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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

REPORT

ON THE PROGRAMME OF SYMPOSIA AT WHICH EXPOSURE WAS GIVEN TO THE
PRELIMINARY DRAFT UNIFORM RULES ON THE SUI GENERIS FORM OF LEASING
TRANSACTION AS ADOPTED BY THE UNIDROIT STUDY GROUP IN OCTOBER 1980

(prepared by the Unidroit Secretariat)

Rome, March 1984

I. - INTRODUCTION

1. - In adopting a text of preliminary draft uniform rules on the sui generis form of leasing transaction at its third session (Rome, 30 September/2 October 1980) the Unidroit Study Group for the preparation of uniform rules on the leasing contract recommended that this text should be given maximum exposure among the business and legal practitioners familiar with the everyday realities of leasing by the organisation of symposia in different parts of the world. The purpose of such symposia would be to enable the text to be presented to, and discussed by such an audience of practitioners. The essential reason for it being judged opportune to have recourse to this exceptional procedure was linked to what was judged to be the inappropriateness at this time of the main alternative, namely the submission of the uniform rules to governmental experts. Their unripeness for consideration by governmental experts until such time as they had been given wider exposure among practitioners was considered to flow principally from two, not wholly unrelated factors: first, the sparseness of attempts at the domestic level to legislate in this field and, secondly, the continuing evolution of the leasing mechanism, in view of its by now proven flexibility. Since this continuing process of evolution was largely the product of the continuing legislative vacuum and the work of the denizens of the financial world, it was considered desirable to sound first the opinion of those responsible for this ongoing evolutionary process, in order to ascertain whether and to what extent the solutions advanced in the text of the preliminary draft as adopted at the Study Group's third session were consonant with the realities of leasing practice.

2. - The Unidroit Governing Council at its 60th session (Rome, April 1981) endorsed the recommendation of the Study Group for the holding of symposia designed to give exposure to the uniform rules and the first in what was envisaged as a programme of symposia was held in New York on 7 and 8 May 1981. This symposium was sponsored by the American Law Institute - American Bar Association Committee on Continuing Professional Education. The audience assembled in New York was largely composed of bankers, businessmen and practising lawyers having expertise in international leasing. Invitational in character, the symposium was structured in such a way as to permit a panel of speakers largely made up of members of the Study Group,⁽¹⁾ to introduce the provisions of the pre-

(1) In New York the panel of speakers was made up as follows:

Co-chairmen : Mr Peter F. COOGAN, Attorney, Messrs Murphy, Weir & Butler, San Francisco; representative of the Department of State of the United States of America to the Unidroit Study Group
Mr Ronald M. DEKOVEN, Attorney, Messrs Shearman & Sterling, New York; alternate representative of the Department of

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liminary draft and the audience to raise questions and indicate any criticism.

3. - Whereas this first symposium was addressed to an essentially North American audience; the second in the programme of symposia, sponsored by Industrie - Leasing AG and held in Zürich on 23 and 24 November 1981, ⁽²⁾ was addressed to a Western and Eastern European audience, although some

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State of the United States of America to the Unidroit Study Group

Members : Mr E. Allan FARNSWORTH, Professor of Law, Columbia University, New York; member of the Unidroit Governing Council

Mr Roy M. GOODE, Professor of Credit Law, Queen Mary College, University of London; member of the Unidroit Study Group

Mr Kraig KLOSSON, U.S. Concord Inc., Larchmont, New York; Chairman, International Committee, American Association of Equipment Lessors

Mr Peter H. PFUND, Assistant Legal Adviser for Private International Law, Department of State of the United States of America

Mr László RECZEI, Ambassador (retired), Professor of Law, University of Budapest; member of the Unidroit Governing Council; Chairman of the Unidroit Study Group

Mr Martin J. STANFORD, Research Officer, Unidroit; Secretary to the Unidroit Study Group

Mr Detlev F. VAGTS, Professor of Law, Harvard University; representative of the Department of State of the United States of America to the restricted exploratory working group of the Unidroit Governing Council on the leasing contract.

(2) The panel of speakers in Zürich was made up as follows:

Chairman : Mr Fritz PETER, Director, Industrie - Leasing AG; Honorary Chairman, European Federation of Equipment Leasing Company Associations; Consultant expert to the Unidroit Study Group

Members : Mr El Mokhtar BEY, Directeur juridique, Société Locafrance, Paris; member of the Unidroit Study Group

Mr Tom M. CLARK, Chairman, European Federation of Equipment Leasing Company Associations

Mr Peter F. COOGAN (v. supra)

Mr Ronald M. DEKOVEN (v. supra)

Mr Roy M. GOODE (v. supra)

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participants came from further afield, for example from Egypt.

4. - Presentation of the uniform rules to, and discussion thereof among a Far Eastern audience was also possible at the First World Leasing Convention, organised by Leasing Digest Conferences in conjunction with the Hong Kong Equipment Leasing Association in Hong Kong from 10 - 12 January 1983. (3)

5. - Further discussion of the uniform rules was also possible at the seminar on international equipment leasing organised by the International Development Law Institute in Rome from 6 to 17 February 1984. This seminar was organised for French-speaking African lawyers. (4)

6. - The results of this programme of exposure given to the uniform rules are set out below, in the shape of the reactions of the participants to various aspects of the draft.

II. - RESULTS OF PROGRAMME OF SYMPOSIA:

REACTIONS OF PARTICIPANTS TO UNIFORM RULES

7. - One of the principal merits of the programme of symposia was recognised as lying in the alternative it offered the professional circles affected by the prospective international instrument to raise their feelings at a sufficiently early stage in the preparation thereof rather than later having a take-it-or-leave-it situation thrust upon them.

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Mr Michel PELICHET, Deputy Secretary - General, Hague
Conference on Private International Law

Mr László RECZEI (v. supra)

Mr Peter SEIFFERT, lawyer with Deutsche Anlagen-Leasing
GmbH, Mainz

Mr Martin J. STANFORD (v. supra).

(3) Presentation of the uniform rules was in the hands of Mr Ronald M. DeKoyen (v. supra), with additional information being supplied by Mr Martin J. Stanford (v. supra).

(4) Presentation of the uniform rules was this time in the hands of Mr Martin J. Stanford (v. supra) as Technical Coordinator of, and Visiting Instructor at the said seminar.

8. - The future Convention's main value was seen in its facilitation of international leasing transactions which had hitherto proved of limited incidence because of the varied legal structures which regulated leasing from one country to another. At the New York symposium it was pointed out that, although most United States leasing companies were involved in strictly United States leasing, out of the total membership of the American Association of Equipment Lessors, which at that time totalled about 725 companies, there were according to a survey instituted by the AAEL's International Committee in 1980 some 60 U.S. leasing companies which did engage in transnational leasing transactions. Of these 60, 30 did so on an entirely transnational basis, generally from the United States into another country. The other 30 engaged in both transnational and internal transactions carried out by a subsidiary of a U.S. leasing company. Such subsidiaries tended in the main to be subsidiaries of the large bank-owned leasing companies but not all of them were so. Thus there were an increasing number of independent leasing companies in the United States that had established international operations and/or begun the process of instituting transnational transactions.

9. - The Chairman of the International Committee of the AAEL expressed his conviction that given greater uniformity of treatment internationally in the legal regulation of leasing there was little doubt that both the number of lessors engaged in transnational transactions and the total number of such transactions would increase dramatically.

10. - The advantages for leasing practitioners inherent in the prospective Convention were summed up under the following headings:

(1) The obligation imposed on Contracting States in Article 2 to honour the qualification given to the leasing transaction by the law of the State where the leasing agreement was concluded or by the proper law of that agreement. This would provide the lessor with an important guarantee concerning the enforceability of his carefully constructed lease agreement in the country of the lessee, unlike the situation prevailing at present, where the lessor was very much at the mercy of the courts of the lessee's country. The enforceability aspect of this provision would therefore put the lessor in a much stronger position by making it possible for him to avoid the pitfalls and surprises which presently precluded a large number of them from wishing to engage in international leasing.

(2) The right given the lessor under Article 9 (1) (b), in the event of a default by the lessee, to repossess the equipment. This right would, it was suggested, override local bankruptcy statutes by virtue of its being contained in a treaty. Under these statutes the lessor was at present forced to go through lengthy court procedures to obtain recognition of his right to repossess, as stated in the lease agreement, in the event of a default by the lessee.

(3) Under Article 6 (1), the protection given the lessor against suits brought by aggrieved third parties on the basis of accidents etc. caused by the equipment under lease, which would be very important in the case of ships, aircraft and the personal property components of nuclear power facilities. Although all lease agreements stated that the lessee had to obtain insurance and that the lessor could not be sued, this did not at present preclude lessors from being sued, especially where the lessee did not have sufficient insurance because of a major catastrophe and the lessor happened to be affiliated to a strong bank.

(4) The impetus such a convention might have in encouraging developing countries where leasing legislation was either non-existent or erroneously lumped in with banking and blanketed by highly restrictive and onerous conditions to adopt as part of their municipal law provisions modelled on those of the future Convention.

11. - Moreover, the leasing community was of the opinion that the uniform rules would assist the identification of risks and therefore help lessors and lessees to know the risks which they were taking on and to decide and to set out clearly in their contracts how these risks were to be shared. It was the hope of the leasing community that the uniform rules would assist leasing companies and their national associations in their task of persuading their authorities to remove the restrictions which were imposed on leasing operations, both domestic and international. The uniform rules were also seen as a vehicle of increased investment. Leasing companies recognised that it was unpractical, if not impossible, to hold a perfect security interest in leased equipment in many foreign jurisdictions. They nevertheless needed to be in a position to assess the extent to which there were legal imperfections and to determine whether the risks were acceptable and, if so, what amount should be added to the rentals to reflect the risks assumed by them. The uniform rules, by identifying and hopefully lowering the risks, would enable leasing to become cheaper and on a macro-economic basis would give a significant fillip to new international capital investment.

12. - The main general observation relating to the scope of application of the uniform rules concerned the exclusion by default of operating leasing. The concern that this exclusion aroused proved to be an essentially North American phenomenon but was to be considered no less important for that. Referring back to the initial study carried out by the Unidroit Secretariat in 1975, in which it was stated that

"Operating leases, unlike financial leases, will often be accompanied by the provision of ancillary services such as maintenance by

the owner. The explanation for this would seem to lie in the fact that the lessor in operating leases is usually the manufacturer or distributor of the equipment in question and, therefore, from a technical point of view fully in a position to provide such services, whereas the lessor in the financial lease situation is a finance house with no facilities for such services."

it was pointed out that this statement was not factually correct in the United States and in some parts of Europe: there was a good deal of operating leasing both in the United States and in Europe which was engaged in by lessors who operated in exactly the same manner as they would in a full-pay-out financial lease, whilst not providing any ancillary services such as maintenance. Particular mention was made of container leases, many of which were "spot leases", i.e. containers leased for short terms directly by lessors.

Whereas the scope of application of the uniform rules had, virtually from the outset of Unidroit's work on this subject, been limited to financial leases, which were considered to raise greater problems of originality and awkwardness of fit in relation to the classical bailment lease category than the operating lease which was considered to fit reasonably comfortably within that same category, there was a body of feeling in the United States that favoured lessors being given the protection of the future treaty in those many instances where they were engaged in both full-pay-out leasing and operating leasing and some leasing where it was only possible to say whether it was operating leasing or full-pay-out leasing depending on what happened to the 20% or 30% residual that the lessor had calculated at the beginning of the lease. The uncertainty affecting this rather gray area where it was difficult to determine with precision the dividing-line between operating leases and full-pay-out leases lent authority to the apparent exclusion of operating leases from the scope of the uniform rules. However, from a lessor's standpoint, it was explained that the protection granted the lessor under the uniform rules, in particular as regards his title to the equipment and his right to repossess the equipment in the event of the lessee's default and eventual bankruptcy, was just as important and applied just as forcibly to an operating lease as it did to a full-pay-out lease.

The fear was moreover expressed that by excluding operating leases a lessee could in a specific situation seek to have the uniform rules ruled inapplicable to a given lease on the ground that it failed to meet one of the criteria listed under Article 1. Particular reference was made in this regard to the provisions of Article 1 (2) (d), under which the term of the lease was stated to have to bear some relationship to the amortisation of the equipment. The example was given of a true lease for U.S. revenue purposes. Such a lease, it was pointed out, would not

be considered a full-pay-out lease or credit-bail transaction in France and the question therefore would arise under the uniform rules of whether the term of such a lease did or did not bear some relationship to the amortisation of the equipment. The answer might well be difficult in a case where the lessor calculated a 20% - 30% residual. This was seen as a case for broadening the scope of the uniform rules so as to encompass all aspects of financial leasing, which from a U.S. lessor's point of view might well include operating leasing as well as full-pay-out leasing, this with a view to ensuring that a lease which on its face stated that the parties had agreed that it was governed by the provisions of the uniform rules, once signed would in fact be so interpreted.

13. - In reply to criticism of the limitation of the uniform rules to tripartite situations, based on the argument that there were many situations in which the lessor and the supplier⁽⁵⁾ would be the same person and there did not seem to be any good reason why such transactions should be excluded from the scope of the uniform rules, it was explained that this limitation was essential to the underlying philosophy of the draft, namely that the reason for insulating the lessor in most cases from liability for the condition of the equipment was because his position was seen as essentially financial, a consideration which would not apply where the lessor producing the equipment himself. Moreover, one of the principal aims of the future treaty was precisely to deal with the problems arising out of the tripartite situation, in particular the absence of contractual nexus between the supplier and the lessee, problems which did not arise with the bilateral lease. There was not the same need for an international convention where all the parties had to do was to write their contract, as was the case with the bilateral lease: the parties in such cases could be left to regulate the problems capable of arising out of their contract by themselves. One solution considered at the third session of the Study Group was to incorporate a reservation in the future treaty enabling countries where under local law it would be appropriate for the provisions of the uniform rules to be extended to bilateral transactions so to extend the application of the uniform rules.

(5) A particularly important example of such leases was the container lease, widely used in multimodal transportation. In these leases the lessee rarely if ever designated the supplier, for the reason that containers were for the most part considered as being fungible. Regulations regarding the size and quality of containers were promulgated by the trade organisation that oversaw the leasing of containers.

14. - In reply to a question concerning the reason for the dropping of the reference to the exclusion of fiscal and accounting aspects of leasing in a prior version of the preamble, it was explained that this explicit exclusion of the fiscal and accounting aspects of leasing was felt to be superfluous, in that it followed implicitly from the statement in the preamble that the uniform rules dealt with the private law aspects of leasing. It was added that, whilst it was not therefore the intention of the uniform rules to unify the tax and accounting aspects of leasing, there was a likelihood that the solutions adopted in the uniform rules would produce an impact on the fiscal and accounting treatment, for which reason it was important to think through the impact of the solutions to the private law problems of leasing proposed in the uniform rules given the great importance of these two other aspects of leasing.

In fact concern was expressed lest the language employed in Article 1 (2) (d) might defeat the drafters' declared intention of excluding the fiscal and accounting aspects of leasing, in that by linking the term of the lease to the period of amortisation of the equipment there was inevitably a risk that fiscal considerations would be brought into play in applying this provision. The example was given of a lease of equipment to which the revenue authorities would attribute an economic life-span of seven years, whereas the lease itself was only for a term of three years: this sort of case could, it was argued, raise problems in the application of the provision in question.

It was explained that this clause was based on one included in the definition of equipment leasing established by the European Federation of Equipment Leasing Company Associations (Leaseurope), a definition which had served as the basis for Unidroit's descriptive definition of the type of leasing covered by the uniform rules, and was principally designed to bring out the financial nature of the transaction, particularly from the lessor's point of view: the idea of Article 1 (2) (d) was to bring out the contrast between the type of lease under which the rentals were designed to amortise the capital cost (the financial lease) and that more classical type of lease constructed in such a way that the rentals were fixed by reference to the use value of the equipment (the operating lease).

It was recognised that the drafting of this clause was vague and inadequate. It moreover ran the risk of excluding progressively more and more leasing from the scope of the uniform rules. When the work of drafting the uniform rules started out, the incidence of operating leasing, particularly outside the United States, was far less substantial than that of financial leasing. That situation had now changed and more and more lessors were now going into operating leasing.

One suggestion made to broaden the scope of this provision was to alter it so as to state that the term of the lease together with any option price for residual value computed takes into appropriate consideration the period of amortisation.

Eventually it was recognised that the simplest solution, notably to accommodate the development both in the United States and in Europe of that type of leasing in which the term of the lease was shorter than the period of amortisation of the equipment leased, would be the deletion of the clause in question.

15. - Some concern was voiced about the potential exclusionary effect of the opening words of Article 1 (2):

"Such transaction presents the following main characteristics".

The opinion was expressed that if, as had been explained by Unidroit, the intention of Article 1 (2) was to give illustrations rather than to lay down definitional ingredients of the type of lease covered by the uniform rules, it would be better for Article 1 (2) to open with the words:

"Such transaction may present the following main characteristics"
or

"Such transaction frequently presents the following main characteristics".

16. - The question was raised in an effectively North-South context of the extent to which a lessee in a developing country could be said to exercise genuine "freedom" of choice in respect of the item of equipment to be leased and the supplier from whom it was to be leased. The implication was that the lessor's bargaining power was so much stronger than the lessee's that the latter could not be said to exercise any effective freedom of choice. This argument could naturally have a potentially significant negative impact on the chances of the uniform rules gaining acceptance in such developing countries, since the whole philosophy of the uniform rules was based on the lessee's dynamic role in the sui generis type of leasing transaction and the narrowly financial character of the lessor's role in such transactions.

17. - Concern was expressed concerning the language employed to deal with the problem of the options available to the lessee under the lease depending on the country in which he had his place of business. This matter was covered in Article 1 (2) (e) of the uniform rules. There was no reference in the clause in question to the system of law to which ref-

erence was to be had in order to determine whether the inclusion of an option would alter the nature of the lease and turn it into something other than a lease, for instance a conditional sale. The view was expressed that it would be simpler to say that the existence of an option does not affect the characterisation of the lease, which would allow those in the countries where the inclusion of an option to purchase did make a difference as regards the characterisation of the lease to take the option that suited their purpose. There was also a proposal for the deletion of the provision in question, on the basis that there were other indicia in the uniform rules that brought out the financial nature of the transaction.

18. - Article 2 of the uniform rules aroused much criticism. First, it was criticised for obliging the court of the forum to look to the law of the State in which the leasing agreement was concluded to see whether the leasing transaction was covered by the uniform rules. It was pointed out that it was normally the courts of a country that was party to a Convention that decided whether or not such Convention was applicable, for example the Convention on the International Sale of Goods concluded in Vienna in 1980. Moreover, apart from the inconvenience that such a rule would cause for the court of the forum in having to hear testimony of an expert on the law of the State where the leasing agreement was concluded, such a rule could also lend itself to exploitation by the parties who could arrange to travel to such place as had the best law to conclude their contract.

It was felt that the future Convention should address the basic issue of the enforceability of the transaction between the parties. The example was given of a State under the law of which it was required that there had to be a writing for an agreement to be valid even between the parties and that State was a party to the uniform rules.

The language of this provision was also criticised in its use of the term "concluded" in respect of the leasing agreement, it being pointed out that the word "concluded" was not very clear and that a word like "signed" was to be preferred. However, it was recalled that the legal writers had long debated which law should govern a particular transaction where the parties had failed to choose a particular law to govern their relationship: the law of the country where the transaction was concluded or the law of the country where the transaction was rather to be carried out. The trend nowadays seemed to be in favour of the law of the country where the contract was to be performed, as the factor which best characterised the agreement, although this too presented problems in that the country where the leasing agreement was to be performed might not necessarily be the country where the lessee had his place of business and the country in which the leasing agreement was concluded therefore perhaps offered greater certainty in that it was always known, whereas the place

where the leasing agreement was to be performed might raise complications, for example by virtue of the existence of a sub-lease.

One participant saw a danger that a transaction that was regarded as being subject to the uniform rules, in accordance with Article 2, in one country should automatically be regarded as subject to the uniform rules in a second country, provided that that second country was also a Contracting State. He feared lest a transaction other than that that was strictly intended to be covered by the uniform rules might happen to be recognised as meeting the requirements for the application of the uniform rules in one country and therefore be necessarily recognisable in a second country, provided that it was a Contracting State, even if such a transaction were unknown or prohibited in such a second country.

19. - Regarding the attempt to protect the interests of the lessee under Article 3 (a) of the uniform rules, the opinion was voiced that it would be sufficient to provide that the supply agreement could no longer be varied to the lessee's disadvantage without the latter's consent, since other variations which were of no concern to the lessee should be permissible. It was explained that this idea had in fact occurred to the Study Group but that it had been discarded on the ground that, in the interest of striking a fair balance between the interests of the various parties, it would probably be necessary in that case to grant a corresponding right to the lessor in the other limb of this article.

20. - As between the two variants of Article 4, preference went to Variant I in that Variant II would put the risk of loss so heavily on the lessor that either he would simply not contemplate leasing to a country where there were no rules as to public notice or else he would first have to lobby in any such country to require that jurisdiction to create a system of public notice. It was considered justifiable for Contracting States to be free to create some public notice safeguards for their creditors' protection but not so justifiable for the leasing community to have to bear the responsibility for persuading States to introduce such a system.

The question was raised of the efficacy of a rule providing for the applicability of the rules regarding public notice laid down under the law of the State of the lessee's principal place of business where the leased equipment was being used in another country entirely. It was therefore suggested that it might be better to draft a more general rule obliging the lessee to give the greatest public notice to his creditors, when contracting with them, of his legal situation in regard to the equipment being used by him, i.e. that he was not the owner but only the lessee thereof. Alternatively, it was proposed that the matter of public notice could be solved by reference either to the law of the State of the

lessee's principal place of business or to the law of the State where the equipment was located. It was pointed out that reference to the *lex rei sitae* would certainly enhance the protection of an innocent purchaser from someone to whom the lessee had fraudulently disposed of the equipment, since such an innocent purchaser would not normally know of the existence of the lessee. However, it was submitted that when an inquiry was made into the credit of a debtor, it was more normal for it to be made in the place where the lessee had his principal place of business than in the place where the equipment happened to be at that particular moment. It was also argued that it was simpler to have one place for recording and definitely cheaper to have one place for searching than to have a multiplicity of filings which would moreover make it difficult to imagine all the places where it might be necessary to search.

Concern was expressed regarding the absence from the uniform rules of any statement saying that the leasing agreement was enforceable in the country of the lessee if it was enforceable generally. There were moreover some jurisdictions which required registration even as a condition of validity between the parties. It was suggested that it might therefore be sufficient to add a clause to Article 4 providing that a leasing agreement should not be rendered invalid between the parties and the reservation of title under it should not be rendered invalid between the parties solely by reason of a failure to register in accordance with any applicable law.

A suggestion was made for the creation of an international registry, in particular for leased equipment of a certain value. It was submitted that, for a charge, a private international corporation might be able to run such a system. There was however much doubt as to the possibility of imposing a system of registration on States which at present did not have any such system.

Some concern was expressed about the words "such title is not enforceable against either a person acquiring an interest in the equipment by attachment or otherwise". The question was asked whether the words "or otherwise" were intended to cover a bona fide purchaser-without notice of the lessor's title and whether the lessee's creditors were intended to be given greater rights under this rule than a bona fide purchaser from the lessee. In reply, it was explained that the intention of the words in question and, more generally, of the entire sentence in square brackets, was to protect those who acquired a specific interest in the equipment, whether a creditor by virtue of attachment or a purchaser acquiring an interest in the equipment.

A suggestion was made that where goods such as aircraft and trans-

portation equipment were already subject to special registration regimes, as far as notice and registration were concerned this special regime should govern such goods but that otherwise lessors and lessees should be entitled to obtain the same benefits as were bestowed on other lessors and lessees under the proposed Convention, for example the general exoneration from tortious and contractual liability granted the lessor under Article 6 (1).

21. - The question was raised of a potential conflict between the provisions of Article 6 (1), the effect of which was in general to exculpate the lessor for any liability arising out of the contractual and tortious duties that would ordinarily flow from his position as bailor of the equipment, and existing treaties. The case was raised of a supertanker on lease having a spill. Such questions of pollution were now governed by international Conventions. While the answer was not completely clear, it was pointed out that the intention of the drafters of the uniform rules had not been to exculpate the lessor for liability deriving from ownership as such but rather for liability arising by virtue of letting the equipment on lease, and it was suggested that the question of whether the lessor would be immune from liability would depend on the particular case and on the terms of the appropriate national law.

The general question was raised of the extent to which the provisions of the uniform rules which sought to articulate and sometimes to limit the lessor's liability would work if the plaintiff in the action in which that liability was being asserted filed the action in a non-Contracting State.

In reply to the question why Article 6 (1) did not specifically give the lessor exoneration from liability arising by virtue of his ownership of the leased equipment as opposed to his position as bailor of such equipment, it was explained that to base this on ownership would not be sufficient because in certain jurisdictions liability was imposed by virtue of the letting on lease, regardless of whether or not the person letting on lease was the owner. What the provision in question was designed to say was that a lessor should not by virtue of entering into a leasing contract incur the liabilities that would ordinarily flow either from ownership or as by law.

22.- In connection with Article 7, the question was raised of what should happen if the lessee rejected the equipment for non-conformity but either held the contract open for performance by a conforming tender or the lessor was still within time to make a conforming tender. It was argued that perhaps the lessee should be entitled to withhold payment of his rentals after such rejection pending the cure of the non-conformity. However, it was recognised that the practical impact of such a rule would be minimal, as the obligation to pay rentals under the lease would not start until the equipment had been accepted by the lessee as being in good working order, usually by the delivery of a certificate from the lessee to the lessor.

The representative of the Equipment Leasing Association of the United Kingdom at the Zürich symposium announced that his association considered the proposed Convention unnecessary. They were of the opinion that the problems which it sought to solve were in many cases theoretical rather than nil. As regards the right given the lessee under Article 7 to proceed directly against the supplier and thus to cut through the problems created by the absence of privity of contract between lessee and supplier, his association considered that this absence of privity of contract did not in practice raise insuperable problems in proceeding against the supplier: these problems could satisfactorily be dealt with by the lessee and the lessor acting in concert. In reply, it was explained that the uniform rules had in Article 7 sought to simplify the complex of matters in this regard and to resolve the underlying problems, such as the effect of the delivery of non-conforming equipment on the situation of the lessee and on the latter's relations with the lessor. It was argued that Article 7's attempt to regulate this complex of problems was moreover to be expected to assist in the reduction of the sources of dispute as between the parties, particularly since the solutions it enshrined were based on the economic realities of the transaction.

Doubts were cast on the efficacy of the direct right of action solution enshrined in Article 7. The example was given of a non-conforming tender of equipment. Under the uniform rules the lessee would have a direct right of action for damages against the supplier, whereas, for his part, the supplier would surely claim that he had made a conforming tender and consequently require payment of the full purchase price from the lessor, possibly if necessary asserting this claim in a suit against the lessor. The lessor would, on the other hand, no longer be able to raise the defence to such an action brought by the supplier that he had a counterclaim against the supplier in the sense of a right of action for damages, because that

right of action had already been transferred to the lessee and two parties could not both have the same right of action. This problem, it was explained, could be dealt with under Article 11 of the uniform rules which provided that, except as otherwise provided by the uniform rules, the parties could vary or exclude any duties incumbent upon them under the terms of the uniform rules.

The point was raised that in the second sentence of Article 7 (2) the lessee was granted the right to reject a tender of equipment in two different cases, first, where the delivery was 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), and, secondly, where the equipment tendered was not in conformity with the terms of the supply agreement. In the following sentence this right of rejection was again referred to but this time in regard to a tender of defective equipment, and there was clearly a difference between equipment which was defective and equipment which when delivered proved not to be in conformity with the supply agreement. The drafting of this sentence accordingly needed to be cured of this defect, so that the third sentence would also speak of "non-conforming equipment" rather than "defective equipment".

The general point was raised in connection with the footnote to Articles 7, 8 and 9, stating that these articles would have to be revised in the light of the adoption of the 1980 Vienna Convention on Contracts for the International Sale of Goods that this reference could be seen simply in terms of the need to coordinate the terminology of the two texts - and the example was given of the uniform rules' use of the term "rejection" in a context where the Vienna Convention would rather speak of "avoidance" - or else at a more fundamental level in the need to focus more on the supply agreement. As an example of this second interpretation, it was pointed out that, since it would be quite normal for the supply agreement to be concluded between parties having their place of business in the same State, there was the possibility that, as a result of the uniform rules, a foreign lessee might have a right of action against the supplier which a domestic lessee might not. However, since the uniform rules were specifically addressed to international leasing transactions, there was no reason to fear any interference with domestic leasing transactions. Moreover, the Convention had never set out to address itself to relations between the supplier and the lessor, on the understanding that these should be left to be dealt with under the governing sale of goods rules.

The further question was in this connection asked whether it was possible that following the lessee's rejection of the equipment a lessor might find himself stuck with the goods, by virtue of his having no right against the seller under the law applicable to the contract of sale, and, notwithstanding his purely financial role in the transaction, thus find himself having to dispose of the goods. It was considered that this possibility was in practice rather remote, since in almost every situation where the lessee had a right to reject vis-à-vis the lessor the lessor would have a right to reject vis-à-vis the supplier, and furthermore this could be clarified in the contract.

Attention was drawn to the fact that the provisions laid down in paragraphs 1 and 3 of Article 7 concerning the lessee's direct right of action against the supplier would only be applicable in those cases in which the law applicable to the supply agreement was the law of a State which was at the same time party to the future Convention. Given that Article 1 made the States of the lessor and the lessee the sole connecting factors for the purposes of determining the applicability of the future Convention, it was pointed out that there would accordingly frequently be cases where the supply agreement, which clearly might very well be subject to the law of the State of the supplier, would therefore fall outside the scope of the future Convention, being subject to the law of a State which was not party thereto.

Regarding the lessee's right to reject within a reasonable time after discovering the defect or after he ought with reasonable diligence to have discovered such a defect, the question was raised whether this provision would enable the lessee to circumvent the acceptance certificate required by the lessor from the lessee (v. supra) before paying the purchase price to the supplier. Thus, once the lessor had already received the lessee's acceptance certificate, it was possible that, say 15 - 25 days later, the lessee might discover a defect and invoke his right to reject and terminate the leasing agreement. In reply, it was pointed out that under Article 11 it was open to the lessor and the lessee to vary the right to reject or indeed to exclude it altogether. If, on the other hand, the right to reject under the uniform rules had not been varied or excluded by the terms of the leasing agreement and the lessor was thrown back on the lessee's acceptance certificate, it would depend on the rules of the applicable law whether such certificate did not create an estoppel precluding the lessee from going behind the certificate of satisfaction signed by him and invoking such a defect in the equipment.

There were some who favoured the restoration in the uniform rules of the principle of all actions brought under Article 7 being brought in the joint names of the lessor and the lessee, on the ground that this would reflect the fact that there was a proximity of interest between both parties and this would enable the court to have all the parties to the transaction before it at the same time.

23. - Under Article 8 (2) the lessee was given the right to terminate the leasing agreement and to recover any rentals or other sums paid in advance where the supplier had failed to make a valid tender of the equipment within the time specified in Article 7 (2). An invalid tender was to be understood as including both the tender of equipment which was not in conformity with the terms of the supply agreement and defective equipment. While

there was no problem regarding the lessee's exercise of his right to terminate and to recover any rentals or other sums paid in advance in those cases where the termination was based on delay or non-conforming equipment, this need not necessarily be the case with defective equipment. In the case of defective equipment it was quite possible that a good deal of time might elapse before it was ascertained which equipment was really defective and this could raise problems regarding the fate of the supply agreement, for example where the supplier had in the meantime gone bankrupt. The question therefore was whether the time for rejecting as between lessee and lessor should be made to correspond with the time allowed under the law of sale for rejection as between buyer (lessor) and seller (supplier).

The point was made that, on a reading of the second sentence of Article 8 (2), it might appear that, in the event of the supplier's failure to make a valid tender of equipment, the lessor was deprived of any claim against the lessor, even for the repayment of any rentals or other sums paid in advance, whereas such an interpretation was at odds with the intention of the drafters of this provision, as was to be seen from the first sentence of Article 8 (2) under the terms of which the lessee was specifically given the right to recover any rentals or other sums paid in advance. This point was seen as requiring an appropriate amendment to the drafting of the second sentence of Article 8 (2).

24.- The question was raised in respect of Article 9 whether the parties could fairly negotiate remedies additional to the ones specified in that article. This question was raised with a view to Article 11 and the possibility that the parties' freedom of contract might be substantially limited. One such additional remedy might seek to confirm the lessor's right to exercise any cross-default rights he might have under other credit agreements or leases with the same lessee based on a default under the leasing agreement in question. It was explained that the default under the other lease might well consist in nothing more than the fact that a default had taken place under the lease in question. In reply, it was argued that if the other contract was not subject to the proposed Convention then it should have no effect on the contract subject to the proposed Convention. It was nevertheless recognised as being an important point in that there were all sorts of additional remedies, such as the lessor's right to sell the leased equipment on the lessee's premises, which were clauses that were to be found from time to time in leases, and it was therefore wise to preserve the ability to stipulate such additional remedies, at least to the extent that they were consonant with the applicable law. Since it was not the intention

to exclude such additional remedies, the purpose of Article 9 being rather to ensure that certain remedies given the lessor were not cut down by local legislation, it was suggested that the words:

"without prejudice to any other remedies that may be conferred on the lessor by the terms of the contract"

might be added to the text of Article 9 as adopted by the Study Group in October 1980. It was admitted that it might be necessary to qualify such a phrase by a reference to any limitations that might be imposed by the law applicable to the leasing agreement.

25.- There was a call for the uniform rules to give more attention to the lender in a leasing context, in particular in the context of a leveraged lease. A loan in a leasing context, it was argued, was *sui generis* in that it raised special arguments as between the lender and each of the other parties to the leasing transaction that would not normally arise in the context of a conventional secured loan. The essential problem usually centred on identifying the borrower. There were potential conflicts of interest between lessor and lender as regards the right to cure the lessee's default in respect of the lease and the lessor's right to buy out the lender's interest where the latter was happy to tolerate a situation in default that the lessor preferred to have sorted out promptly.

Such conflicts could arise in respect of the stream of rentals under the lease. The lender would typically want the stream of rentals assigned to him to service the loan and would normally be successful. The lessor would meanwhile also be entitled to it. A lessor in certain leases, in particular leveraged transactions, would be entitled to certain tax indemnification benefits, and many a lender would want to claim the assignment to himself of such benefits.

As regards the lien in the underlying equipment, it was pointed out that it would at this moment in time be difficult to contemplate unification of the chattel security aspect of the subject in view of the vast differences that existed on this subject from country to country.

Article 10, it was explained, put the lender in a position from which he would be able to exercise the lessor's rights vis-à-vis the lessee as the lessor's assignee. So far as regulating the relationship between the lender and the lessor was concerned, the uniform rules left this to private contract between the parties. Besides, it was not by and large

the intention of the uniform rules to deal with matters that could adequately be dealt with by contract between the parties. The uniform rules being essentially concerned with transactions of an international character, the agreement between the lender and the lessor would in most cases moreover be an agreement concluded between parties in the same country.

In order to cope with the situation, particularly common in leveraged leases, where there were multiple lenders and the fact that there might at times be transfers of an interest in the equipment and lease from one lessor to another, it was suggested redrafting Article 10 so as to read:

"The lessor may, with the consent of the lessee, transfer all or part of its right, title and interest in the leasing agreement or equipment to one or more third parties."

There was some questioning of the need to make the lessor's right so to transfer all or part of its right, title and interest dependent on the lessee's consenting thereto. It was argued that this right of the lessor should be untrammelled by any need to seek the lessee's consent, his freedom of assignment being seen thus as a necessary corollary of his ownership of the equipment. Moreover, the lessor's assignment would not normally be expected to make the lessee's situation under the leasing agreement any more onerous. It was accordingly suggested amending the drafting still further so that the opening words of this article would read:

"The lessor, unless otherwise provided by the leasing agreement, may transfer...."

Such an article would facilitate matters for those jurisdictions which placed legal restrictions on the transfer of contractual rights.

Some disquiet was expressed at the proposal for the disappearance of the need for the lessor to seek the lessee's consent to any transfer of its right, title and interest in the leasing agreement or equipment. This disquiet arose mainly from the argument that the leasing agreement could in certain jurisdictions be considered to be a contract *intuitu personae* and that the lessor did not to that extent possess an absolute right to be exercised entirely as he saw fit.