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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

N O T E

for the attention of
the Study Group for the preparation
of uniform rules on the leasing contract
(first session : 17 - 19 November 1977)

Rome, October 1977

1. - The Governing Council of UNIDROIT at its 56th session, held in Rome on 19 and 20 May 1977, decided to endorse the principal recommendation of its restricted exploratory Working Group on the leasing contract (for the report of which see Study LIX - Doc. 5, UNIDROIT 1977) and accordingly to set up a Study Group responsible for the preparation of uniform rules on said contract (see Minutes of the 56th session of the Governing Council, p. 32).

2. - The list of recommendations annexed to the report of the restricted exploratory Working Group and setting out the Group's feelings on various aspects of the leasing contract which could, in the words of one member of the Council, "be expected to be acceptable to a very considerable number of States in the form of an international convention on the subject", was forwarded to the Study Group as a set of suggestions for it to bear in mind when laying the ground for uniform rules. The seven-point draft proposals submitted to the Working Group by Mr Peter were also forwarded to the Study Group, covering "the essential ground to be dealt with in any international convention on this subject"^(°).

3. - The Governing Council, having by its decision to set up a Study Group resolved the fundamental question of principle regarding the usefulness, feasibility and desirability of uniform rules in this field, preferred to refrain from setting any specific limitations on the terms of reference of the Group. Thus one member stated that "the better course of action would ... be for /the/ Group to lay the results of its work before a future session of the Council in two or three years time with a view to the latter then taking a decision as to whether or not it would be useful to submit some or all of this work to governmental experts". The session did, however, afford an opportunity for the raising of various suggestions by members of the Council for consideration by the Study Group in the context of its future work.

4. - As regards the possible end-product to be envisaged, various possibilities were put forward. However, the argument here centred basically on the comparative merits of either an international convention or a model law. Thus one member of the Council, while recognising that "this was virgin territory where the legal problems were of such a nature as to require international rather than national solutions", nevertheless wondered whether, "in view of the threat which might arise to the acceptability of any draft

(°) To avoid unnecessary repetition it should be noted that, unless otherwise indicated, the use of inverted commas refers to the interventions of various members of the Governing Council at its 56th session (see Minutes of the Meeting, pp. 23-33).

convention which UNIDROIT might prepare on leasing as a result (inter alia) of fiscal legislation already existing in this field, the better solution might not be to seek to prepare a model law" which in his view "moreover offered the advantage over an international convention of one's being able to prepare a rather more detailed instrument". The same speaker accordingly saw the possibility of a dual option being open to the Group: "either to prepare a detailed model law or to prepare a draft set of such rules as would have constituted the main features of such a model law which could then be put forward at an international level as uniform rules".

5. - As regards the methodology of the Group's work, which was generally recognised to be quite a long-term project - "if the end result was to be useful" to quote another member - several interesting suggestions were made. One of these followed the line of thought that "in view of the complexity of the subject-matter, it would be sensible to leave the Group ... complete freedom to look at /the/ subject from different angles and to make different proposals to the Council /at a future date/ in the light of its examination of these different aspects ... the Council would then be able to take a more precise decision on the specific future delimitation of the uniform rules ..." concluding that the Group "should accordingly examine both the case for broad uniform rules covering the general body of leasing contracts as well as that for limiting attention to one or more specific and particularly prevalent forms of leasing".

6. - This view met with support from another member who particularly liked the idea of the Study Group being free to propose alternative solutions to the Council in the context of the desirability or otherwise of "the final draft also /including/ some rules on the fiscal and accounting aspects of the subject". He felt, in this last regard, as did other members of the Council, that "the Institute could not avoid some consideration of the fiscal and accounting aspects of leasing" as an operation which, in his view, "owed its very origins to circumstances dictated by fiscal and accounting considerations". Another member, addressing his attention to "the Working Group's recommendation that any uniform rules on this subject would have to eliminate as completely as possible those aspects of leasing relating to fiscal problems", remarked on the difficulties that would be met here: this would entail in his view the preparation of "a set of articles especially designed to eliminate the effect of any such uniform rules on fiscal problems, given the intertwined character of private law and revenue law in this domain". It was the view of another member that "the fiscal problems on this subject were such that ... the exercise in clarification ... being proposed could not fail, whether in the form of a model law or as a uniform law annexed to an international convention, to offer useful solutions to those countries experiencing such problems".

7. - The question was also asked whether the instrument to be prepared "should already at this stage seek to create a complete legal framework for the leasing contract or whether its chances of success would not perhaps be enhanced were it to be restricted to a limited number of fundamental points as a sort of first step towards a more comprehensive unification". The Council was then reminded of "the advice proffered by Mr Peter at /its/ previous session, namely that it would be necessary to limit one's initial efforts to the clarification of a few basic points, without agreement on which consideration of further aspects of the subject would be futile ... particularly ... in view of the virgin territory to be traversed and the overwhelming need to isolate those characteristics of the sui generis /leasing/ contract which distinguish it from the alternative contractual models to which it had generally been assimilated".

8. - Much of the enthusiasm evinced on the part of members of the Council for this subject could be traced to "the nebulousness which currently surrounded so much of this subject and the virtual absence of any national legislation", it being felt that "this last factor could well enhance the chances of an attempt at unification in this field", to the extent that the likelihood of national resistance would thereby be diminished. Reference was repeatedly made to these countries, and developing countries in particular, where "while the practice of leasing was expanding all the time, it was a practice which had as yet found no specific recognition in private law". Attention was drawn to the vacuum still existing on this subject from the angle of substantive law in these countries, notwithstanding the comparatively early enactment of fiscal provisions, which was, in the view of one member, simply a reflection of the increasing practice of leasing in such countries. Another member, hailing from Eastern Europe, referred to the great difficulties experienced in countries such as his which had as yet enacted no legislation on this subject "when it came to determining the duties of the parties to leasing contracts". He felt that these countries would accordingly "greatly welcome a model on this subject, be it in the form of a uniform law or a model law".

9. - One member from a developing country, looking forward to the time when draft rules could be laid before Governments on this subject, stressed that "the value of such a draft would be greatly enhanced were it to be supported by an explanatory memorandum, on the lines of the explanatory memoranda which UNCITRAL appended to its draft Conventions when laying these before Governments". He felt that "such a memorandum could be prepared by the Secretariat and would be of great value to lawyers in countries where the situation on leasing was like that in his own country, in the sense that it would help to throw light not only on the international but also on the internal implications of this new contract".

10. - The importance of this contract for developing countries led one member of the Council to stress "the need, at the stage of deciding on the composition of the ... Study Group, to take account of the huge differences distinguishing a leasing contract concluded between parties both of whom were based in reasonably developed industrialized countries from the same contract concluded between parties only one of whom was based in a developed country, with the other being based in a developing country". This view was supported by another member who thought that the Group should include a member from a country where the institution of leasing as such was not yet known, because as the work of the Group /progressed/ the effect of this institution on the law of such a country would become progressively clearer".

11. - A note of dissent from the otherwise virtually unanimous enthusiasm of the Council for the setting up of a Study Group on this subject was introduced by the member who indicated that in his country "there was a feeling of scepticism as to the value that could be expected to result from this work and in particular as to whether the difficulties inherent in the subject and the amount of resources that it might prove necessary to deploy would in fact justify the end result". However, in view of the enthusiasm evinced by his colleagues, he felt that "perhaps the best course would lie in a further exploration of the topics that might be dealt with". He felt that these needed to be more sharply identified, in view of the variety of "purposes inducing parties to enter into /leasing/ contracts". Thus, where leasing contracts were essentially "sales on credit with a special form of security", this "led inevitably into the vast and difficult area of security interests in movable property" and "raised not only the question of whether or not one should investigate the relationship between the owner of leased property and third parties coming into contact with such property, but also many others such as registration"; in such a context, that is where leasing contracts are essentially "sales on credit with a special form of security", he found it "difficult to see that there were special principles for leasing contracts which were not equally applicable to other forms of security interest".

12. - As regards the scope of future uniform rules and addressing himself in particular to § 10 of the recommendations of the restricted Working Group of the Council (op.cit., Annex 1, p. 3) he appreciated "the hesitation of /said/ Working Group ... over overlapping with perhaps the best known form of leasing contract, to wit the charterparty" but felt that "for some aspects of the work being proposed it was unwise to exclude the leasing of aircraft, ships and rolling stock from the very outset, as some of the problems of leasing contracts were as likely to apply to these contracts as to any other form of leasing". He therefore favoured "an open-minded approach as to the extent to which these areas should also be

examined, particularly as aircraft, ships and rolling stock were the most mobile kind of property and ones where there was a likelihood of problems arising at an international level"^(°).

13. - With a view to facilitating the work of the Group, the following list of questions is put forward for their consideration:

- (i) Should one concentrate on a particular form of leasing and, if so, which, e.g. the sui generis leasing mentioned in the recommendations of the restricted Working Group of the Council: or should one rather endeavour to provide a legal framework for leasing contracts in general ?
- (ii) Should one aim immediately to create a complete legal framework for the form of leasing contract indicated in the Group's answer to (i) or would the chances of success perhaps be enhanced were one to restrict one's initial endeavours to a limited number of fundamental points ? ^(°°)
- (iii) Should attention be concentrated on international leasing operations or rather on leasing operations in general ?
- (iv) How can a lease be defined for the purpose of uniform rules, in particular so as to distinguish it from a security interest ?
- (v) Will it be necessary to create separate definitions for a leasing contract for its strictly legal, its fiscal and its accounting aspects ? To what extent should some rules be prepared relating to the fiscal and accounting aspects of leasing ?
- (vi) Should the scope of the uniform rules be limited to capital goods and professional parties or should consumer goods be included ? Should the scope of such rules extend to cover the leasing of aircraft, ships and rolling stock ?

(°) It should however be noted that § 10 of the Group's recommendations simply states that "there is a case for excluding" the leasing of such items from the scope of the proposed uniform rules.

(°°) The answer to this question will clearly determine the extent to which answers will have to be found to all or some of the remaining questions.

(vii) What provisions should be drafted regarding the ownership of the leased goods during the course of the leasing contract ?

(viii) What provisions should be drafted regarding the ownership of the leased goods on the expiry of the leasing contract ?

(ix) What provisions should be drafted regarding the case where the supplier fails to deliver the goods covered by the leasing contract ?

(x) What provisions should be drafted regarding the case where the goods on delivery to the lessee prove to be defective or unsuitable for the purpose for which they were intended ?

(xi) Should any provisions be drafted regarding the extent to which a leasing company should be given immunity from duties and liabilities that would ordinarily fall upon it as the legal supplier of the leased goods, and, as a corollary, the extent to which these duties and liabilities should be transferred to the physical supplier ?

(xii) What provisions should be drafted regarding the physical risks arising in connexion with the leased goods ?

(xiii) What provisions should be drafted where the leased goods have been lost during the course of the leasing contract through the act of a third party ?

(xiv) What provisions should be drafted for the case where the lessee fails to perform his duties under the leasing contract ? In particular, what effect should be given to compensation clauses in leasing contracts designed to protect the lessor in such cases ?

(xv) Should any restrictions be imposed on the lessor's powers to repossess and dispose of the leased goods upon termination of the lease, whether for default or otherwise ?

(xvi) What provisions should be drafted regarding the lessor's reservation of title against third parties, including the general body of creditors upon insolvency of the lessee (see also question (vii) above) ?

(xvii) Should any provisions be drafted regarding whether or not leased movables remain personalty regardless of their being affixed to realty subsequent to the conclusion of the leasing contract ?

(xviii) Should any provisions be drafted regarding whether or not encumbrances may be created over leased goods ?

(xix) Should any provisions be drafted regarding the assignment of leasing contracts ?

(xx) Are there any other aspects of leasing contracts which merit the drafting of uniform rules ?

(xxi) Which form of unification is to be preferred for the leasing contract: an international convention incorporating uniform rules or a model law ?