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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

RESTRICTED EXPLORATORY WORKING GROUP OF THE GOVERNING COUNCIL

ON THE LEASING CONTRACT

R E P O R T

of the session held in Rome 16-18 March 1977
incorporating the recommendations adopted by the Group
at its final meeting

Rome, March 1977

UNIDROIT Secretariat

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2. The Working Group was seized of the following papers:

(i) Report on the contract of leasing, prepared by the Secretariat (Study LIX - Doc. 1, UNIDROIT 1975);

(ii) Summary of the discussions of the Working Group called to examine the feasibility of preparing uniform international rules on the leasing contract (C.D. 54 - Doc. 4/1, UNIDROIT 1975);

(iii) Questionnaire on the leasing contract (with special reference to international leasing) (Study LIX - Doc. 2, UNIDROIT 1976);

(iv) Preliminary analysis of the replies to the Questionnaire on the leasing contract (with special reference to international leasing), prepared by the Secretariat (Study LIX - Doc. 3, UNIDROIT 1976);

(v) Note for the attention of the restricted exploratory working group of the Governing Council on the leasing contract (Study LIX - Doc. 4, UNIDROIT 1977);

(vi) Minutes of the 55th session of the Governing Council (C.D. 55th session, UNIDROIT 1976);

(vii) Note prepared by Messrs. P. Bibot and J. Ingelbrecht in reply to the letter of UNIDROIT dated 9.XII.1976 (Leasing C.D. Sub-Committee 2nd session - W.P. 1);

(viii) Le statut légal du leasing, par M. Paul Bibot, Directeur de la S.A. Locabel (Leasing C.D. Sous-Comité 2^{ème} session - D.T. 2) (French only).

3. The session was devoted to an extensive examination of the case for preparing uniform rules on the leasing contract, particular regard being had to the fiscal factors affecting said contract and to the relationship between such contracts and the general body of security interests. There was agreement among the members of the Group as to the advisability of the Governing Council proceeding to set up a study group empowered to draft uniform rules on the leasing contract. It was recognised that the need for such rules is probably felt more keenly outside the United States of America, for the simple reason that most non-American companies are still effectively operating in a legal vacuum. This, together with the other recommendations adopted by the Working Group at its last session, is set out in the paper annexed hereto, viz. Annex I. In accordance with the wish expressed by the Group at its final session, Annex II sets out the draft proposals submitted by Mr. F. Peter, expert consultant to the Group, both in their original German form (Annex II (a)) and in the English translation of the same prepared by the Secretariat with the assistance of Professor Vagts (Annex II (b)).

Recommendations of the restricted exploratory Working Group
of the Governing Council on the leasing contract

1.- Notwithstanding the considerable role played by fiscal considerations in specifically international leasing operations, it was felt that there is a sui generis derivation of private law in leasing which merits special rules framed with its peculiar characteristics in mind. The preparation of such rules can and must steer clear of those aspects of leasing which attract the attention of revenue authorities, the philosophies behind revenue law rules and private law rules being quite distinct.

2.- In the opinion of the Group, it is feasible to formulate a legal framework around the sui generis contract of leasing without such a definition bringing the contract automatically under the scope of Article 9 of the Uniform Commercial Code and similarly inspired security interest legislation. In particular security interests being closely tied to an underlying sale contract, the only real potential security interest in a leasing transaction would be the purchase money security interest relating to the sale contract between the manufacturer/distributor of the item to be leased and the prospective lessor and inuring in such case to the benefit of the former. The relationship between the lessor and the lessee under the leasing contract itself does not establish a security interest so long as no transfer of title takes place.

3.- The Group felt that the nature of the rules to be prepared should be international uniform rules, which would realise a dual advantage in leaving the decision as to the choice of their precise scope of application until a later moment: such rules could both facilitate clarification of the divergencies existing from country to country and serve specifically as rules governing international operations. A decision as to the precise form which such rules, once drafted, would take, that is, whether they should be presented as a uniform law or as a model law, was considered to be premature at the present stage. Such a decision could, it was submitted, better be envisaged at such time as the study group which it will be within the Governing Council's power to set up at its next session has completed the task of drafting uniform rules on the leasing contract. The preparation of a model contract was recognised

to be of little value without the stamp of approval of the parties that would be using it - reference here being made to the problems encountered on this score by the 1964 Uniform Laws on Sale - and in any event would involve such complex problems that it was considered to be premature to envisage such a step prior to the completion of the task of clarifying the few basic points regarding the sui generis characteristics of the leasing contract that are dealt with under the paragraphs that follow. The group drew attention to the prestige that could accrue to a draft boasting the combined blessing of bodies such as UNIDROIT, the Commission of the European Communities and the European Federation of Equipment Leasing Company Associations (Leaseurope).

4.- It was agreed that in every case in the drafting of uniform rules it would be necessary to take account of applicable national legislation.

5.- Clear concepts should be employed in the task to be undertaken so as to avoid an a posteriori classification of a lease as contemplated by the envisaged uniform rules under some quite different schema.

6.- It was felt that the principal aim of the envisaged draft would be to regulate the tripartite leasing operation in view of the sui generis characteristics of this operation by comparison with existing schemata. Such tripartite operations involve a leasing company which, at the request and on the specifications of the lessee, buys capital goods for the specific purpose of leasing them to the latter. It was felt that bipartite leasing operations should only be regulated in the envisaged uniform rules to the extent that such operations did not fit within the schema of a nominate contract and that where the operation fell within such a schema, then it should be treated in accordance with the appropriate provisions of municipal law.

7.- Leasing could be defined negatively for the purposes of the envisaged uniform rules as being neither a credit transaction nor a sale nor a financing transaction, but rather a special form of rental providing the use of goods. It was felt that the definition of leasing undertaken in any future measure could be devised in either or by an amalgam of the following ways: first, by identifying those characteristics which differentiate leasing from existing contractual schemata and, secondly, by enumerating the requirements to be fulfilled before a contract could be considered as a leasing contract, after the manner of the 1930 Geneva Convention on Bills of Exchange and Promissory Notes in its definition of a bill of exchange.

8.- The scope of the envisaged rules should be limited to capital goods, although a dissenting opinion favoured the preparation of rules covering leases in general so as not to exclude consumer transactions.

9.- The parties to the leasing contract should be professional parties, and the item leased should be obtained for professional purposes only, again subject to the dissenting opinion sub 8 supra.

10.- There is a case for excluding the leasing of aircraft, ships and rolling stock from the scope of the envisaged rules (1).

11.- A leasing contract envisages the use of the item leased for a specific length of time corresponding to the economic life of said item.

12.- The leasing company is and remains the owner of the item leased, whatever agreements may be made with regard to the termination of the leasing contract.

13.- The lessee cannot be obliged to purchase the item leased at the end of the contract. Equally the parties must be left free to include an option to purchase the item leased in their leasing contract. The additional possibilities open to the lessee on termination of the contract are either the restitution of the item leased to the lessor or a renewal of the lease.

14.- The lessor has the right to transfer to the lessee any right of action which would normally have inured to his benefit against the person from whom the lessor purchased the item to be leased. Unless the contract provides otherwise, the lessee has a direct right of action against the vendor in the event of the item leased not proving to be in conformity with the specifications given by the lessee.

15.- The lessee undertakes the physical risks arising in connection with the item leased. It was, moreover, the feeling of the Group that the general rule of the law of products liability under which the lessor would be liable as owner for damage caused to a third party could not be applied to the special situation obtaining in tripartite leasing.

16.- It was agreed that some means of providing for the protection of creditors would have to be found. One proposal, emanating from Leaseurope, postulated no special registration system but rather an accountancy rule, whereby the lessee would have to place his lease rentals in his profit - and - loss account and set out his total commitment under the contract below the line in his balance sheet. The lessor, under this rule, would have to put the assets leased in his own balance sheet. The books

(1) See decisions (2) and (3) of the restricted Working Group of the Governing Council on the leasing contract held in April 1975, C.D. 54 - Doc. 4/1.

in question would, under the terms of this proposal, have to be open to anyone interested in the item leased. Third parties would accordingly be under a duty to consult these books in order to invoke their good faith in dealing with the lessee. However it was felt by some that such a proposal could represent no more than a minimum requirement. Their feeling was that many countries would only be satisfied in such a situation if there were some form of registration of the lessor's title to the item leased. A question of public interest is involved and this could therefore well be argued as a case for mandatory rules. Either one could envisage the creation of a special registration system or one could leave the modalities of such registration to the individual countries, simply postulating that the lessor's title must be registered in accordance with the provisions in force in the individual countries in order to be valid against third parties dealing with the lessee. This division of opinion led to the suggestion that it might be advisable to envisage different solutions for different systems, on a pattern (a) and pattern (b) approach, leaving both the balance sheet and the registration solutions open for those legal systems where one would be more acceptable than the other.

17.- The principle that depreciation can only be undertaken by the owner/lessor and that it is he, within certain limits, who has the right during the term of the leasing contract to amortize the item completely was favourably received, although it was felt to touch on a subject where the line dividing private law from revenue law was less clearly demarcated than in others.

18.- The Group agreed that, in the absence of special legislation, professional parties shall have full freedom in relation to the conclusion of leasing contracts regarding industrial goods. This was felt to reflect the universally accepted notion of the freedom of the contracting parties.

19.- There would be no need for uniform rules to deal with the question of revaluation of the rentals to be paid in respect of the item leased in the event of devaluation of the currency in which the rentals are being paid. Leasing companies at present offer fixed rates for the entire length of the contract, even for five - or seven - year time spans.

20.- The Group took note of the draft proposals put forward by Mr. Peter which it decided should be annexed to the present paper by way of information. This in no way indicated any endorsement by the Group of the contents thereof.

A N N E X II (a)

Draft proposals submitted by Mr F. Peter for the attention of the
restricted exploratory Working Group on the leasing contract

1. Leasing ist weder Kredit noch Kauf, noch Finanzierung, sondern eine Sonderform der Miete als Dienstleistung.
2. Eine Leasing-Gesellschaft ist eine Gesellschaft, die auf Wunsch des Mieters, speziell für die Vermietung an diesen, Anlagegüter kauft.
3. Die Leasing-Gesellschaft ist und bleibt Eigentümerin des Objektes, welche Abmachungen in Bezug auf das Ende des Leasing-Vertrages auch immer getroffen werden.
4. Sachrisiken im Zusammenhang mit dem Eigentum übernimmt der Mieter.
5. Abschreibungen können nur beim Eigentümer, respektive Vermieter vorgenommen werden, der das Recht hat, in bestimmten Grenzen während der Dauer des Leasing-Vertrages, das Objekt vollständig abzuschreiben.
6. Durch steuerliche und andere Vorschriften die den Leasing-Vertrag oder die Leasing-Gesellschaft betreffen, darf keine Benachteiligung (Wettbewerbsverzerrung gegenüber konkurrenzierenden Verfahren wie z.B. Kauf auf Kredit, Teilzahlung usw.) erfolgen.
7. Mangels spezieller Gesetze, volle Freiheit in Bezug auf den Vertragsabschluss über gewerblich industrielle Objekte unter wirtschaftlich versierten Partnern.

ANNEX II (b)

Draft proposals submitted by Mr F. Peter for the attention of the
restricted exploratory Working Group on the leasing contract

1. - Leasing is neither a credit transaction nor a sale nor a financing transaction, but rather a special form of rental providing for the use of goods.
2. - A leasing company is a company which, at the request of the lessee, buys capital goods for the specific purpose of leasing them to the latter.
3. - The leasing company is and remains the owner of the item, whatever agreements may be made with regard to the termination of the leasing contract.
4. - The lessee undertakes the physical risks arising in connection with the property.
5. - Depreciation can only be undertaken by the owner, that is, the lessor who, within certain limits, has the right during the term of the leasing contract to amortize the object completely.
6. - Fiscal and other regulations that govern the leasing contract or the leasing company shall not produce disadvantages (distortion of competition vis-à-vis competitive practices such as sales on credit or instalment sales).
7. - In the absence of special legislation, professional partners shall have full freedom in relation to the conclusion of contracts regarding industrial goods.