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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 made by members of the Unidroit Governing Council at its 63rd session (held in Rome, 2 - 4 May 1984)

Rome, April 1985

At the 63rd session of the Unidroit Governing Council, held in Rome from 2 to 4 May 1984, the members of the Council were called upon to advise as to the next steps to be taken in respect of the text of the preliminary draft uniform rules on international financial leasing adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract at its fourth and final session in March 1984. The Council authorised the President of Unidroit to convene a committee of governmental experts to finalise work on this draft. In the process of reaching this conclusion certain members of the Council made comments which it is the purpose of this paper to reproduce for the consideration of the committee of governmental experts.

Thus one member of the Council wondered whether the Study Group had appreciated the full implications of Article 5 of the preliminary draft which provided that "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". In the previous draft it had appeared that the provision was concerned especially with bankruptcy but the latest formulation seemed capable of being paraphrased so as to read "the lessor's title to the equipment shall not be enforceable unless...". This seemed to extend very widely the benefit of the provision to third parties and he feared that the article might be construed as requiring notice for the lessor's title to be protected in more cases than in his opinion was desirable. This raised the question of what precisely was meant by the giving of notice. In addition he suggested that the reference to the "lessee's principal place of business" might potentially open up the door to the thorny problem of renvoi since it was possible that the equipment might be operated in a country other than that of the lessee's principal place of business. These were problems which he hoped would not be overlooked when the text was subsequently considered by governmental experts.

In reply, the Chairman of the Study Group agreed that the language of Article 5 might be improved. He cautioned however against adoption of a contrario reasoning, particularly in the context of a prospective international instrument such as the preliminary draft, and he explained that the meaning of the provision was that in the absence of any rules as to public notice the question of the enforceability of the lessor's title would fall to be determined by the applicable national law.

In reply to another member of the Council who had questioned the soundness of Article 1, paragraph 2 (b) of the draft, the Chairman of the Study Group recalled that it had become a standard provision in Conventions dealing with international commercial contracts. It was however evident that the provision could only be applied when the court of the forum was itself situated in a Contracting State.

Another member of the Council was not satisfied that in its present form the preliminary draft adequately ensured that the interests of the parties were fairly balanced. In addition, and while recognising the novelty of leasing, he sensed that the preliminary draft contained a large number of somewhat vague and general expressions and he hoped that, in addition to bringing about a more just balance in the rights and duties of the parties, the committee of governmental experts would also succeed in tightening up the language of the preliminary draft.

In reply, the Chairman of the Study Group stated that he was in full agreement that certain drafting improvements to the text could be made. As to the balancing of the interests of the parties, he was however of the belief that the draft made a serious attempt to reconcile the interests of users in the poorer countries which experienced the need to import capital equipment and those of the creditor whose aim was profit but who ran a certain risk and whose only real security was the ownership of the equipment leased.