

A LA CONVENTION DE CREDIT-BAIL N°

Passé en date du

Entre

la Société LOCAFRANCE

Et

Le montant des loyers et de l'option d'achat indiqué respectivement aux Art. 5 et 6 des conditions particulières de la convention de crédit-bail, a été établi par le bailleur en tenant compte :

- des versements échelonnés aux dates ci-après indiquées en fonction des conditions de paiement retenues :

- d'une réception du matériel effectuée dans la période du au ; la date d'échéance du premier loyer étant fixée au (Art. 2 §2.1. de l'accord général de location).

En conséquence, la base de calcul des loyers et de l'option d'achat a été déterminée comme suit :

- Prix de référence : F (H.T.)
- augmenté des intérêts débiteurs calculés au taux de % l'an + TVA sur les versements à effectuer par le bailleur avant la date d'échéance du premier loyer, pendant la période courant de la date de chacun de ces versements à la date d'échéance du premier loyer ;
- diminué des intérêts créditeurs calculés au taux de % l'an + TVA sur les versements à effectuer par le bailleur après la date d'échéance du premier loyer pendant la période comprise entre cette dernière date et la date desdits versements.

Dans l'hypothèse où la date d'échéance du premier loyer ou les dates de versements effectués par le bailleur ci-dessus précisées seraient modifiées, le montant des loyers et de l'option d'achat ferait l'objet d'un rajustement selon la même méthode de calcul, pour tenir compte des décalages constatés.

FAIT EN DOUBLE EXEMPLAIRE, à PARIS , le

Le Bailleur
(signature et cachet)

Le Locataire
(signature et cachet)

Les parties devront faire précéder leur signature de la mention"Lu et approuvé.Bon pour accord"

ANNEX IV

MODÈLE DU CONTRAT DE LA « AUTO- & EQUIPMENT-LEASING S.A. »

CONTRAT DE LEASING N°

Entre

Auto- & Equipment-Leasing SA
Müllerstrasse 16, 8004 Zurich
(bailleur)

et

(preneur)

il est conclu le contrat de bail suivant :

A. *Objets de bail :*

Assurés selon art. 7 auprès de : a)
b)

B. *Lieu d'emplacement :*

C. *Durée du bail :* mois
début :
fin :

D. *Loyer par mois :* *fr.* avec/sans frais d'entretien et de service *

La part des intérêts comprise dans le loyer est calculée à l'aide du taux d'intérêt pour les crédits en blanc, taux fixé par les banques zuricoises, membres de la convention sur les taux d'intérêt. Si ce taux augmente de ¼%, le bailleur peut augmenter le loyer de base de 1%. Un recul du taux n'a pas d'influence sur le loyer de base.

E. Lors de la conclusion du contrat, une taxe de fr. est payable.

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* The author of the article "Le contrat de finance-equipment-leasing" from which this standard contract is taken notes that it is rare for a financial lease to contain such a provision for the maintenance of the equipment leased. To his knowledge, the Auto and Equipment Leasing Co. is the only leasing company offering such a provision in its contracts and that only provided certain requirements are met (equipment the maintenance of which requires special knowledge, possibilty of fixing the maintenance costs in advance, etc.), cf. B. STAUDER, op.cit., Dixième Journée Juridique, at p. 43.

CONDITIONS GÉNÉRALES DE BAIL.

1. *Début de bail.*

Le contrat de bail lie les parties dès qu'il est signé. Le bail au sens propre et l'obligation de paiement des mensualités commence, sous réserve des dispositions suivantes, à partir du moment de la remise de l'objet de bail au preneur.

Le présent contrat est conclu sous réserve que les objets de bail soient fournis. Si la livraison devait être retardée de plus de deux mois, le bailleur aura le droit d'annuler le contrat sans devoir allouer une indemnité.

Des revendications relatives à une livraison tardive des objets de bail doivent être adressées au fournisseur et non pas au bailleur. En conséquence, le bailleur ne répond pas de la demeure du fournisseur. En revanche, le bailleur s'engage de céder au preneur tous les droits résultant du contrat d'achat avec le fournisseur.

2. *Loyer.*

Le loyer est payable le premier jour d'un mois. Les loyers ou parties de ceux-ci qui ne parviennent pas au bailleur jusqu'au septième jour d'un mois, sont prélevés sans avertissement préalable par remboursement postal. Si ce remboursement n'est pas payé, le bailleur peut exiger par avance le paiement du loyer pour toute la durée du bail, ou annuler le contrat conformément à l'art. 265 du CO.
Le loyer est également dû au cas où les objets de bail ne peuvent être utilisés pour une raison quelconque.

3. *Ajustement du loyer.*

La part des intérêts comprise dans le loyer est calculée à l'aide du taux d'intérêt pour les crédits en blanc, taux fixé par les banques zuricoises, membres de la convention sur les taux d'intérêt selon lettre D du contrat de leasing. Si ce taux augmente de ¼%, le bailleur peut augmenter le loyer de base de 1%. Un recul du taux n'a pas d'influence sur le loyer de base.

4. *Obligation de vérification et défauts.*

Dès leur remise, le preneur doit vérifier les objets de bail et, le cas échéant, aviser immédiatement le bailleur et le fournisseur des défauts constatés. Si des défauts se révèlent plus tard, le preneur les signalera dès qu'il les aura découverts.

D'éventuelles revendications à la suite de défauts des objets de bail doivent être adressées directement au fournisseur. Le preneur s'engage de faire valoir ces droits envers le fournisseur à ses frais et en temps utile.

Ces revendications ne libèrent pas le preneur de ses obligations de paiement et autres obligations relevant de ce contrat. Le bailleur ne répond pas des défauts des objets de bail. En revanche, le bailleur cède au preneur tous les droits de garantie que la loi et le contrat d'achat confèrent au bailleur envers le fournisseur.

5. *Entretien des objets de bail.*

Le preneur est tenu d'assurer une utilisation normale des objets loués, d'éviter une utilisation exagérée, d'entretenir les objets à ses frais et d'une manière adéquate et — pour quelque raison que ce soit — de procéder immédiatement et à ses frais à des travaux nécessaires de rétablissement ou de réparation. A cet effet, seules des pièces de rechange fournies ou admises par le fabricant peuvent être utilisées.

Si les travaux réguliers d'entretien et de service sont compris dans le loyer, les rétablissements ou les réparations sont à la charge du fournisseur. Toutefois, le bailleur ne répond pas de l'exécution adéquate de ces travaux par le fournisseur.

6. *Responsabilité.*

Le preneur est responsable envers le bailleur de tous les endommagements des objets de bail qu'ils aient été causés par le preneur lui-même, ses auxiliaires ou par des tiers.

Le preneur répond de même de tous les dommages causés auprès de tiers à des choses ou personnes par les objets de bail à moins que les prescriptions coercitives de la loi règlent la responsabilité différemment. Le preneur ne peut faire valoir aucun droit envers le bailleur pour des dommages qui lui sont causés.

7. *Assurances.*

Le preneur a l'obligation de faire assurer les objets loués en faveur du bailleur contre perte, extinction ou endommagement. En outre, le preneur doit prouver l'existence d'une assurance de responsabilité civile ou inclure les objets de bail dans son assurance de responsabilité civile d'entrepreneur.

Si l'existence d'un contrat d'assurance ne peut pas être prouvée lors de la signature du contrat de leasing, le bailleur a le droit de conclure une assurance adéquate aux frais du preneur.

8. *Sous-location.*

Le preneur n'a pas le droit de remettre à des tiers les objets loués ou de transférer à des tiers des droits relevant de ce contrat. Les objets loués ne peuvent en aucun cas être déclarés comme accessoires d'un immeuble ou être mis en gage.

9. *Propriété.*

Les objets loués demeurent la propriété du bailleur. Si les objets devaient être saisis, frappés d'une rétention ou encore d'une confiscation relevant du droit des poursuites, le bailleur est à aviser sans délai par télégramme. Cela est également valable si une tierce personne demande la vente aux enchères de l'immeuble sur lequel les objets loués se trouvent.

10. *Droits d'accès et d'inspection.*

Le bailleur a en tout temps accès aux objets loués et peut les faire examiner.

Le preneur est tenu de signaler immédiatement au bailleur tout changement du lieu d'emplacement des objets loués.

11. *Expiration du loyer.*

Après l'expiration du contrat, les objets loués doivent être rendus dans un état intégral et utilisable (au sens de l'art. 271 CO) si le preneur ne fait aucun usage de son droit d'achat ou du droit de prolongation de location.

En cas de décès du preneur, le contrat ne pourra être annulé qu'avec l'assentiment du bailleur.

Si le preneur déplace son domicile, resp. son siège à l'étranger, le bailleur a le droit de résilier le contrat. Cela est également valable si le preneur change le lieu d'emplacement des objets loués sans en aviser le bailleur. Le droit de résiliation s'étend en outre au cas où l'objet loué serait déplacé à l'étranger.

12. *Droit de prolongation de location.*

Pour autant que le preneur ait rempli correctement ce contrat jusqu'à la fin de la durée prévue et qu'il le signale au bailleur, au plus tard un mois avant l'expiration du contrat, le preneur a le droit, après l'échéance du contrat, de continuer à louer les objets pour un temps indéterminé moyennant d'un paiement de 1/12 du loyer annuel. Durant cette prolongation de location, le contrat peut être résilié à la fin du mois par le preneur moyennant avis donné un mois à l'avance.

13. *Formalités.*

Des conventions supplémentaires stipulées verbalement ne sont pas valables. Des réserves et des conventions spéciales ne sont valables que si elles sont faites par écrit.

14. *For et lieu de l'exécution.*

Les deux parties reconnaissent Zurich comme for de juridiction et lieu d'exécution. Si le preneur déplace son domicile ou son siège à l'étranger, le lieu de l'exécution est également le for de la poursuite.

Les deux parties ont pris connaissance de l'ensemble des clauses du présent contrat de leasing et se déclarent formellement d'accord avec son contenu.

Zurich, le

Le bailleur	Le preneur