

UNIDROIT 1985
Study LIX - Doc. 20
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Preliminary draft uniform rules on international financial
leasing, as adopted by the Unidroit Study Group for the
preparation of uniform rules on the leasing contract:
comments submitted by the Chairman and one member of the
Unidroit Study Group on the comments submitted by the Governing
Council of the Asian Leasing Association (Asialease)

Rome, January 1985

Members of the Unidroit Study Group responsible for the drafting of the text of the preliminary draft uniform rules on international financial leasing adopted at its fourth session (Rome, March 1984) were sounded for their reaction to the comments submitted by the Governing Council of the Asian Leasing Association (Asialease) on the aforesaid text.

The Asialease comments were submitted on 16 July 1984 and incorporated the wish that they might be examined by the Study Group with a view to a possible reviewal of those provisions of the text to which they referred prior to the convening of the committee of governmental experts on the subject authorised by the Unidroit Governing Council in May 1984. Since such a procedure was not feasible, the comments of the Asialease Governing Council were circulated among the members of the Study Group individually. This consultation has yielded the following observations by the Chairman of the Study Group, Professor László Réczei (Hungary) and by one member of the Study Group, Professor Luiz Olavo Baptista (Brazil). These observations are appended below under the article of the uniform rules to which the Asialease comments refer. The Chairman of the Study Group in addition was of the opinion that in general the effect of acceptance of the amendments proposed by Asialease would not be to improve the text.

Re Article 5

(1) Professor Réczei

It is proposed to add a sentence to article 5 in order to make it more effective. According to the present draft the lessor's title is enforceable against all third persons if the lessor complies with the internal rules of the State ... etc. If these rules contain a provision in the sense as proposed the insertion of the additional sentence does not render art. 5 more effective. If these rules contain no such provision the proposed amendment aggravates the situation of the lessor.

(2) Professor Baptista

The paragraph suggested is acceptable and seems to be a good idea from a practical point of view. In Civil law countries in particular, the rule that "accessorius sequitur principalis" could raise doubts as to whether the equipment is or is not to be regarded as a fixture and would be incorporated in the real property. From a theoretical point of view this might not be necessary, if we speculate on the respective rights of the people involved.

But this kind of speculation is not based on the same principles in all laws. Each one differs from the other. So the practical "dispel all doubts" approach is better for a uniform law project.

Re Article 7

(1) Professor Réczei

According to article 7 the lessor warrants the quiet and undisturbed possession of the lessee. This warranty is unconditional. I do not see any reason to prescribe what the lessor shall do if a third person has a superior title or right enabling this person to disturb the unrestricted use of the lessee. Leave it up to the lessor and be satisfied with the claim given to the lessee against him.

(2) Professor Baptista

This would seem to be a useless and redundant addition. The lessor - as one can see from article 7 (2) as it already stands - must take all the measures deemed useful to ensure the lessee's quiet possession. If we add the suggested paragraph, one might be tempted to read into it an interpretation that only by forewarning such creditors would the lessor have accomplished his obligation.

Re Article 9

(1) Professor Réczei

Article 9, para. 2 does not set out an absolute rule, whereas para. 3 of article 9 is in the nature of an exception. The text proposed as para. 3 to this article is not very clear to me. It provides: "... the lessor to be compensated for payments ...". By whom? The lessor concludes the sale contract with the supplier. If he pays an advance it is done in the sense of the contract and probably not on the specific authorization of the lessee. If, therefore, the lessor makes a payment by way of advance he shall recover it first of all from the supplier.

(2) Professor Baptista

The three suggestions made would tend to restrict the freedom of choice of the parties to the contract. In my point of view this is a dangerous trend, as the restrictions could have a bias for lessor or lessee interests.

para.1 (b): Which "reasonable time" is objected to ? The expression is used twice.

However this is a matter to be left to the parties in their contract, or for the courts to decide, in the event that the parties do not establish a time-limit.

para. 2: I would object to this addition. It favours the lessor, and we are drafting a law for both lessor and lessee. They must decide, on the market, freely, who is to bear these expenses.

para. 3: Probably the same objection could be made with regard to the suggested paragraph 3.

Re Article 11

(1) Professor Réczei

I do not think it would be proper to delete the rule concerning the right of the lessee to recover rentals paid in advance in case of termination of the sale contract. The rentals paid in advance have been paid in the hope that the leasing contract will be fulfilled. If not and the lessee is not responsible for the termination of the sale contract, the lessor has lost his title to the rentals. *Causa data causa non secuta*.

(2) Professor Baptista

I think this suggestion is objectionable, because if the lessee has not received the object there seems to be no reason why a rental should be paid. However, there would be expenses and costs, just for giving the credit to the lessee. This is also a matter to be established in a contract, according to the particular circumstances of the case.

Re Article 12

(1) Professor Réczei

The amendment to article 12 is not necessary. Para. 1 (d) of this article provides that the lessor has a right to such compensation as will place it in the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms. *Herzchen was willst du noch mehr ?*

(2) Professor Baptista

Para. 1 (b): I would agree with the suggestion which reflects a practical reality, that the price of any equipment falls after it leaves the shop.

Para. 1 (c) and 1 (d): There seems to be no reason to change the order, or to maintain it as it is, because the article offers a choice between various issues.

Para. 3: In a Civil law country, like Brazil, the legislator would not use "reasonable time" or equivalent expressions. A time-limit should be established, especially when the lessee's default takes no time to be remedied; 5 to 15 days would be a sufficient time-limit.

That suggestion could, in consequence, be accepted.