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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Preliminary draft uniform rules on the sui generis form of
leasing transaction as adopted by the UNIDROIT Study Group
on the leasing contract

Rome, March 1981

INTRODUCTION

1.- The third session of the UNIDROIT Study Group for the preparation of uniform rules on the leasing contract was held in Rome at the seat of UNIDROIT from 30 September to 2 October 1980. Its composition was as follows:

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2.- The Study Group had as its principal business the examination of the alternative revised versions of the tentative draft uniform rules on the sui generis form of leasing transaction which it had examined at its previous session (Rome, February 1979). In the light of the Group's reading of these alternative revised texts and of the suggestions made during this reading, a small drafting committee assisted by the UNIDROIT Secretariat prepared the provisional text of a set of preliminary draft uniform rules on the sui generis form of leasing transaction which was then submitted to the Study Group at its final meeting. At this final meeting this provisional text was amended and as such its substance adopted by the Study Group, subject to drafting improvements, notably affecting the French text, which it was agreed should be left to be worked out by the members of the Study Group by correspondence. After consultation, this drafting has now been finalised and the final text of the preliminary draft uniform rules as adopted by the Study Group is set out below in the form of an appendix.

APPENDIX

Preliminary draft uniform rules on the sui generis form
of leasing transaction as adopted by the Study Group.

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNISED the desirability of determining by agreement certain uniform rules relating to the sui generis transaction here referred to as "financial equipment leasing",

HAVING RECOGNISED the feasibility of dealing with the private law aspects of the said transaction,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

Article 1

1. - This Convention applies to an international tripartite transaction in which one party (the lessor), on the specifications of another party (the lessee), acquires from a third party (the supplier) plant, capital goods or equipment (hereinafter referred to as "equipment") the use of which the lessor grants to the lessee for business or professional purposes in return for the payment of rentals.

2. - Such transaction presents the following main characteristics:

- (a) it consists of one or more contracts;
- (b) the free choice of the equipment and of the supplier lies with the lessee and is the lessee's responsibility;
- (c) the equipment is acquired by the lessor in connection with a contract (the leasing agreement) which either has been concluded or is to be concluded between the lessor and the lessee;
- (d) the leasing agreement is for a term which takes the period of amortisation of the equipment into consideration;
- (e) the parties to the leasing agreement may choose between two options (to buy or to renew) exercisable either during the course or at the end of the term thereof, to the extent that the inclusion of such an option would not alter the nature of the agreement.

3. - Such transaction is an international transaction for the purposes of paragraph 1 of this article if the principal places of business of the lessor and the lessee are in different States.

4. - This Convention applies only:

(a) when the States referred to in paragraph 3 of this article are Contracting States; or

(b) when the rules of private international law lead to the application to the leasing agreement of the law of a Contracting State.

Article 2 (°)

Where a transaction is regarded as being subject to this Convention according to (a) the law of the State in which the leasing agreement was concluded or (b) the proper law of that agreement as determined by the rules of private international law of the forum, such a transaction shall also be regarded as being subject to this Convention in any other Contracting State. /

Article 3

Unless otherwise agreed:-

(a) once the leasing agreement has been concluded, the agreement between the supplier and the lessor (the supply agreement) may not be varied without the consent of the lessee;

(b) once the supply agreement has been concluded, the specifications given by the lessee to the supplier may not be varied without the consent of the lessor.

Article 4

Variant I

The lessor's title to the equipment shall be enforceable against all third parties provided that the lessor has complied with such rules (if any) as to public notice as may be prescribed by the law of the State of the lessee's principal place of business. /Where the lessor has not so complied, such title is not enforceable against either a person acquiring an interest in the equipment, by attachment or otherwise, or the lessee's trustee in bankruptcy or liquidator. /

(°) The Study Group at its third session decided that this article will be revised in collaboration with the Hague Conference on Private International Law.

Variant II

The lessor's title to the equipment shall be enforceable against all third parties provided that the lessor has complied with such rules (if any) as to public notice as may be prescribed by the law of the State of the lessee's principal place of business. /Where the lessor has not so complied or where there are no such rules, its title is not enforceable against a person acquiring an interest in the equipment, by attachment or otherwise, unless the lessor proves that this interest was acquired in bad faith. /

Article 5

Where the equipment has become a fixture and to the extent that the lessor has priority, under the law of the State where the fixture is situated, over the claim of any person having an interest in the real property concerned, the lessor may, in the conditions prescribed by the leasing agreement, remove the fixture from the real property. Upon removal the lessor shall reimburse any encumbrancer or owner of the real property who is not the lessee for the cost of any damage caused by the removal of the equipment from that part of the real property to which it was affixed. Such reimbursement shall make allowance for the normal wear and tear of the real property in question.

Article 6

1. - The lessor shall not, subject to the provisions of the second and third paragraphs of this article, be liable in respect of any of the contractual and tortious duties that would ordinarily flow from its position as bailor of the equipment.

2. - The lessor shall, notwithstanding the provisions of the first paragraph of this article, be liable to the lessee where the latter's quiet possession is disturbed by the lawful act of a person having a superior title or right not derived from any act or omission of the lessee.

3. - The lessor shall, notwithstanding the provisions of the first paragraph of this article, be liable in respect of any of the contractual and tortious duties that would ordinarily flow from its position as bailor of the equipment where and to the extent that it has materially /and legally/ intervened, at a technical level, in the choice of the equipment to be supplied or in its use.

Article 7 (°)

1. - The lessee shall have a direct right of action for damages against the supplier for any loss or damage sustained by it as a result of the supplier's failure to deliver the equipment in accordance with the terms of the supply agreement. This right shall in no way prejudice the lessor's rights of action against the supplier under the supply agreement.

2. - Except as otherwise provided by this Convention, the lessor shall not be liable to the lessee for the non-performance or imperfect performance of the leasing agreement resulting from the supplier's breach of the supply agreement. However, the lessee shall have the right, as against the lessor, to reject a tender of the equipment which is not made within a reasonable time after the delivery date stipulated in the supply agreement (or if none, within a reasonable time after the making of that agreement) or which otherwise fails in a material respect to conform to the terms of the supply agreement. The right to reject in respect of defective equipment shall be exercised, by notice to be given to the lessor, within a reasonable time after the lessee has discovered the defect or ought with reasonable diligence to have discovered it. Rejection for non-conformity of the equipment under the supply agreement shall not preclude a fresh tender of conforming equipment if made within a reasonable time after notice to reject.

3. - The lessee shall have the right to bring legal proceedings to compel the supplier to make delivery of the equipment in accordance with the terms of the supply agreement and shall give prompt notice of such proceedings to the lessor.

4. - Once the equipment has been delivered it is placed in the care of the lessee whose use of it shall be consistent with that of a normal user of such equipment and who shall ensure that it is kept in good condition.

Article 8

1. - The lessee shall not be entitled to withhold payment of the rentals due under the leasing agreement for non-delivery of the equipment or for a tender of non-conforming equipment, unless this results from the fault of the lessor and only to the extent that the lessee has sustained loss thereby.

(•) It was agreed by the Study Group at its third session that Articles 7, 8 and 9 would have to be revised in the light of the adoption of the 1980 United Nations Convention on Contracts for the International Sale of Goods.

2. - Where the supplier fails to make a valid tender of the equipment within the time specified in Article 7 (2) the lessee shall be entitled to terminate the leasing agreement and to recover any rentals or other sums paid in advance. It shall have no claim against the lessor for non-delivery, delay in delivery, or defective delivery of the equipment except to the extent to which this results from the lessor's fault referred to in paragraph 1 of this article.

Article 9

1. - In the event of default by the lessee under the leasing agreement, the lessor may, subject to the provisions of paragraph 2 of this article and unless otherwise agreed, exercise any one or more of the following rights and remedies:

(a) termination of the leasing agreement;

(b) repossession of the equipment;

(c) recovery of accrued and unpaid rentals, together with interest;

(d) recovery of such compensation as will place the lessor in the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms. The leasing agreement may provide for the manner in which this compensation is to be computed and such provision shall be enforceable between the parties in all Contracting States, unless the court finds that it is wholly unreasonable;

(e) variation or termination of the supply agreement with the consent of the supplier.

2. - The lessor shall only be entitled to terminate the leasing agreement if it has by notice given the lessee a reasonable opportunity of remedying the default so far as the same may be remedied.

3. - Upon termination of the leasing agreement, the lessee shall return the equipment to the lessor in good working order, subject to normal wear and tear; failing this, the lessee shall be liable to the lessor for equivalent compensation.

Article 10

The lessor may, with the consent of the lessee, transfer its right, title and interest in the leasing agreement to a third party. Such an assignment may alter neither the nature of the leasing agreement nor its legal treatment as provided in this Convention.

Article 11

Except as otherwise provided by this Convention (°), the parties may vary or exclude any duties incumbent on them under its terms.

(°) It was agreed to leave any decision as to which provisions of the uniform rules are to be regarded as mandatory to be taken at a later stage.