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PRELIMINARY ANALYSIS  
OF THE REPLIES TO THE QUESTIONNAIRE ON THE LEASING CONTRACT  
(WITH SPECIAL REFERENCE TO INTERNATIONAL LEASING)

prepared by the Secretariat

Rome, September 1976

1.- In accordance with the instructions it received from the small working group of the Governing Council called to examine the feasibility of preparing uniform international rules on the leasing contract in April 1975 (1), the Secretariat of UNIDROIT has in the interim been engaged in a wide-ranging inquiry designed to clarify certain problems peculiar to leasing operations in general and to throw light on the implications of international leasing operations, in particular. This inquiry has been conducted along two closely-linked fronts.

2.- First, in March 1976 the Secretariat drew up a questionnaire entitled "Questionnaire on the leasing contract (with special reference to international leasing)" (2) and between the end of March and the outset of April this was circulated across the five continents, among banks specialising in leasing, leasing companies, leasing company associations, distinguished academic names in the same field as well as the interested international and regional organisations. A large body of replies has been received to date and this paper is principally intended to give a preliminary analysis of these (3). It will also

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(1) Cf. CD 54 - Doc. 4/1, UNIDROIT 1975, pp. 1-2.

(2) Study LIX - Doc. 2, UNIDROIT 1976.

(3) Replies have hitherto been received in respect of the following countries:

Australia, Austria, Belgium, Republic of China (Taiwan), Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, the German Democratic Republic, Hungary, India, Italy, Japan, Korea, the Netherlands, Norway, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America, Yugoslavia.

A further reply has been received from the "Société Européenne pour le financement de matériel ferroviaire" (EUROFIMA).

The Secretariat takes this opportunity of acknowledging its debt of gratitude to the International Chamber of Commerce and the European Federation of Equipment Leasing Company Associations (Leaseurope) the good offices of which were to an outstanding extent instrumental in making this inquiry a success.

incorporate comments offered on the Secretariat's preliminary report on the contract of leasing (4) which, in line with the decision of the aforementioned working group (5), was circulated at the same time as the Secretariat's questionnaire (6).

3.- The second front on which the Institute has proceeded has consisted in making and pursuing contacts with leasing practitioners, both with a view to obtaining expert first-hand knowledge of leasing and the incidence and implications of international operations and to gauging the veritable degree of interest and enthusiasm aroused in the industry itself by the Institute's initiative. On this score too, the Institute's endeavours have been pleasingly rewarded. In particular a close working relationship has been established with the European Federation of Equipment Leasing Company Associations (Leaseurope) which has member companies in 15 European countries (7). Meetings have been arranged with both the Chairman of this Federation and with representatives of the British and Italian national associations. News of UNIDROIT's efforts in this field was greeted favourably at the last annual meeting of Leaseurope and the Secretariat has been invited to take part in the Federation's next annual meeting (8).

4.- The evidence of these encounters points unmistakably in favour of the desirability of launching the preparation of uniform international rules on the leasing contract as expeditiously as possible. Interest, in Europe at least, would seem to lean towards an uniform international regulation for the leasing contract in general rather than rules cast with the international leasing opera-

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(4) Study LIX - Doc. 1, UNIDROIT 1975.

(5) Op.cit. p. 2.

(6) Also circulated with the questionnaire was a summary of the discussions of the small working group seized of the question in April 1975.

(7) These are: Austria, Belgium, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Italy, Luxemburg, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom.

(8) This will be held in Munich 8-9 November 1976 and will feature discussion on leasing outside Europe, with particular reference to the situation in the Far East and in America; cross border leasing; risk aspects of leasing, in particular insurance problems; attitudes regarding the regulation of leasing in Europe, including a discussion of possible developments in Europe.

tion specifically in mind. This stems from the almost total absence of legal regulation of the leasing contract - with the notable exception of Belgium and France - and the problems that this causes for lessors in particular, when it comes to asserting their title to the equipment before a court of law. It further emerged from the Secretariat's enquiries that, notwithstanding trans-national leasing associations being formed with the specific objective of favouring the conclusion of international leasing between the members of such associations (9), the mounting of a truly international operation in Europe has hitherto been so fraught with difficulties as to render the incidence of such operations virtually minimal. It would appear that the only means in which a leasing operator can carry out cross-border leasing in Europe is through subsidiaries set up in accordance with the law of the country where he wishes to operate (10). The

(9) Among such clubs are the International Credit Union (I.C.U.), Lease Club, Multilease, Exfinter, Leasunion.

(10) Cf. "Des espoirs prématurés... et déçus", Le Monde, 20/21 June 1976:

"En départ, la création des réseaux internationaux de crédit-bail a été très souvent le fait des principales sociétés américaines spécialisées avec, à leur tête, la société-mère, qui se trouvait conduite, en raison du volume de ses affaires et de ses moyens financiers, à développer son influence par le contrôle direct d'un réseau de participation et de filiales... Les consortiums bancaires, de leur côté, créèrent des filiales un peu partout... Des clubs, enfin, furent constitués par des sociétés indépendantes... Ajoutons-y les clubs formés par des consortiums bancaires... Pourquoi les ~~clubs~~ <sup>espoirs</sup> placés dans ces formules ont-ils été, la plupart du temps, déçus ? Essentiellement parce que le crédit-bail ne s'exporte pas: il faut que la nationalité du bailleur et du preneur soit la même, toute différence se révélant un cauchemar, car les réglementations en vigueur ne sont harmonisées ni sur le plan comptable, ni sur le plan juridique, ni sur le plan fiscal, ni même sur la définition du crédit-bail. Une telle harmonisation a été reconnue souhaitable lors du Congrès annuel de "Leaseurope"...";

cf. also Bernard MAROIS: Le leasing international, Banque, 1976, 288 at 292, where he states: "la plupart des opérations de leasing se font par l'intermédiaire de sociétés domiciliées à l'étranger (dans le pays de destination du bien ou dans un pays fiscalement accueillant)... Le coût d'un financement international par leasing serait... prohibitif par rapport au coût d'un financement par crédit acheteur ou fournisseur. C'est pourquoi les sociétés de leasing opèrent peu au départ de la France et font acheter les biens mobiliers qu'elles veulent donner en leasing par une filiale située hors de France. Ainsi elles peuvent bénéficier du crédit export, et leur filiale peut établir un contrat de leasing avec le preneur à un coût compétitif."

difficulties obtruding with international leasing operations will be touched on subsequently when examining the replies to the questionnaire. However, the Secretariat's conversations with the practitioners isolated the main factors here as being, first, the fiscal and legal uncertainty resulting from the inconsistent treatment of leasing from one country to another and, as already mentioned, the almost total absence of any legal regulation specifically enacted for leasing; secondly, the currency problems attaching to the repatriation of the rentals paid by an overseas lessee; thirdly, the practical and legal problems involved in the repossession of goods leased abroad; and, fourthly, the problems associated with assessing the commercial reliability of a foreign lessee.

5.- The general mood recognisable within the corps of leasing operators represented in Leaseurope with regard to the creation of a uniform legal framework is distinctly favourable. This is not to say that there is not considerable debate within Leaseurope's membership on the precise details of such a framework, in particular centring on the advisability of following the wider model provided by the British system, for instance, or the more restrictionist French and Belgian systems. However, there can be no doubting the general keenness to resolve the present legal vacuum with a uniformly applicable legal code. In this context it is useful to note the four points to which the Chairman of Leaseurope indicated that he would limit, initially at least, efforts towards uniform rules on the leasing contract, specifically international leasing operations being left to one side for the time being. These four points are: first, the formulation of a uniform definition for the leasing contract; secondly, the protection of the lessor's title; thirdly, the requirement that the value of the goods must be amortised over the duration of the lease; fourthly, the inclusion in the contract of an option to purchase the goods in favour of the lessee. Regarding the first of these points, the definition which he advocates would comprise two essential elements, namely that a leasing contract is one where goods are purchased by one party from another with a view to their being leased to a third party. It is self-evident that the formulation of such a uniform definition would be the cornerstone of any unification in this field (11). To

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(11) Cf. remarks of Mr. D.R. Soper at Leaseurope working meeting, Zurich, 1974: "I think none of us know any longer what leasing is".

protect the lessor's title, he would favour a provision stating that title to the goods remains vested in the lessor. Undoubtedly the most controversial point is the fourth, since many countries, notably those in the Anglo-Saxon orbit, would not regard a contract containing such an option to purchase as a lease (12). The Chairman of Leaseurope emphasised the difficulties that the uncertainty existing on this point had caused, so that, even within the same country, one court would imply such an option into the contract whilst another would deny that such an option could be so implied. This uncertainty highlights the favourableness of the conditions for an attempt at uniform rules, all the more so when one remembers the almost total absence of national legislation specifically treating of leasing (13).

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- (12) Cf. letter of 14 January 1976 from the Equipment Leasing Association of the United Kingdom:

"... an option to purchase is never found in U.K. leases. A contract containing an option to purchase would be entirely lawful in this country. But it would not be a lease. The legal, fiscal and accounting treatment would be quite different. We in the U.K. are inclined to the view that the absence of an option to purchase is essential to the definition of a lease. In our view, a lease does not pass title to the goods. The essence of a lease, in our thinking, is that it is a contract to finance the use of goods - as distinct from a contract to finance the purchase of goods." However, the French system does not automatically transfer ownership, as what is involved is a mere option and not an obligation (cf. remarks of Mr. A. Dietz and Mr. R. Bas to annual meeting of Leaseurope held in London, October 1975, at pp. 56-58 of the official account of the proceedings of the said meeting).

- (13) The potential role of uniform rules on leasing could in this sense be likened to the drawing up in 1929 of the Warsaw Convention on international carriage by air and its subsequent enactment as national law all over the world; a more recent example of unification, as yet at the stage of drafting, but which offers the same model legislation in a novel field, is the preparation within UNIDROIT over the last few years of international uniform legislation on the legal status of air-cushion vehicles ("hovercraft").

6.- This absence of legislation has also come to the attention of the Commission of the European Communities. Consideration is accordingly being given to a possible harmonisation of the rules governing leasing in EEC member States, to the extent that there is a need for such harmonisation in order to facilitate leasing operations between firms based in different countries of the Communities. For the time being, the Commission's concern with leasing is restricted to deciding whether or not leasing contracts should be included in the scope of application of the directive being prepared on consumer credit.

7.- At an international level the Secretariat has also established relations with the International Union of Lawyers (UIA) which is holding a seminar on international leasing at Geneva on 13 September 1976 (14).

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8.- Prior to embarking on an analysis of the replies to the questionnaire sent out by the Secretariat of UNIDROIT in March/April 1976, one should mention one or two of the comments offered in connexion with the preliminary report on the leasing contract prepared by the Secretariat in March 1975.

9.- The main point raised concerned the new types of leasing contract which have developed over the last few years out of the ever more varied needs of the business community in this field. In the Federal Republic of Germany, for instance, the most important of these new leasing operations are, first, the non-pay-out leasing contract with an option for the lessor to demand from the lessee purchase of the leased goods; secondly, the leasing of motor-vehicles; thirdly, the leasing contract subject to termination (15). As Professor Drobnig remarks,

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(14) This seminar will study the legal problems arising out of leasing operations between different nationals concerning ownership and protection of the same, the equipment guarantee, insurance and financing, from the aspect of the liability of the parties concerned, the protection of their rights, the applicable procedure and the competent jurisdiction.

(15) Reply of Professor Ulrich Drobnig of the Max-Planck-Institut für ausländisches und internationales Privatrecht (Hamburg).

"leasing is still so much subject to new developments and experiences, that also in the foreseeable future new forms of leasing contracts are likely to be developed." (16)

10.- The comments of the Paris Service de Recherches Juridiques Comparatives drew attention to the dissociation of the theoretical and the effective ownership of the goods under a leasing contract, noting that by a sort of functional diversion the credit supplier uses the force of the right of ownership to guarantee his contractual credit. The conclusion which the Service de Recherches Juridiques Comparatives (S.R.J.C.) draws from this observation is the desirability of specifically narrowing the scope of UNIDROIT's study of this question to those operations which partake of a credit-raising character to the exclusion of those operations which are pure leases and nothing more. The S.R.J.C. would, in the interests of efficiency, favour in fact the extension of UNIDROIT's study to embrace all secured transactions not involving dispossession (subject, as they add, to any interference with the current work underway within UNCITRAL). The reasons which lead to this conclusion are, first, that an effective set of rules for leasing might be regarded as over-restrictive by practitioners who could thus be induced to develop other forms of security which would fall outside the scope of the international rules; secondly, the tendency evidenced by the Uniform Commercial Code and the Crowther report in favour of a global regulation of all financial operations which amount in practice to secured transactions not involving dispossession, regardless of the name given to them by the parties. The S.R.J.C. point to the great simplification of credit-law operations that would be the fruit of such a move, unifying legal regimes the only reasons for the differences between which are often purely contingent. The argument of the S.R.J.C. is that the creation of such a unitary set of rules could provide both a simple and an effective tool for international trade, of especial usefulness for those medium-sized firms which are frequently baffled by the complex rules of credit law. This would offer a model for the reform of the national laws.

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(16) Cf. also remarks of Mr. T.M. Clark at annual meeting of Leaseurope, 1975, at p. 73 of the official account of the proceedings of the said meeting, where he draws attention to the proliferation of new forms of lease which it would seem develop so fast that not even the average leasing operator can hope to keep track of all the latest manifestations. As Mr. Clark pointed out, this merely served to highlight the need for an overall definition.



11.- As the S.R.J.C. recognise, however, any rules for secured transactions come up against the problem of the publicity needed to ensure the effectiveness of the security as against third parties. Not only are some States more lukewarm than others to the whole idea of publicity but at the international level the whole question becomes understandably even more difficult. On this point the S.R.J.C. makes a plea for imagination in looking at new methods, such as the one being studied within the E.E.C. for the draft directive on the recognition of secured transactions not involving dispossession.

12.- Another point regarding the scope of UNIDROIT's work in this field was made by Professor Goode of the United Kingdom when he said that, with reference to the decision of the small working group, first seized of the question in April 1975, to exclude the leasing of ships and aircraft from the scope of UNIDROIT's study, "a substantial part of international leasing arises in relation to ships and aircraft... I do not disagree with this decision but merely point out that the volume of international leasing business to be regulated thereby becomes drastically reduced." In fact, international leasing first gained momentum in the financing of ships and aircraft, this type of activity being known as big ticket leasing. The potential of this sector can be seen from the fact that in 1973 the William Brandt merchant bank of London estimated that the total number of orders for new vessels between 1973 and 1978 would amount to 200 million tonnes, worth some 40 billion dollars. Prices have risen so enormously in this field that the role of leasing has developed great importance. However, it should be pointed out that whereas international leasing would appear to have got off the ground successfully in respect of such large contracts as those concerning aircraft, ships and drilling platforms, the same is by no means true for the international financing of such assets as industrial and office equipment (17).

13.- The reply of Dr. Richter-Hannes of the Institut für ausländisches Recht und Rechtsvergleichung of Potsdam-Babelsberg in the German Democratic Republic, noting the decision of the small working group composed of members of the Governing Council to exclude the leasing of ships, pointed out that the provisions of the recent legislation enacted in the G.D.R. on the leasing of ships (18) would

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(17) Cf. Marois, op. cit., at p. 289.

(18) §§ 87-89 of the Seehandelsschiffahrtsgesetz of the German Democratic Republic (SHSG) of 5. II. 1976 (GB 1. I Nr. 7S. 109).

seem to be equally appropriate for other types of financial leasing. She points out that the leasing of ships is considered in the G.D.R. as a form of financial leasing with the following main legal characteristics:

(i) The lessor hands the object of the leasing contract over to the lessee and after the expiry of the contractual period agreed upon, the lessor is obliged to transfer the ownership of the object of the contract to the lessee (the transfer can be agreed on right from the outset or as an option to purchase);

(ii) the lessee becomes virtually owner of the object of the contract from the moment he takes possession, which means he has to bear the risks of loss or damage thereto from the outset (§ 88(2) of the new statute).

Dr. Richter-Hannes draws attention to the fact that if the lessee of a ship does not intend to buy the ship, he does not need a leasing contract and will prefer a bare-boat-charter (charter by demise).

The new statute offers solutions in two areas of controversy. First, if the lessee falls behind by more than two rentals in succession, the lessor is entitled under § 89(1) to claim immediate payment of the remainder of the rentals. Secondly, under § 89(2), in the event of the lessee becoming unable to pay, the lessor can demand the return of the ship or immediate payment of the outstanding rentals, but only one or the other not both. This solution was adopted in accordance with the principle that the lessor cannot claim a higher sum in such an eventuality than he would have obtained had the contract been performed in its entirety. In the case where the ship's return is the method decided upon, the lessor must, under § 89(3), reimburse that part of the purchase price already paid by the lessee, while the lessor has a claim against the lessee to compensate him for his use of the ship.

The lessor is protected for loss of the ship by the introduction of a mandatory insurance policy to be taken out by the lessee, with claims against the insurance company to be exercised by the lessor (§ 88(3)).

PRELIMINARY ANALYSIS OF REPLIES RECEIVED  
TO UNIDROIT QUESTIONNAIRE ON LEASING

Question 1.1.

1.1. Leaving aside those operations affecting real estate, which is the form of leasing preponderantly used in practice: (a) financial leasing, (b) operating leasing, (c) sale-leaseback or (d) some other variation of leasing ?

14.- Broadly speaking, it may be said that financial leasing is the form of leasing preponderantly used, partly because of the close links between the main leasing companies and the banking sector. The answers from some countries indicated that operating leasing is widely practised too, but normally for special types of goods. In India, however, financial leasing and sale-leaseback as practised in the West are not in vogue, so that, apart from the traditional hire-purchase, the only form of leasing operation practised is operating leasing. Sale-leaseback would seem to be less prevalent and mostly limited to the real estate market, although used in the form of both financial and operating leasing. Other forms of leasing were mentioned in connexion with different countries; for example, discounted leasing is used to a certain extent in Denmark, the leasing contract being made between the supplier and the lessee, whereupon the contract is assigned to the lessor at the same time as the equipment is sold to the lessor. The French have "leasing adossé" which, in addition to having the same characteristics as sale-leaseback, gives the supplier-lessor-lessee the option to sub-lease the equipment to a sub-lessee who is then entitled to exercise the option to purchase contained in the main leasing contract.

1.2. Does the lessee's choice as to the form of leasing to be used differ according to the special type of goods concerned ?

15.- It would seem that the lessee's choice as to the form of leasing does to a certain extent depend on the type of goods concerned, or the use for which they are intended, although in certain countries at least, for instance Sweden, a trend can be detected towards a more flexible relationship between the type of goods and the form of

leasing chosen. In the United Kingdom, for instance, specialist types of equipment such as computers are leased by both financial and operating leasing, but for most other types of goods only financial leasing is available. In France industrial equipment and public work equipment are leased by financial leasing, whereas highly technical equipment requiring a high degree of repair and expensive upkeep, is leased by non full-pay-out leasing. Although the contract often includes an option to purchase, the equipment is rarely purchased, usually being returned to the lessor at the expiry of the lease with a request sometimes for a newer model. In the Federal Republic of Germany the choice as between financial and operating leasing depends on the type of firm involved, since industrial firms use operating leasing alone. In Norway, whereas financial leasing covers virtually any type of equipment, operating leasing is, broadly speaking, limited to cars, computers, copying machines and trucks. The law of the Netherlands does not permit financial leasing to be used in respect of cars.

16.- However, it is clear that the type of leasing elected for will depend also on such other circumstances as market conditions, the facilities which the supplier is prepared to offer or the financial circumstances of the lessee. One Dutch company replied that they only practised operating leasing where they could estimate the residual value. A considerable factor in the mind of the lessee when choosing the form of leasing he wishes to employ will be the question of whether or not he wishes to ensure that his equipment is maintained and serviced during the course of the lease; if the answer is yes, operating leasing will normally be his choice. In Hungary the choice of the lessor is determined above all by the governing principle that all goods delivered by the lessor should fill only provisional or temporary needs on the part of the lessee. Thus the most important factor determining the form of leasing to be chosen in this country will be the economic calculation relating to the goods to be hired.

QN. 2. Does the leasing operation respond, in your opinion, to overwhelmingly fiscal considerations or do you feel that it serves to fulfil important additional purposes and, if so, which ?

18.- The overwhelming response on this question seemed to be that, while leasing does respond to fiscal considerations, these are not the primary reasons impelling businessmen to elect in favour of this method of financing. An exception here should, however, be signalled from the very beginning: the United States, where the primary motive would appear to be tax deferral, with the avoidance of capital

budget limitations and the preservation of other borrowing capacity figuring as only secondary motives. It would appear that in the United States without the substantial taxation advantages benefitting leasing "there would be no real motive for the financial institution which has advanced the funds to finance a leasing operation engaging in that operation because it could obtain a greater return on the money in other uses", to quote Ambassador Kearney, the United States member of the Governing Council of UNIDROIT.

19.- In other countries, however, while fiscal incentives no doubt play an important part in inducing the various parties in favour of leasing, and certainly played an important part at the outset, other financial and economic factors have now become equally important. These other factors are well brought out in the reply of the Equipment Leasing Association of the United Kingdom:

"a) Leasing avoids the need to lock up capital resources in fixed assets. It is important to note that this benefit does not apply only to companies whose liquid position is strained. It applies also to companies that could afford to purchase, if they can deploy more profitably the funds that would otherwise be locked up. In practice, we find that many customers employ a policy of 'mix'; leasing is one among other facilities that they employ simultaneously to finance their capital requirements, relating it as they do to specific assets.

b) From the point of view of a company's internal operating budget, leasing has the advantage of immediately focussing the company's attention on the true cost of the asset over the expected period of use. Thus a company is readily able to assess the benefits of the capital investment compared to the expected savings and profitability from the use of the asset.

c) From the point of view of the company's investment policy leasing provides a medium term facility which is not readily available elsewhere, and which in our view is an element of financial stability that has been much underrated in the past. It matches cash flow to the anticipated life of the asset. It is important to note that leasing is a flexible facility; many, probably most, leases are tailor-made, and the rentals can be related to the earning power of the asset.

d) The facility of leasing is certain. Except in the event of default by the lessee, there can be no acceleration in the payment of the agreed rentals over the period of the contract. (The average primary period of a lease is about 5 years, though leases up to 10 years are quite usual, and even longer-leases are not unknown). This certainty of cash flow can relieve the anxiety that may be associated with borrowing repayable on demand.

e) Leasing can be certain in another sense. Though some lessors offer the option of leases where the rentals are variable with tax changes and/or changes in money costs, leases on fixed terms are available. In such cases cash outflow is precisely predictable, and cannot be affected by extraneous changes.

f) Leasing offers 100% finance.

g) Ownership of an asset can sometimes have the psychological effect of locking the owner into use of an asset which should be replaced, at the present time of rapid technological change and innovation, by a more efficient piece of equipment. Leasing can assist a company to assess the need for and benefits from re-placement, and thus promotes flexibility in an investment programme.,

h) Leasing is a simple and convenient method of financing capital assets. Mortgages may be difficult to set up in conjunction with other long term financing arrangements, and registration, for certain types of assets, is sometimes complex. It is to be noted that there are advantages for the lessor as well as the lessee; ownership can provide a better form of security than a mortgage, where enforcement is sometimes difficult.

i) Leasing plays an important role in major capital investment projects, such as in the fields of oil, shipping and aviation. Consortium leases can be arranged for projects that would be beyond the scope of one company. It is to be noted that the high calibre of the lessees has made it possible for the leasing industry to attract the necessary finance.

j) Leasing gives an ability for companies providing finance to provide facilities in line with the different types of risk undertaken. The nature of leasing, which secures ownership of the asset to the lessor, is, in a way, a half-way stage between a merchant banker's equity participation and a simple medium term loan. With new types of risk such as arise through financing the development of North Sea energy resources, the particular security available to the financier through his ownership of the asset makes it possible for operators to obtain, by leasing, facilities that might not be forthcoming by other methods.

k) The lease rentals reflect the ability of the lessor as owner to benefit from whatever incentives are offered for new capital expenditure, but this is only part of the calculation made in arriving at rental levels. Certain customers have tax situations which may make

a lease attractive to them, but we will not elaborate, except to say that though this is most important, we do not regard it as the central advantage of leasing to which the other advantages are additional. On the contrary, it is the other features of leasing set out above that we regard as central, since they flow from the essential nature of leasing; whereas the tax advantage is contingent on the present system of fiscal incentives in the U.K."

20.- Not all of these factors are of course going to be present in every country, but the above list does, nevertheless, serve to indicate the rich variety of positive reasons inducing parties to select leasing rather than the many other means of essentially medium-term credit available (19). It is, above all, a very agile means of preserving company liquidity in present economic conditions. Among the major factors militating in favour of leasing in France, for example, are the fact that there is no need to lay down an initial deposit, the way in which such operations do not have to be entered on the company's balance-sheet, the covering of costs over the economic life of the equipment (financial leasing), the flexibility of the operation (another reason for the multiplicity of new forms of leasing developing constantly), the determination of the rentals in the light of the profitability of the equipment, the simplicity and rapidity of the operation, above all as regards requests for leasing, the fact that leasing companies are not really obliged to demand supplementary guarantees from firms wishing to lease, as the lessor's ownership is, especially where the equipment is standard, the foremost of guarantees, the advantages deriving from the fact that the lessee permanently knows the amount it is costing him to use this equipment, by virtue, that is, of the rentals he is paying.

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(19) However, a word of warning at least as regards the situation for leasing operations conducted in the United Kingdom, should be added here. To quote Professor Goode: "There is no doubt that in the case of financial leasing fiscal operations play a very important role. Indeed in the view of some finance houses the impact of taxation has been allowed to predominate and to distort the basic concept of leasing as a service to the lessee in which the risks of obsolescence, charges in interest and tax rates etc. are borne by the lessor. Increasingly one finds leasing contracts being written in which the burden of depreciation beyond an estimated depreciation specified in the contract is carried by the lessee; and the lessor is often given the right to increase rentals if for example there is an increase in corporation tax"; cf. the provisions of the Seehandelsschiffahrtsgesetz of the German Democratic Republic discussed supra at § 13 of the present paper.

21. - The reply from the National Bank of Hungary indicated that, in addition to fiscal considerations, leasing also responds to such other considerations as foreign exchange or trade policy for the development of international relations between firms by means of cooperation agreements. It is a common practice that cooperation agreements include terms relating to leasing. With regard to this reply it must be remembered that East European States like Hungary and Yugoslavia usually carry on leasing only as lessees in international import leasing operations. To quote from the reply of Professor Eörsi (Budapest University):

"Initiative for national financial leasing has been taken in respect of machinery to be imported in a form that lease contracts have been signed with the right of emption with building contractors engaged in the execution of certain large-scale projects for the long-term lease of specialised building machinery and vehicles. Leases of this kind are normally financed from the investment funds by the banking institute for development. These transactions already bear the marks of financial leasing."

22.- The fiscal advantages are undeniable, the major fiscal advantage seeming to be the way in which leased equipment can, for tax purposes, be "depreciated" within a shorter period than the normal depreciation period. However, the above-listed factors, far from exhaustive, will, it is hoped, serve to point to the equal importance of these other reasons (20). Virtually all the replies received, with the one notable exception of the United States, supported this thesis.

QM. 3. Does there exist in your country legislation governing the minimum qualifications for a firm to engage in leasing operations and, if not, what do you think such minimum qualifications should be and what factors should be reflected in such a requirement?

23.- The vast majority of States do not have such legislation and the replies from these are divided between those who feel that such legislation would be unnecessary and those who are anxious for some such control. Those countries possessing such legislation are notably France and Belgium, although legislation on leasing companies

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(20) The reply from the Österreichische Länderbank indeed stated that the main argument in favour of leasing is the liquidity benefit and that tax benefits are negligible.



will probably come into force in Norway on 1 January 1977, regarding the Board of Directors, the Committee of Shareholders' Representatives, Central Committee and the right of the Government to appoint such members. The reply of one Norwegian leasing company sent prior to the enactment of this legislation talked of a bill which proposed that leasing companies should have a minimum share capital, and that leasing companies should increase their own capital by 10% for each new contract. One reply from Finland indicated that it is expected that leasing companies will be subject to examination and regulation by the Finnish Bank Inspection Board in the near future. However, this reply was balanced by another reply from the same country which stated that "leasing companies should operate on a sufficiently solid financial basis to enable them to be good for their engagements in all circumstances, and at present the leasing companies in our country fulfil these qualifications."

24.- In France Article 2 of law n° 66-455 of 2 July 1966 refers the regulation of companies habitually engaged in leasing to the laws governing banking and related activities. Such companies must accordingly apply for the status of a finance house and, if they receive deposits, that of a bank, and bring themselves into line with the resulting requirements regarding a minimum capital, as well as being subject to the control of the Banking Commission, having to draw up periodical statistics, publish their accounts, etc. In Belgium, under Article 2 of arrêté royal n° 55 of 10 November 1967, persons habitually engaging in leasing have to be approved by the Ministry of Economic Affairs. The arrêté ministériel of 23 February 1968, determines the conditions on which this approval will be granted.

25.- In the United Kingdom, apart from the licensing provisions of the Consumer Credit Act 1974 which require those who carry on the business of consumer hire to take out a licence, the general verdict would seem to be that no greater protection is required for the time being. The reasons are quite well illustrated in the reply received from one United Kingdom leasing company:

"Many leasing companies are themselves substantial or are associated with substantial financial institutions conducting a range of businesses. Their management is responsible and knowledgeable. There appear to be few leasing companies operating which are in any sense irresponsible without such legislation being in existence."

However it may well be that existing relatively strict non-specific company legislation has brought about this effect. If legislation could be framed in acceptable form which protected third parties from damage of any sort arising from the use of leased equipment we feel this might be beneficial but it would have to be framed in such fashion that the rights of individual companies/persons were not unnecessarily restricted."

These views are supported by the reply from another United Kingdom company:

"The paramount objective of leasing is the provision of leasing facilities to customers, who should be sufficiently skilled to secure satisfactory terms. After the commencement of the lease it is the lessor who is at risk, and it is unlikely that the lessee's interest could be prejudiced by a lessor not meeting some financial qualification."

A major fear which would seem to emerge concerns the difficulty of devising any minimum qualifications which would not inhibit the growth of leasing companies.

26.- Although no legislation yet exists on this point in Italy, there was a bill before the previous Parliament, referred to in the Secretariat's preliminary report, which would have obliged leasing companies to operate with a certain minimum share capital.

27.- The East European countries enact rather special rules for this question, in line with the essential nature of leasing operations in these countries as explained above. Thus in Czechoslovakia leasing contracts may only be made by organisations authorised to carry on foreign trade. As mentioned earlier, Hungarian enterprises can only conclude leasing contracts in international trade transactions if the goods to be leased fill only provisional or temporary needs. In Hungary there is also a decree of the Minister of Finance made in 1970 whereby enterprises or cooperatives cannot undertake the leasing of machinery or equipment as a specific line of business unless their memoranda of association, statutes or contracts for association provide for the exploitation of this type of business, by enumerating the kind of machinery or equipment to be leased. As in Czechoslovakia, import leasing may be carried on provided that the lessor is authorised by the Ministry of Foreign Trade or that the foreign trading licence has been extended to professional leasing.

28.- The Korean Government in December 1973 enacted the Leasing Industry Promotion Law in order to promote and develop the industry in Korea. Firms wishing to engage in leasing must, under Articles 3 and 4 of the said law, have the authorisation of the Minister of Finance and, in order to gain such authorisation, must be joint-stock companies with an authorised minimum capital.

29.- In the Federal Republic of Germany opinion on the question seems to be divided. While leasing companies believe that there should be rules with respect to the minimum capital of specialist leasing companies as well as uniform accounting practices and an obligation to publish the accounts, the authoritative voice of Professor Drobniig (Hamburg) states:

"It appears doubtful whether any such qualifications should be established. Vis-à-vis the lessee this seems unnecessary: the lessor is the party who has to make full performance at the inception of the leasing contract. The lessee has only very few, if any, claims against the lessor, and for these he is moreover secured by the statutory right of retention on the leased goods (CC § 273).

Matters are different in the relationship between the lessor and his financier(s). However, here again it is doubtful whether the financiers require protection. Apart from their close "natural" contact with the leasing firm (they have very often created, and therefore do control, the leasing firm), the financiers as professional lenders know very well how to protect themselves. In Germany they may even demand real security for their loans to the lessor, namely by means of a security transfer of ownership of the leased goods."

30.- If such minimum qualifications were to be enacted, the Verband Schweizerischer Leasing-Gesellschaften would favour rules protecting the lessee's right to exercise his option to purchase in the event of the leasing company's bankruptcy and protecting the public to the extent that leasing companies may collect deposits.

31.- The Spanish would seem to favour the enactment of minimum rules governing which companies may practise leasing in the interests of ensuring that only serious companies should be allowed to operate in this field and of ensuring a better protection for the rights of the lessee. Equally it was the opinion of a Dutch company that "some standards as to financial stability and technical skill are desirable."

QN. 4. Would you agree that the sole purpose of the finance lessor in a typical financial leasing operation is to advance the funds required for the lessee to obtain the use of certain goods ?

32.- It was generally agreed that this constitutes the essential, rather than the sole role of the finance lessor. Replies indicated, however, that leasing companies also give important guidance on the structure of the lease, alternative methods of finance, particularly when they are themselves able to offer alternatives; that leasing companies have to be prepared to intervene in the event of litigation between suppliers and lessees; that leasing companies refuse to purchase and lease such equipment and machinery as is known by experience to be unsatisfactory. However, some replies indicated that an eventual definition would have to stress the difference between a lease and a loan. One Dutch company stated: " / W/e are in favour of a definition emphasizing the service of providing the client with working plant he desires without investing his own capital" whilst one United Kingdom company replied: "The lessor advances funds in a certain way which results in the lessee paying for the equipment in a manner which is not possible if funds had been borrowed." It seems necessary to add that the rights and duties of the lessor are perhaps more ample than the statement made in this question, but that the primary duty of the lessor is, subject to the reservations illustrated above, correctly stated.

QN. 5. Are the leased goods in a typical financial leasing situation delivered direct from the supplier to the lessee and would you agree that the finance lessor normally has no means at his disposal for examining the technical qualities of the leased goods ?

33.- The goods are in fact almost invariably delivered by the supplier to the lessee who will previously have himself selected them. While the lessor rarely undertakes any technical assessment of the goods he leases, he will not agree to buy goods from a supplier whose reputation is in doubt. It is for the lessee to check the technical quality of the goods he receives. However, a reply from Belgium indicates that the lessor could always refuse to intervene if he found that the goods did not meet with his approval.

34.- The joint reply of Mr. Bey and Professor Gavalda (France) indicated, however, that the lessor, in France at least, does have some possibilities of vigilance as regards the technical qualities of the goods he leases, first, at the stage of his examination of the potential lessee's initial application when he will see whether or not the equipment sought is standard, and, secondly, after the contract has been concluded when the lessee sends the lessor his note announcing his receipt of the goods, the lessee's signature amounting to an acknowledgement that the goods delivered conform with the order made by the lessor.

35.- A special situation prevails, as indicated above, in Eastern Europe. For example, in Hungary the supplier is usually a foreign firm and, therefore, delivery cannot take place directly to the customer, the agent appearing in the contract being the competent foreign trading firm. The replies from the Czech Chamber of Commerce and the National Bank of Hungary pointed out that the lessor must have the means of verifying the technical features of the goods.

QN. 6. Would you agree that two of the unique problems raised by the tripartite contractual relationship encountered in financial leasing are:

a) the question of the person to be sued and the basis of the action to be brought in the event of the leased goods proving to be defective or failing to meet the purpose for which their use was obtained, and

b) the question of liability for injury caused to third parties by the leased goods ?

How are such problems dealt with or likely to be dealt with in your experience ?

36.- The first of these two problems was generally recognised to be one of the major problems, if not the major problem associated with leasing. One of the most enlightened comments on this subject came from Dr. Garcia-Barbón y Castañeda (Spain) who suggested that the best method of solving question (a) would be to recognise legislatively the autonomous sui generis character of the leasing contract, providing it with an appropriately autonomous legal definition, thus avoiding the pitfalls hitherto experienced by the courts in attempting to fit the solution of this problem into the institutions of the traditional contractual schema.

37.- Hitherto problem (a) would seem to be solved in virtually all countries by the lessor assigning his rights against the supplier in the event of the goods supplied proving to be defective or unfit for the use for which they were intended. This he does in his leasing contract with the lessee by excluding his own liability for such cases. This is achieved by a tripartite agreement in the United Kingdom (whereby the supplier passes all the guarantees and warranties affecting the goods to the lessee), and by virtue of "stipulation pour autrui" or "mandat" in France. In Belgium it would appear that such an assignment has to be notified before it can be invoked, with the result that lessor and lessee will sometimes be co-plaintiffs against the supplier. In Finland the lessor acts as defendant in such a dispute, qua owner of the goods, but the legal proceedings take place mainly between the lessee and the supplier. One Danish reply indicated that a leasing company in Denmark would support the risk of subsequent defects where these could not have been discovered by the lessee at the outset of the lease (by virtue of the principle "caveat emptor"). In Sweden the problem is little known as yet, although a lessor will often await approval of the goods from the lessee before making payment. In Federal German leasing contracts the lessor usually reserves his right to sue the supplier in these cases should the lessee fail to exercise his right of action. In the United Kingdom too, a lessor will sometimes agree to go against the supplier of defective goods or goods unfit for the purpose for which they were intended, provided that the lessee indemnifies the lessor in respect of its costs. As one reply noted this is, however, "cumbersome and time consuming and may result in adverse publicity or conflict of interest."

38.- As regards problem (b) it would seem that this is usually covered by an insurance policy taken out by the lessee, in accordance with the terms of his leasing contract which normally exclude the liability of the lessor for such damage (21). This, however, raises the question, unresolved as yet, of whether an injured third party may in fact sue the lessor, irrespective of any conditions in the leasing contract purporting to exclude such a course of action. So far as the leasing of ships and aircraft is concerned and in other

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(21) In France this is furthermore a simple application of the principles embodied in the Civil Code entailing "responsabilité du fait des choses", liability which automatically attaches to the holder of goods.

cases when such damage claims could be very substantial, a prudent lessor will itself effect insurance with the premium cost in respect of such a policy being somehow passed on to the lessee. In any case, the undoubted European majority opinion is currently that it is the lessee who must respond for such damage, so that the lessor would be able on this principle to bring an action of recourse against his lessee. In Finland, a distinction is sensibly drawn depending on whether the damage is due to a manufacturing defect - in which event the supplier would be held liable - or an improper use of the goods, in which case the lessee would be liable. One United Kingdom reply indicated a similar line: "the lessee would join the supplier or manufacturer in the action if there was evidence that the injury had been caused by defective goods." However, the same comment goes on to add the rider that "it is difficult to accept that a lessor could be responsible for injury caused to third parties, and in the United Kingdom it is necessary to prove negligence." (22)

39.- In East European countries the situation regarding both problems is complicated by the factors which we have already had occasion to mention. To quote from Professor Eörsi's reply: "The problems involved in tripartite contracts are in Hungarian financial leasing of ever greater complexity, for here... three persons, and not a single person, viz. the foreign trading enterprise, the builder of the project and the banking institution are inserted between manufacturer and user." The reply of the National Bank of Hungary states: "Lessors undertake in most cases warranty, even if they are not suppliers of goods. There are cases, on the other hand,

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(22) Cf. Magnuco: "Finance Lessor's Liability for Personal Injuries" (1974) University of Illinois Law Forum 154, where he states at p. 165: "Under a finance lease... the lessor can have no direct effect on the safety of the leased equipment. The lessor never takes actual possession of the equipment and possesses no expertise in its maintenance. Furthermore, the lessee undertakes the burden of maintaining the equipment. The safety of the equipment therefore depends directly on the manufacturer and the finance lessee." At p. 167 he argues: "Sentiment favours placing the economic burden on the large enterprise that sold the defective product rather than on the innocent plaintiff injured by the defect. The deep pocket sentiment is relevant in most cases in which the plaintiff seeks to impose liability on a business enterprise... It applies to the finance lessor to some extent because the finance lessor is a large investor making a profit by leasing equipment. Since the finance lessor enjoys tax and other benefits of ownership, he should also assume the burdens of ownership, one of which may be strict liability."

where the lessors are willing to conclude contracts only on the condition that the lessee gives a preliminary declaration to them, according to which it waives claims of any kind which could be made against the lessor. Such a solution occurs if the lessor is a financial company or a bank." The reply from the Yugoslav National Committee of the I.C.C., however, felt that it was indispensable to bring the lessor into the network of liability and compensation.

40.- Professor Goode's reply mentioned two further problems:

"(a) Difficulties arising where the lessee does not wish the existence of the lessor to be made known to the supplier and therefore stipulates that it is to be allowed to purchase the goods from the supplier apparently on its own behalf though in reality as agent for the leasing company.

(b) The problem arising from the fact that the leasing company does not wish to commit itself to the supplier until it knows that the lessee is going to sign the lease while the lessee may be reluctant to sign the lease before it has taken delivery of the goods and satisfied itself that they conform to the lessee's requirements."

Qn. 7. What criteria are adopted in your country for fixing the sum payable by the lessee upon his defaulting in payment of the rentals due under his contract and what validity is accorded to such minimum payment clauses in your country ? (23)

41.- The general solution in such cases is, by contract, to require the lessee to return the equipment and to pay the total balance of rentals due, discounted to reflect the sale or re-leasing of the equipment, although in the United States the lessee must also pay any deficiency in the sale price under stipulated value, in Sweden the lessor will rather claim damages representing between one-half and two-thirds of the contracted sum, whilst in Finland the

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(23) Here one should mention the French law of 9 July 1975 which has added the following paragraph to Article 1152 of the Civil Code:

"The judge may nevertheless reduce or increase the penalty agreed, if it is clearly excessive or derisory. Any provision to the contrary shall be considered as not having been written."



damages to be claimed must not exceed three-quarters of the total of the outstanding rentals and only if the remaining term of the lease is shorter than one year the total of the outstanding rentals. Lessors in some countries can also demand interest, at the rate fixed in the contract. However, it must always be remembered that the court is always prepared to intervene, in general, where the penalty claimed is unreasonable or excessive.

42.- The reply of the Equipment Leasing Association of the United Kingdom indicated that, where a third party is involved, a separate arrangement may be made where an agreed price is set at convenient break points for the third party to buy the equipment from the lessor.

43.- In Hungary the general rule provides that in relations between State enterprises an interest on arrears of 15% per annum is due on late payments. However, one should also note § 246(1) of the Hungarian Civil Code whereby a person in default with rentals, failing to perform his contract in some other way or performing it in a faulty manner, may undertake to pay a certain sum as liquidated damages. In Yugoslavia it would appear that the damages awarded would differ according to the individual case. In Czechoslovakia the lessor takes back the goods from the lessee after three rentals have remained unpaid.

QN. 8. Is an option to purchase regarded as an integral part of a financial leasing contract in your country? Do such options to purchase ever appear in other types of leasing contract? What level of price is normally fixed on the exercising of such an option in your country?

44.- This question perhaps more than any other marks the watershed between the Common law or Common law-inspired countries and those countries belonging to the civilist tradition. In fact, whereas for many countries, including France, Italy, Belgium, Hungary, Yugoslavia, Switzerland, Spain, Netherlands, as also in the contracts concluded by EUROFIMA, an option to purchase is regarded as an integral part of any financial leasing contract and in some countries is widely used in operating leasing, particularly in Eastern Europe, and in sale-leaseback, in many other countries, notably the United Kingdom, Australia, Japan, Denmark, Finland, Norway, Sweden, Korea, the presence of such an option, either in verbal or written form, would

destroy the character of a true lease, in the eyes of the revenue authorities, and turn it into either a hire-purchase agreement or an instalment sale, with very different legal and fiscal implications. It is submitted, however, that the differences between the two blocs of countries are more in appearance than in reality: by way of example, it should be pointed out that, in the United Kingdom, a lessee under a financial lease, once he has paid all his rentals in the primary full-pay-out period, enjoys the continued use of the equipment for a peppercorn, and the lion's share of its value when it comes to be sold.

45.- The situation in Federal Germany and Austria would seem to be somewhat between these two extremes. In the former an option to purchase is frequently to be found in financial leasing contracts, but is never regarded as an integral part of such a contract. Such an option will not, for example, be found in non-pay-out leasing contracts and in leasing contracts which are subject to termination by notice. Industrial enterprises in Federal Germany only grant such options with a set time-limit. In Austria a financial leasing contract must not incorporate a purchase option, but there is the possibility of purchasing the object after the expiration of the contract. Something similar is found in the United States. To quote a reply from that country, "the option is, of course, highly desired by the lessee in a full-pay-out situation, but is often satisfied by a good faith reliance on the integrity of the lessor not being greedy at the end of the lease. This is so because the giving of an option endangers the tax benefit of rental deductibility."

46.- While the same reply continued: "The option clearly is dependent, where rationally determined, on the relationship between the term of the lease and the economic life of the equipment. In evolving technology fields, this can be impossible of accurate quantification", in those countries where an option to purchase is permitted, the price fixed on the exercising of such an option will either be the residual value of the object (fixed in the Federal Republic of Germany, for example, according to the recognised fiscal value of the object) or a nominal sum ranging from 1% to 8% of the object's cost price.

QN. 9. What is the situation in your country where goods leased under a leasing contract are then affixed to realty, for instance, do such goods remain personalty ?

47.- This question produced no really clear answer, as very few countries have rules on the subject specifically framed with leasing in mind. However, it can be inferred from the body of the replies that the answer to this question would usually depend on the manner in which the leased goods were affixed to realty. Thus the Common law countries generally regard such goods as personalty unless they are affixed permanently to realty. A similar result is achieved in Japan. The Socialist countries of Eastern Europe and the Federal Republic of Germany consider that such goods remain personalty. The Scandinavian countries seem to adopt the view that the leased goods will only remain personalty in such a situation if they do not on attachment to realty become a natural part thereof or an accessory thereto. A Danish reply indicated that if a machine is installed in certain premises at the expense of the owner of these premises, no special right can be enforced as regards that machine. Thus where the lessee is the owner of the premises and these premises are part of his business, the lessor will not be able to claim ownership in the machine. In Sweden "industrial real estate" and special machinery which is leased is excepted from the general rule of law and remains personalty.

48.- In France such goods will generally remain personalty provided that the owner of the goods is not the owner of the realty involved. The Netherlands adopt the pragmatic approach evidenced in the Scandinavian countries: as long as the movables can be removed from the immovables in such a way that no damage is caused either to the movables or to the movable to which it had been affixed, they are considered as remaining movables. In Belgium the arrêté ministériel of 23 February 1968 provided that a plate should be installed on the goods indicating that they remain the property of the lessor. However, to the extent that this is not conformed with, and notwithstanding the fact that such goods cannot become "immeubles par destination" because the lessor remains their owner, problems arise where the lessee becomes bankrupt. The Swiss reply indicated that the title of the lessor in such a situation would be difficult to prove in view of Articles 642 and 644 of the Swiss Civil Code. In Austria, if it is intended that such goods remain the property of

the lessor, they must be so described in the Land Register. In Korea the Leasing Industry Promotion Law provides that such goods shall remain the lessor's property provided that identification marks on them attest to this fact.

49.- Several replies, notably from the United States and the Republic of China (Taiwan), indicated that this problem is usually resolved by most lessors by obtaining waivers from landlords or mortgagees.

QN. 10. Are any encumbrances permitted over leased goods in your country ?

50.- Certain countries, notably France, Spain and Italy do not permit encumbrances over movables, although in Italy this rule is tempered for leasing to the extent that such an encumbrance may be created with the agreement of the lessor. India does not permit the creation of any encumbrance over hired assets generally. Although in most other countries the lessee is theoretically at law entitled to create an encumbrance over the leased goods, this possibility is almost invariably prohibited by the leasing contract itself (24). Professor Drobnig (Hamburg) points out, however, that this prohibition need not necessarily bind third parties who are entitled to acquire encumbrances under the general rules governing the acquisition in good faith from a non-owner. In practice, furthermore, at least in the United Kingdom, it is possible, notwithstanding such a prohibition in the leasing contract, to take a mortgage on a ship which may be the subject of a bare - boat or time - charter and a semi-formal "arrangement" exists for noting the U.K. register of aircraft, the practical effect of which is similar to charging the asset.

51.- Some exceptions to the general rules indicated above are, however, to be noted. Thus in the Netherlands encumbrances are permitted over leased goods, provided the rights and obligations of the lessee are not modified. In Belgium while there are no encumbrances as such over leased goods, the use of such goods can be restricted by the taking out of a certificate.

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(24) Although an Australian reply pointed out that the lessor may charge his reversion.

52.- In Eastern European countries no possessory lien can be established without the delivery of the pledged chattels. However, in Hungary a lien securing a banker's credit may be established even without the delivery of the pledged chattels, as soon as the bank credit is granted.

QN. 11. Does your national law permit a leasing contract to be assigned ?

53.- It would seem that leasing contracts are usually assignable, whether by lessor or by lessee, although the leasing contract usually provides that an assignment by the lessee requires prior approval by the lessor. Exceptions to this general rule are Korea where the lessee cannot assign the leasing contract to others, although the lessor can, and Austria. Furthermore, in Belgium, whereas assignment by the lessor is quite possible, it would appear that assignment by the lessee hardly ever happens and that the assignment of possession is generally prohibited by the terms of the leasing contract.

QN. 12. Is there legislation in your country designed or apt to protect the lessor's title as against third parties ?

54. Apart from France and the United States, whose special legislation - based systems of publicity were illustrated in the preliminary report of the Secretariat, only Belgium and Korea have special legislation on this question. The Belgian arrêté ministériel of 23 February 1968 creates the duty for all lessors to place a plate on the equipment leased specifying that it is his property. The Korean Leasing Industry Promotion Law protects the lessor's title against third parties, by obliging leasing companies to attach to the leased goods identification marks the contents of which no other person can destroy, remove or change. Those who infringe this provision are liable to a fine. In Italy the lessor's title is adequately protected in respect of movables registered in public registers and machines and equipment subject to special requirements as to form and/or registration.

55.- Otherwise in all other countries the only existing protection of the lessor's title as against third parties will currently depend upon the law of property for Common law countries and the provisions of civil codes and relevant property legislation in the remaining countries. For instance, in the United Kingdom, apart from the special provisions enacted for ships and aircraft, the Common law rule nemo dat quod non habet adequately protects the lessor's title as against third parties for most purposes. Although there are statutory exceptions to the nemo dat rule in the United Kingdom, most of these are inapplicable to goods let on lease. In the Federal Republic of Germany the lessor's title is only protected in the framework of the general rules on good-faith-acquisition of title to movables. Generally speaking, a third party will acquire title to the leased goods if the lessee sells them to a third party and transfers possession to him, unless the third party was negligent in ignoring the lessor's title (Civil Code § 932). A Finnish reply referred to some old regulations, particularly under that country's Distraint Act, protecting the lessor's interests.

56.- The unsatisfactory nature of this situation in certain countries was brought out in the reply of Dr. Garcia-Barbón y Castañeda (Spain) who pointed out that there are no special legal rules in Spain which enable a leasing company to defend its title other than those which may be exercised by any owner of movables. The leasing company must therefore engage the customary declaratory procedure, in which the value of the goods whose return he is claiming will be declared. Dr. Garcia-Barbón y Castañeda regards this procedure as being ill-fitted to the needs of trade law business.

QN. 13. To what extent do you feel that leasing can be dealt with independently of security interests in general?

57.- This was intended as quite a wide-ranging question to stimulate comment as to the desirability or otherwise, particularly in the light of Professor Goode's suggestion mentioned in the preliminary report of the Secretariat at § 57, of subsuming leasing under a general treatment of security interests. Professor Goode's reply here is perhaps worth citing:

"In my view retention of title under a finance lease should be treated as a security interest for the purpose of any statute requiring the registration of security interests. This was indeed advocated by the Crowther Committee in its report on consumer credit following on Article 9 of the American Uniform Commercial Code."

58.- Clearly the comments of the Service de Recherches Juridiques Comparatives of Paris, as discussed earlier, would favour the enlargement of the scale of UNIDROIT's endeavours in this field to embrace the entirety of secured transactions not involving dispossession.

59.- The general view emerging from the replies, however, was that it would be better to deal with leasing independently of security interests. Professor Drobnig (Hamburg) said: "Although leasing resembles security interests in certain respects, the two institutions are clearly independent of each other. Leasing can therefore be dealt with independently of security interests." The Equipment Leasing Association of the United Kingdom replied: "As a general statement, we do not believe any special preference or protection need be given to the owner of movable securities which are leased, as opposed to the owner of movable securities which are not leased. If however, the question of security interests is to be examined, then since we believe that leasing is a distinct facility - i.e. not a loan against security and certainly not a conditional sale - we would not like to see the security aspect of leasing dealt with in measures designed with quite different types of transactions in mind." Another reply from the United Kingdom nevertheless added the following suggestion: "We do, however, believe that it would sometimes be helpful if a chattel mortgage system could be introduced so that any owner (whether such was a lessor or not) or a party having an equitable interest in a movable security could better protect its existing position." The reply of the "Verband Schweizerischer Leasing-Gesellschaften" expressed the view that leasing should be dealt with as such, with particular attention being paid to the extent of the lessee's solvency, both as regards the amount of his assets and his profit-earning capacity, and only secondarily to the value of the object leased, excluding, subject to exceptions, the creation of particular security interests, such as "nantissements de valeurs", mortgages, personal guarantees, sureties. The reply of the "Association Belge des Entreprises de Leasing" put the matter quite clearly when it stated that the answer to the present question depends on one's conception of the leasing contract. They said that if one considers leasing as a financing operation, the problem of security interests may arise just as for any other financing operation. If, on the other hand, in accordance with the legal nature of the leasing contract, one saw in it above all the hiring of goods with the lessor remaining the owner of such goods, the problem of security interests only arises to the extent that the ownership of the leased equipment does not of itself amount to adequate security. One Danish reply, in marked similarity, commented: "The lessor has the ownership of the equipment which separates leasing from movable securities in general, for example a mortgage of equipment, where the debtor is the owner."

QN. 14      Passing to the specifically international leasing situation, would your answer to questions 1.1. and 1.2. differ in respect of international leasing?

60.- Prior to analysing the replies specifically devoted to international or cross-border leasing, a fitting preface is to be read in the remarks of Professor Drobnig (Hamburg):

"There seem to be two forms of international leasing operations, although only one of these eventually remains a truly international leasing transaction.

If a prospective foreign lessee wishes to acquire goods from a German supplier by leasing, usually the German leasing company will refer this transaction to a foreign correspondent in the country of the foreign lessee. The foreign leasing company then concludes the leasing contract with the foreign lessee. The German leasing company is not a party to this contract, but may receive merely a small commission. This practice is based on the consideration that only the foreign leasing company can properly explore the economic standing of the prospective foreign lessee and that it can also best tailor the terms of the contract in accordance with the legal and especially the fiscal situation in the country of the lessee. This form of leasing as such, however, does not really involve an international element. The contact with the foreign country of the supplier is only brief; the essence of the transaction described is to "nationalize" the leasing transaction in the country of the lessee and thus to remove the international element which it had originally contained. For convenience' sake, these operations may be called "indirect international leasing contracts". They are by far the more frequent ones.

By contrast, "direct international leasing contracts" are very rare in Germany. The initial fact situation is the same as that described above. However, in these cases usually there are no leasing companies in the country of the prospective foreign lessee, so that the German leasing company concludes a contract with the foreign lessee. Also the reverse situation (foreign leasing firm, German lessee) is very rare for fiscal and customs reasons."

61.- A further reply from the Federal Republic of Germany, referring to the almost insurmountable problems raised by direct international leasing, pointed out that German leasing companies prefer mainly to do their export business and foreign investments in the form of international co-operation. The leasing contract is then concluded between a national leasing company and the lessee and the former purchases the object direct from the foreign manufacturer.



62.- The "Locabel" Company of Belgium pointed out that, in its view, at the level of international leasing, a distinction had to be drawn between two main types of operation: first, the so-called "fournisseur" leasing operations essentially involving export firms in search of a method of financing their exports, and, secondly, big-ticket leases which are generally very complex and fulfil strictly fiscal or financial purposes.

63.- Japanese replies indicated that there are no direct international leasing operations to overseas users, such operations being made through overseas branches or joint ventures. Equally most foreign firms do their business in Japan through their subsidiaries established under Japanese law.

64.- Danish and Swedish leasing companies tend to prefer close cooperation with leasing firms in other countries, thus in effect turning international operations into domestic ones.

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65.- Most replies indicated that their reply to QN. 1.1 would not differ as regards international leasing, except that financial leasing primarily and sale leaseback secondarily predominate here even more so than in internal leasing. In Eastern Europe the situation would seem to be different, however, with operating leasing being resorted to much more frequently than financial leasing.

66.- The answer as to QN. 1.2 might differ in that the lessee's choice of the form of leasing may have to be varied for certain goods, for example a United Kingdom lessor cannot own an aircraft which is to be operated on the U.S. register and in these circumstances some form of short-term "wet" lease would probably be required. A reply from the United States indicated that his answer to QN. 1.2 might vary for international leasing depending on local tax realities.

67.- The French view this differently. The joint reply of Mr. Bey and Professor Gavalda submitted that the form of leasing does not depend on the lessee, but is determined rather by legal and fiscal considerations relating to each country. They state that the lessor is influenced by two main factors: absolute respect for his title to the goods so that leasing contracts will not be concluded where they risk being treated by the local courts and authorities as instalment sales or hire-purchase contracts with an immediate transfer of title from the so-called lessor to the so-called lessee, and the possibility for him to transfer the rentals out of the country of his co-contractant into his own country, and not be subject

there to taxation or duties which cannot be borne directly or indirectly by the user of the equipment.

QN. 15. What would you estimate as the proportionate incidence of the various forms of leasing employed in international operations?

68.- No statistics were available but most replies indicated that, the countries of Eastern Europe apart, the vast majority of such operations use financial leasing. One French authority suggested that the proportion of such international operations not using financial full-pay-out leasing must be virtually nil.

QN. 16. Is the lessee/user in international leasing operations usually a firm or is he sometimes, and to what extent, also a consumer? What is the approximate ratio as between the different types of lessee/user?

69.- International leasing operations almost invariably have corporate bodies or government agencies as the lessee. As Mr Bey and Professor Gavalda say, this is in the interests of the legal and financial certainty of the operation. They point out that in certain countries, such as Switzerland and the Federal Republic of Germany, the conclusion of such an operation with non-merchants would mean having to observe public policy formal requirements absolutely incompatible with the speed and operational technique of leasing. Furthermore, in view of the complex nature of and large financial sums involved in such operations, the co-contractant must have great prestige and the contract must concern very valuable equipment.

QN. 17.1. In the light of the previous questions regarding leasing operations in general, what, in your opinion, are the aspects of international leasing operations that give rise to especial difficulty and/or differ from those commonly encountered in purely internal leasing operations?

70.- The special difficulties mentioned were:

(i) The disparate treatment from country to country concerning what is to be regarded as a genuine leasing contract for legal purposes, irrespective of the parties' denomination of their agreement. (25) Connected with this is the question of where title resides (and in the United Kingdom the question of legal and equitable title) and when it passes. This will

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(25) An example cited was the case of Finland where financial leasing is regarded as a financial operation and the leasing company is not recognised as the owner of the goods. For these reasons many companies, as indicated above, set up foreign subsidiaries who then carry out the operation according to their national law.

be answered differently by the different legal systems depending on the qualification the individual contract is to be given under the particular legal system involved.

(ii) Problems relating to the transfer of earnings and the risk of adverse effects through changes in exchange rates (which party should bear such risks). The currency in which the rentals are to be paid has to be convertible; the debtor has to have capital in this currency and must bear exchange risks, according to the reply of Mr Bey and Professor Gavalda.

(iii) The disparate treatment from country to country as to what is to be regarded as a true lease or a concealed sale for fiscal purposes, irrespective of the parties' denomination of their agreement.

(iv) The fiscal factors relating to whether or not a non-resident can be considered to have title to leased goods.

(v) Additional tax problems, arising out of the clash between two revenue systems. These include notably problems relating to value-added tax and to the withholding of taxes. Given that the revenue law applied is the law of the country where the goods are being used, international operations are sometimes extremely difficult where the lessor is a foreign national. The reply of Mr Bey and Professor Gavalda indicated that international conventions exist which settle some of these problems, in particular those relating to fiscal guarantees (double imposition, for example). A reply from Spain also referred to the double payment of customs duties, once on importation for the period of use (temporary importation) and then again a final payment on the definitive importation of the goods.

(vi) Problems of interpretation and quantification of damages by foreign Courts consequent upon any default by the lessee and with regard to the enforcement of judgments by foreign courts.

(vii) Several replies (notably from the Netherlands and the Republic of China (Taiwan)) pointed out that, although the leasing agreement may state the governing law to be that of the lessor's country, this will not be considered a valid clause in the country of the lessee.

(viii) Central bank approval is difficult to obtain. The reply from the Republic of China (Taiwan) stated that "financial regulations may make it difficult for the lessee to obtain central bank approval for a lease liability in a foreign currency."

(ix) A problem which is both related to (viii) and the political risk inherent in export leasing (danger of non-recovery of rentals and equipment and danger of non-transfer and non-reexport of currency) was mentioned in the reply of Professor Vasseur (Paris) who indicated that one of the main problems for international leasing in France is caused by the refusal of the French Authorities to grant public export credits for international leasing operations in which the lessor is a French firm and the lessee, domiciled abroad, is a foreign firm. As Professor Vasseur said, this problem can only be circumvented by the creation abroad of an international leasing company as a subsidiary of the French leasing company.

(x) Expropriation

(xi) Problems associated with estimating the creditworthiness of the lessee and his capacity of survival.

QN. 17.2 In particular, is the burden of the obligations arising under an international leasing operation distributed differently from or in much the same manner as for internal leasing operations as described in the Secretariat's preliminary report?

71.- The burden of the obligations arising under an international leasing operation is distributed in much the same manner as under an intra-national operation. The parties to an international operation are concerned about just the same factors as they would be in an internal leasing situation (i.e. specialisation of the parties, transfer of guarantees and actions of the owner against the lessee, etc.), subject, however, to certain alterations in the legal relations between the parties arising out of the complex nature of specifically international operations. In this connection Professor Drobnig indicated that "[t]he terms of international leasing contracts differ from those of ordinary German leasing contracts in that an attempt is being made to take into account the national laws both of the lessor and the lessee."

QN. 18.1 In which of the various forms of leasing employed in international operations do you think that the need for the preparation of international uniform rules would be most useful and is most keenly felt?

72.- Here there was a great diversity of replies. There were those who felt that international uniform rules would be to the mutual advantage of lessor and lessee for all forms of leasing used in international operations. There was a majority of opinion which favoured precedence being given to financial leasing (one reply suggested that sale-leaseback might be dealt with secondarily). A Belgian reply suggested operating leasing is the field where the lack of international uniform rules is most keenly felt.

73.- The reply of the Belgian Locabel company pointed out that it is obviously "fournisseur" leasing operations which ought to be given priority in the preparation of international uniform rules. The Director of Locabel, Mr Bibot indicated that such operations are in fact not always carried out with the aid of a bank or a body with expert knowledge of international dealings, but directly between manufacturers and users through their respective leasing companies which do not necessarily have any international experience. He distinguished these operations from big ticket leases which are generally concluded by large firms which are acquainted with international regulations and find a means of conforming thereto, may even of turning them to their advantage.

74.- The answer from the Equipment Leasing Association of the United Kingdom was guardedly in favour of "finance full pay out leasing, but the preparation of international uniform rules is not practicable until it is clearly established what is meant by a lease, having regard inter alia to our view that any agreement incorporating an option to purchase cannot be a lease. Even then it would be difficult to lay down uniform rules, because systems of incentives, may differ from one country to another and may be mutually inconsistent."

75.- A further reply from the United Kingdom stated that they felt it would be useful if

"(a) There could be general agreement among all countries on a common form of registration of ownership of equipment whether leased or mortgaged.

(b) It could be generally agreed that the existence of an option to purchase had or had not the effect of changing a true lease to a hire purchase agreement and if the fiscal consequence flowing from such a decision could be standardised, and

(c) International agreement could be reached regarding the non-liability of lessors in respect of damage to third parties. There is a danger, particularly for bank lessors that a damaged third party will join the lessor in any suit against the lessee in the belief that the latter would be weaker financially than the lessor. This contains an obvious danger."

76.- Some replies felt that the preparation of such rules was either inopportune at the present time or premature. On the first score, one United Kingdom reply suggested that the preparation of such uniform international rules "should be held in abeyance until such time as there is further progress in relation to the harmonisation of taxation and chattel security laws within the EEC." Professor Drobnig felt that "uniform rules for

international leasing operations seem to be premature at present, for two reasons: first, since at national level leasing is still in full development; and, secondly, since the only truly international leasing operations (direct international leasing...) occur at present only very rarely."

77.- A Norwegian bank, on the other hand, felt that "uniform international rules would be most helpful and accommodate further growth of leasing. It also has an economic aspect, as uniform rules would simplify matters and reduce costs."

78.- The general conclusion that the Secretariat was able to draw from all these replies was that an international unification of the rules relating to international leasing is not practicable until some unification is first achieved at the level of leasing as practiced in the individual countries, particularly as regards the question of a uniform definition. For these matters the reader is referred to the opening section of this paper, at §§ 4-5.

QN. 18.2 How far do you consider the various forms of leasing employed in international operations to merit special, individual treatment, or could they rather be dealt with adequately and conveniently at the same time and in the same instrument?

79.- Most replies favoured dealing with the different forms of leasing individually, although with the same basic overall framework. The "Verband Schweizerischer Leasing - Gesellschaften" favoured, in this regard, dealing with financial leasing and sale-leaseback by themselves and operating leasing by itself. The joint reply of Mr Bey and Professor Cavaldi (France) stated that both financial leasing and leasing generally have certain common philosophical, economic, legal and fiscal features and for this reason they felt that it would be useful to deal with these common features at the same time and in the same instrument. They argue that this need not prevent the particular characteristics of each type of activity being given special treatment within the selfsame instrument. The essential concern of the parties to this type of operation is, they point out, to eliminate potential conflicts of law and to harmonise the fiscal situation.

QN. 19 To the extent that international rules are felt to be called for in this field, which form of unification would, in your view, be more fitting:

- a) international uniform legislation or
- b) some form of model contract or
- c) a combination of the two (i.e. a) and b)), bearing in mind that

certain subjects which at present are in practice normally covered by the lessor's general conditions or standard forms of contract should perhaps be subjected to some form of mandatory rules of law, without prejudice, however, to the basic principle of the parties' freedom of choice as to all other matters not subject to such rules.

80.- Whilst a considerable number of replies favoured a model contract, particularly to the extent that this would help identify the problems to be solved, the dominating view was that the best solution would be international uniform rules accompanied by a model contract.

81.- Professor Goode felt that while "there is much to be said for some model form of international leasing contract ... provision would have to be made for special conditions to be added that would be peculiar to the particular subject matter involved." However, as a Belgian reply indicated, a uniform model contract would be inconceivable without the framework of some international rules, on which it would be based. A model contract without such rules, the same reply stated, would not bring progress, as the contract would then be subject to national law. The general view of the leasing industry was that any such rules would not have to be so inhibiting as to check further constant development and growth of leasing to fit better the lessee's needs and demands.

82.- Everyone seemed agreed that the preparation of such a model contract and accompanying international uniform legislation must not interfere with the parties' freedom of contract more than is necessary to secure the basic rules on the main questions adverted to throughout this paper, notably regarding protection of the lessor's title, transfer of guarantees and the legal means whereby the lessee can proceed against the manufacturer/supplier, freedom to transfer rentals exempt from taxes and duties, etc. Thus the reply of Dr. García-Barbón y Castañeda indicated that, while he favoured the preparation of uniform international rules establishing a model contract, regarding the respective rights and duties of the parties, this would have to safeguard the parties' "autonomia de voluntad" to establish the express agreement and conditions they consider to be necessary.

83.- The most cautious in their attitude to eventual international uniform rules were the United Kingdom replies. One U.K. leasing company replied:

"We doubt if unification will prove readily practicable but we would favour the introduction of a uniform international set of rules provided this supplants all existing national legislation. If, however, a set of rules is introduced which does not have this consequence it would in all probability further confuse an already complicated situation.

We do not believe it desirable for a model contract to be introduced and feel that lessors/lessees should be permitted to continue to negotiate their own terms as at present. It might, however, be desirable to write into the uniform international set of rules provisos to the effect that certain statutory information regarding the lessor/lessee, the goods and the insurance thereof were incorporated into leasing contracts, and that the type face used for printing lease documents was of a minimum size so that it could be read without spectacles."

84.- The U.K. Equipment Leasing Association was rather less guarded in its reply:

"International uniform legislation would be the best of the three forms of unification; because leasing is flexible and the terms of the agreement are tailor made, international uniform legislation would give a framework of certainty, within which the partners can negotiate the terms they want. A model contract could be rather restrictive, since it would not be possible to know what attitude the courts would take, particularly to the claims of third parties not parties to the lease contract."

85.- Among the Eastern European countries Hungarian opinion would generally seem to favour a model contract, whereas the reply of Dr. Richter-Hannes of the German Democratic Republic favoured the approach advocated by the majority and set out above, albeit in a different form, namely the combination of international uniform rules for financial leasing and model contracts for operating leasing.

86.- Generally, however, it must be stressed that leasing practitioners are very much in favour of international rules for leasing. Indeed the reply of EUROFLIA stated that: "International rules on leasing, accompanied by model contracts, are indispensable." In concluding, one should mention the perceptive words of Mr G.H. Dodsworth, M.P., "to the last annual working meeting of Leaseurope held in London in October 1975. Making a very strong plea for international rules on leasing, he stated:

"There is relatively little national legislation that specifically deals with leasing - and in some countries, including my own, there is none at all. In these circumstances it may be desirable to direct our attention to the concept of an international law - as opposed to a model law, or even model contracts, that might be adopted, or adapted, by nation states..."

I have in mind the international character of much leasing. We lease, among other things, items such as ships and aircraft, which will almost certainly move from one national jurisdiction to another - and we lease commercial vehicles, which may do so. But even where the leased

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\* Chairman of the U.K. Equipment Leasing Association and Vice-Chairman of Leaseurope.



item remains in one place, it is not unknown for the lessor to be in one country and the lessee in another - and perhaps the supplier is in a third.

In the absence of any international law, it would be possible to say that the lease must be interpreted according to the law of the lessor's country - unless the lease itself provides otherwise. This may suffice to deal with any dispute between the parties - though even this is not certain, since there may well be provisions in the law of the lessee's country from which contracting out is forbidden. But it cannot adequately deal with problems in which third parties are involved. When lessor and lessee are in different countries, and the lessee fails and goes into liquidation, any claims by the lessee's creditors on the assets, or apparent assets, of the lessee will be settled according to the law of the lessee's country, whatever the lease may say - unless or until there is an accepted international law.

It would also be clear, under the kind of international law of leasing that I have in mind, that lessors have freedom of establishment. It should be possible for a lessor in one country to set up a subsidiary or a branch in a second country subject only to the conditions that apply to lessors indigenous to that second country. I am doubtful if this can be assured in any way other than by an international law.

There are other aspects of an international law of leasing that can be touched on only briefly. Such a law might make clear, for example, that for capital or corporate tax purposes the leased asset is to be treated as the property of the lessor. It might provide that the withholding tax, if any, on rental payments is to be at most no greater than the withholding tax on loan interest. It might provide that there should be no fiscal penalties on import leases. It might stipulate that - unless a lease expressly provides otherwise - rentals are due in the currency of the lessor and that any risk of changes in the exchange rate is to be borne by the lessee.

There is one final point that should be most clearly made. The international law I have in mind should be specific to leasing and only to leasing. Whether there should be other international laws on other subjects is a matter on which I here express no opinion. But in an EEC context we have recently seen directives, draft directives, and other documents on credit institutions. It has been far from clear whether these directives cover leasing, or are intended to cover leasing, or should cover leasing. This is profoundly unsatisfactory. Leasing should be subject to law framed with leasing in mind, and not swept up inappropriately by legislation designed for some other purpose."