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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Preliminary draft uniform rules on international financial leasing

adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract as revised by the drafting committee of the Unidroit Committee of governmental experts for the preparation of a Convention on international financial leasing following and in the light of the committee of governmental experts' first reading thereof:

Explanatory report

prepared by the Unidroit Secretariat

Rome, December 1985

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ERRATA

At page 7, lines 7 /8:
for the words "set out below as an appendix to this report" read "reproduced in Study LIX - Doc. 24".

At page 18, line 33:
for the word "lessor's" read "lessee's".

At page 21, line 4:
delete the word "do".

At page 23, line 12:
delete the word "the" after the word "of".

At page 33, replace lines 30 and 31 by the following sentence:
"The solution consequently arrived at by the drafting committee in Article 2 (1) (b) was that, for the uniform rules to be applicable by virtue of the operation of the rules of private international law, it would be necessary for both the supply agreement and the leasing agreement to be governed by the law of a Contracting State."

At page 40, lines 15/16:
for the word "failire" read "failure".

At page 43, line 6:
delete the word "therefore".

At page 43, line 39 after the word "bankrupt", insert the words "it was felt that".

At page 51, line 10:
for the word "to" read "from".

At page 51, line 31:
for the word "lessor's" read "lessee's".

At page 52, line 4:
for the word "to" after the word "derogate" read "from".

At page 52, line 20:
for the word "compromised" read "comprised".

At page 55, at the end of line 2 insert a comma.

At page 56, line 10:
for the word "techincal" read "technical".

At page 57, line 40:
for the word "lessee" read "lessor".

At page 59, line 22:
for the word "for" read "from".

At page 63, line 10:
for letter "(c)" read "(a)".

At page 72, line 24:
delete the word "for".

At page 76, line 5:
for the word "accordingly" read "in the event".

At page 76, line 32:
for the word "first" read "fresh".

At page 77, line 16:
for the word "in" after the word "involved" read "between".

At page 78, line 36:
for the word "an" read "as".

At page 80, line 24:
after the words "referred to" insert the word "a".

At page 89, lines 10/11:
delete the word "principal".

At page 89, line 12:
after the words "of these States" insert the words "as well as the State in which the supplier's place of business is located".

At page 89, line 12:
the reference to "Article 1 (2) (a)" should be to "Article 2 (1)".

At page 89, line 14:
delete the word "principal".

At page 92, line 22:
after the word "on" insert the word "an".

A. INTRODUCTION

1. General nature of problem

1. - Initiatives in the field of the unification of commercial law have generally tended to proceed from situations in which, notwithstanding the existence of a more or less developed body of law governing individual classes of contract in the different States, the special needs of international intercourse have proved to require some measure of harmonisation in these laws so as to lessen the degree of legal uncertainty that would otherwise result. A phenomenon of fairly recent date has indicated a quite different area for the potential usefulness of uniform commercial law. This is in relation to the development by businessmen of new contractual techniques to meet newly perceived market needs and changes in market conditions for which the existing range of commercial techniques has proved inadequate. This phenomenon has been referred to as the "contrat sans loi" in the sense that such law as has grown up in respect of these techniques has fallen foursquare within the range of expression of the parties' freedom of contract, untrammelled, or at least to a very large extent, by any interference from the legislator in whatever guise.

2. - Such new techniques have naturally tended to fall back for their contractual documentation on differing distillations or amalgams of those classical contractual techniques from which they have loosely evolved. This has been nowhere more true than in the case of leasing where the indiscriminate borrowing of characteristics culled from different, often contrasting, contractual techniques has effectively resulted in the creation of a legal hybrid which, while possessing characteristics which are, on the one hand, highly redolent of a classical bailment nevertheless also, on the other hand, possesses features which have led commentators to suggest that it has more in common with the traditional conditional sale or hire-purchase type of transaction. Still further commentators have noted similarities with other classical legal institutions (1).

3. - So long as this analysis of the legal nature of leasing remained theoretical, its impact on the operations of parties making use of leasing was correspondingly marginal but, with the growing internationalisation of leasing transactions, on the one hand, and the considered pronouncements of a growing number of courts and legislatures on the nature of leasing, on the other, the opportunities for divergencies and disparate treatment of leasing from country to country grew apace. The essential drawback of such disparate treatment resides in the possibility for what is set up as a leasing trans-

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(1) For a discussion of the doctrinal debate on the nature of leasing, see Report on the contract of leasing (crédit-bail) prepared by the Unidroit Secretariat (Study LIX - Doc. 1), pp. 20-26.

action in conformity with the law, say, of the lessor's State being disqualified as such by the law of the lessee's State or vice-versa, with consequent confusion notably over the availability of the tax indemnification benefits associated with ownership of the asset. The negative impact of such uncertainty on the incidence of cross-border leasing transactions is not hard to imagine.

4. - The problems arising out of the disparate versions of the legal nature of leasing were moreover compounded by the nebulousness and fragmentary nature of such domestic legislation as happened to exist in respect of such transactions, admittedly relatively rare. But such legislation was not only rare but also piecemeal, the national legislator at times addressing leasing in its fiscal aspects, at others addressing its accounting aspects but only rarely tackling its substantive legal aspects.

II. Drafting by Unidroit of uniform rules on the leasing contract: historical background

5. - It was against the background sketched in the foregoing paragraphs that the Unidroit Secretariat in February 1974 recommended to the Governing Council at its 53rd session that it be authorised to prepare a preliminary study looking into the desirability and feasibility of drawing up uniform rules on leasing. This proposal highlighted the legal problems arising from the difficulty of classifying leasing within the classical contractual schemata and the unusual legal consequences flowing therefrom. The Governing Council accepted this recommendation, giving the topic priority status on Unidroit's 1975-1977 triennial work programme and empowering the President of Unidroit to convene a working group to study an international unification of the applicable rules on the subject.

6. - The outcome of this decision was the preparation by the Unidroit Secretariat of a preliminary report illustrating the mechanics of the different kinds of leasing and the legal problems arising out of that sui generis type of leasing commonly referred to as financial leasing. This report was considered by a small working group of the Unidroit Governing Council (2) which met in Rome on 21 April 1975 to examine the feasibility of drawing up uniform international rules on the leasing contract. This group made

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(2) For a list of the members of this group, see Preliminary draft uniform rules on international financial leasing adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract: Explanatory report prepared by the Unidroit Secretariat (Study LIX-Doc. 18)(hereinafter cited as "Explanatory report"), at. p. 11, note 1.

a series of decisions, notably not to attempt, in view of the enormous difficulties that would be involved, any uniformisation of the national legal rules pertaining to exclusively domestic leasing operations but rather to address specifically international leasing, and not to convene any more meetings on the subject pending the Unidroit Secretariat's gathering of further information, in particular from the banks specialising in such operations, regarding the precise nature of international leasing operations.

7. - These decisions were endorsed by the Governing Council at its 54th session in April 1975 as a result of which in March 1976 the Secretariat sent out a questionnaire to leasing operators and experts the world over, designed both to clarify certain legal problems peculiar to leasing transactions in general and to throw light on the implications of cross-border leasing in particular. Replies to this questionnaire came in from all four corners of the world and were analysed by the Secretariat in a paper submitted to the Governing Council at its 55th session in September 1976. One of the major facts to emerge from this inquiry was that the successful mounting of truly cross-border leasing transactions, as opposed to indirect international leasing transactions concluded through subsidiaries of the lessor incorporated in the country into which the latter wished to lease or by means of joint ventures, was still a rare occurrence, even if the sums involved in the small number of transactions actually mounted successfully were enormous, and that this was in no small measure due to the varying legal treatment accorded leasing from one country to another. Interest among those responding to the questionnaire leaned accordingly more towards a uniform international regulation of the rules governing leasing transactions in general rather than rules cast with international leasing specifically in mind. The primary purpose of the drafting of uniform rules was therefore seen as the resolution of the legal vacuum affecting leasing at the domestic level with a view to facilitating and thereby extending the possibilities for the use of this means of financing international trade.

8. - Twin doubts nevertheless persisted in the minds of members of the Governing Council regarding the aptness of this subject for unification, as regards first the feasibility of disentangling the private law aspects of leasing from its fiscal aspects, given the generally agreed unsuitability of the latter for an attempt at unification, and, secondly, the desirability of dealing with leasing separately from the general body of security interests in movables, a subject then being studied by the United Nations Commission on International Trade Law (UNCITRAL). In order to clarify these doubts the Governing Council set up a restricted exploratory working group(3)

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(3) For a list of those taking part in the work of this group, see Explanatory report, op.cit., at p. 12, note 2.

drawn from amongst its own membership but assisted by consultant experts from the world of leasing practice. The Working Group gave positive answers to both problems when it met in Rome from 16 to 18 March 1977. As regards the first problem, it was of the opinion that, notwithstanding the considerable importance of fiscal considerations in specifically international leasing transactions, there was a sui generis derivation of private law in tripartite financial leasing which merited the framing of special rules cast with its particular characteristics in mind and that it would be possible in the drafting of such rules to steer clear of those aspects of leasing which rather fell within the competence of the revenue authorities, the philosophies underlying revenue law and private law being quite distinct. As regards the second problem, the group felt that it was perfectly feasible to formulate a legal framework around the sui generis leasing transaction without such a definition bringing the transaction automatically under the scope of Article 9 of the Uniform Commercial Code of the United States of America and similarly inspired security interest legislation. In particular, security interests being closely tied to an underlying sale contract, the only potential security interest in the sui generis type of financial leasing would be the purchase money security interest relating to the sale contract between supplier and lessor. The relationship between lessor and lessee under the leasing agreement itself, on the other hand, did not establish a security interest so long as no transfer of title took place.

9. - The Working Group accordingly recommended to the Governing Council that a study group should be set up with the assignment of drafting international uniform rules on the sui generis type of leasing transaction. It was felt that international uniform rules would realise a dual advantage in making it possible to leave the choice of the final form which the rules would take until a later stage, leaving open both the possibility that they be used to clarify the situation at the domestic level and the possibility that they be addressed to specifically international situations. The group also made a preliminary examination of the ground to be covered in the uniform rules, concluding with a number of policy recommendations to the Governing Council, notably that the principal aim of the uniform rules should be to regulate the tripartite leasing transaction, commonly referred to as financial leasing, in view of its sui generis characteristics in relation to the classical contractual schemata within one or other of which it had hitherto generally been the tendency to try to accommodate it, and that bipartite leasing transactions, where there was no financial intermediary between the supplier/lessor and the lessee, should only find a place in the uniform rules to the extent that such transactions did not fit within the scheme of a nominate contract and were not therefore amenable to treatment under the relevant rules of law governing such contracts.

10. - The working group's recommendation that a study group should be set up was endorsed by the Governing Council at its 56th session in May

1977. This study group, manned by eminent experts from legal and economic systems as diverse as those of Belgium, Brazil, France, Hungary, Italy, the Netherlands, Nigeria, Switzerland, the United Kingdom, the United States of America and Yugoslavia, held four sessions in Rome, from 17 to 19 November 1977, on 1 and 2 February 1979, from 30 September to 2 October 1980 and from 27 to 30 March 1984 (4). The Study Group elected Mr László Réczei, Professor of Law in the University of Budapest and a member of the Unidroit Governing Council, as its chairman. Mr Réczei had already chaired the restricted exploratory working group on the leasing contract which had met in March 1977. Stress all along having been laid on the need to seek solutions that would facilitate the use of leasing on a cross-border basis and which accordingly responded to and reflected the economic reality of the transaction rather than solutions which, by seeking above all its accommodation in one or other of the classical contractual schemata, ended up by distorting the nature of the transaction, great store was, in determining the composition and balance of the Study Group, set on achieving a suitable blend of theory and practice.

11. - Following the third session of the Study Group, the latter recommended that, instead of following the usual course of transmitting the text it had prepared directly to a committee of governmental experts for the hammering out of a final text for adoption at a diplomatic Conference, the Unidroit Governing Council should rather first give the uniform rules maximum exposure among the business and legal practitioners familiar with the everyday realities of leasing, inter alia by the organisation of symposia in different parts of the world. The purpose of these symposia would be to enable the text to be presented to and discussed by such practitioners. The unripeness of the uniform rules for consideration by governmental experts pending such time as they had been given such exposure was considered to flow principally from two, not wholly unrelated factors: first, the continuing 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 well proven flexibility and adaptability to meet constantly newly appearing market needs. The Governing Council at its 60th session in April 1981 endorsed this recommendation and symposia were subsequently organised in New York, on 7 and 8 May 1981, and in Zurich, on 23 and 24 November 1981, sponsored by the American Law Institute - American Bar Association Committee on Continuing Professional Education and by Industrie-Leasing AG, the leasing subsidiary of the Swiss Bank Corporation, respectively. Whereas the first was addressed to an essentially North American audience of bankers, businessmen and practising lawyers, the second was addressed essentially to a similar audience drawn from Western and Eastern

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(4) For a complete list of those taking part in the work of the Study Group Group, see Appendix to Explanatory Report, op. cit.

Europe. Presentation of the uniform rules to, and discussion thereof among a numerous 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 to 12 January 1983. Further presentation and discussion of the uniform rules was also possible at the seminar on international equipment leasing organised for French-speaking African lawyers by the International Development Law Institute in Rome from 6 to 17 February 1984.

12. - Much constructive criticism of the uniform rules was made at these various venues. This was considered by the Study Group when it met for its fourth session. This session was designed to consider the case for the amendments proposed during the course of the programme of symposia and to enable the drafting to be improved. To this end the Study Group was seized of a revised version of the text adopted in October 1980 which had been prepared in Budapest in December 1983 by the Unidroit Secretariat in tandem with the Chairman of the Study Group. Much additional effort during this fourth session went into improving the overall drafting of the uniform rules. The text adopted by the Study Group at this session was then, in accordance with Unidroit tradition, submitted for approval to the Unidroit Governing Council at its 63rd session held in May 1984. This approval was given by the Council which authorised the convening of a committee of governmental experts responsible for hammering out the text of a draft Convention on international financial leasing.

13. - The first session of this committee was held from 15 to 19 April 1985. 22 Unidroit member States and two non-member States were represented at this session, which was also attended by observers representing four international intergovernmental organisations and one international non-governmental organisation (5). The committee was seized of comments submitted by the Governing Council of the Asian Leasing Association (Asialease) (6), comments submitted by the Chairman and one member of the Study Group on these Asialease comments (7), observations submitted by the European Federation of Equipment Leasing Company Associations (Leaseurope) (8), comments made by members of the Unidroit Governing Council at its 63rd session (9) and comments submitted by the delegation of the People's Republic of China (10). The committee elected Mr László Réczei, who had already chaired the Study Group, as its chairman.

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(5) For a complete list of those taking part in this session, see Committee of governmental experts for the preparation of a Convention on international financial leasing (first session, 15-19 April 1985): Summary report prepared by the Unidroit Secretariat (Study LIX - Doc. 24), at pp. 1 - 4.

(6) Study LIX - Doc. 19.

(7) Study LIX - Doc. 20.

(8) Study LIX - Doc. 21.

(9) Study LIX - Doc. 22.

(10) Study LIX - Doc. 23.

14. - After a first reading of the preliminary draft uniform rules on international financial leasing as adopted by the Study Group at its fourth session, the committee of governmental experts referred examination of the various points raised in the course of this reading to a drafting committee made up of the chairman of the committee and the representatives of France and the United Kingdom. This examination yielded a redraft of the preliminary draft uniform rules which is set out below as an appendix to this report. This revised text was laid before the committee of governmental experts at its final session on 19 April. In accordance with a proposal by the chairman, it was decided not to examine this revised text on this occasion but to convey it to Governments, supported by a commentary, with a request for comments, following the receipt of which the President of Unidroit should reconvene the committee of governmental experts. In the meantime the Unidroit Secretariat was given responsibility for the drawing up of draft final clauses for embodiment in the text of an international Convention to be built around the preliminary draft uniform rules.

B. Preliminary draft uniform rules on international financial leasing adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract as revised by the drafting committee set up by the Unidroit Committee of governmental experts for the preparation of a Convention on international financial leasing following the committee of governmental experts' first reading thereof.

I. Some general remarks concerning the preliminary draft uniform rules.

15. - The motives behind Unidroit's efforts to establish a uniform legal framework for leasing spring essentially from two inter-related factors, one economic, the other legal. Whereas leasing has to a very large extent been able to realise its full potential at the national level, this phenomenon has not by and large been repeated at the international level, and among the factors held responsible for this shortcoming have been the often vast differences in the legal treatment of leasing from one jurisdiction to another. Some countries, notably France in 1966, Belgium in 1967, Brazil in 1974 and Portugal in 1979, have tackled the problem of legislating for leasing but in general most legal systems have simply tried to force leasing into what seemed to each of them, according to the internal logic of their own legal system, the most appropriate of the existing contractual schemata, without much thought for the inadequacy of the legal treatment of leases resulting from the application to them of the principles of these schemata, the very limitations of which had led to the development of the new technique of leasing in the first place.

16. - While the classical contractual schemata had provided the source and the model for many of the typical features of this new technique, the truth was that, in fusing these different characteristics borrowed from different contractual techniques, leasing had ultimately outgrown its relationship with its precursors and developed a separate hybrid legal personality of its own. The distinctness of this hybrid legal personality was notably to be seen in the particular dynamic structure and economic finality of the leasing transaction. Two factors in particular distinguish the sui generis type of leasing from the classical bailment, conditional sale or hire-purchase transaction: first, the dynamic role played by the lessee who relies on its own skill and judgment in selecting both equipment and supplier with a concomitant reduction in the role of the lessor whose ownership is stripped of virtually all the normal attributes of ownership, from an economic point of view, and whose interest in the transaction is limited to the recouping of its capital investment represented by the purchase of the leased asset; secondly, the agreement between lessor and lessee is concluded for a term which takes the period of economic amortisation of the leased asset into consideration, whence the essentially financial nature of the transaction, in that the lessee's payment of its rentals is not merely consideration for its right to quiet possession of the equipment, as would be the case with a typical bailment for example, but also guarantees the lessor the amortisation of the capital invested by it in the acquisition of the asset to be leased, together with its costs and a profit margin.

17. - These two characteristics are central to the philosophy underpinning the preliminary draft uniform rules: they justify the atypical disposition of rights and duties enshrined in the provisions of the uniform rules. At the same time they necessitate a choice between what the authors of the uniform rules considered to be the sui generis type of leasing transaction deserving of a separate legal treatment and those other types of leasing which are essentially amenable to classification under one or other of the classical contractual schemata and which accordingly would not justify the application of the atypical set of rights and duties enshrined in the uniform rules. Thus the uniform rules address the tripartite type of leasing transaction commonly referred to as financial leasing and do not extend to the bipartite type of leasing generally known as operating leasing. Whereas, admittedly, the distinction between financial and operating leasing can at times be somewhat arbitrary, a good deal of operating leasing being engaged in by lessors operating in exactly the same manner as they would in a financial lease and it frequently only being possible to determine with certainty whether the type of lease in question was a financial or an operating lease depending on what happened to the 20% or 30% residual factored in by the lessor at the outset of the lease, the dividing-line between tripartite leasing and bipartite leasing is much

easier to draw. The decision to restrict the application of the uniform rules to the tripartite type of lease commonly known as financial leasing and to exclude the bipartite type of lease commonly known as operating leasing was fundamental to the philosophy underpinning the uniform rules in that the reason for insulating the lessor in most cases from liability for the condition of the leased equipment was because its role was purely financial in character, a consideration which would not apply were the lessor producing the equipment itself, as would normally be the case with the bipartite type of leasing. Moreover, the reason for focussing on financial leasing was precisely to deal with those sui generis legal problems arising out of the complex, tripartite nature of financial leasing, such as the absence of contractual nexus between the supplier and the lessee, problems which would not arise with a two-party lease. There was not the same need for an international Convention, for any law at all, where the parties could be left to regulate the problems likely to arise out of their contract by themselves, as in the case of a two-party lease. This was manifestly not the case, on the other hand, with the more complex tripartite lease where, for instance, the aforementioned absence of contractual nexus between lessee and supplier could raise many a problem at the international level regarding recognition of the basis of the lessee's right of action against the supplier.

18. - For those States under the local law of which it would nevertheless be appropriate for the application of the uniform rules to extend to bipartite and operating leases, it was suggested that one solution would be to incorporate a reservation in the future treaty enabling such States to do so. Another solution would be the drafting of an optional protocol to the uniform rules to cover bipartite and operating leases. However, it was clear that the feats of philosophical pyrotechnics that would be called for in any attempt to accommodate both tripartite and bipartite leasing in the same text might risk prejudicing the chances of success of the whole project and it was accordingly thought wiser to concentrate attention, at least in a first phase, on the tripartite type of lease with a view to bringing that work to a successful conclusion. Once the work on such a first phase was complete, then it would be in order to give consideration to the desirability of drafting companion uniform rules on bipartite and operating leases.

19. - The same concern referred to in the foregoing paragraphs, namely to ensure the uniform rules the greatest possible chances of success, dictated a further limitation on their scope of application. Whereas the uniform rules were for a long time seen as primarily seeking to clarify the legal situation regarding leasing in general, and indeed one of the recommendations of the restricted exploratory working group of the Unidroit

Governing Council on the leasing contract that met in March 1977 was that the instrument to be prepared should be in the nature of international uniform rules covering leasing in general,and therefore not just leasing situations with an international element, so as to leave the choice of their precise scope of application until a later date, the Study Group at its third session in October 1980 decided that the scope of application of the uniform rules should be limited to international leasing transactions. This decision was prompted by recognition of the fact that certain States were only in the habit of becoming parties to international instruments the scope of application of which was restricted to international situations. It was moreover dictated by awareness of the added difficulties that would be caused by attempting a unification that would be applicable not only to international leasing transactions but also to domestic leasing situations.

20. - Realisation of the desirability of the aforesaid limitations on the scope of application of the uniform rules led to the taking of another decision, namely the couching of the uniform rules in the form of an international Convention, albeit with many of the features typical of contemporary international commercial law Conventions missing. The Study Group came to the opinion that a model law on this subject would not be appropriate insomuch as it would not offer the same guarantees of removal of the differences between the legal treatment accorded to the sui generis type of leasing from one jurisdiction to another as an international Convention. The Study Group for this reason saw the uniform rules' greatest chances of success therefore as lying in the form of an international Convention. It nevertheless considered that it fell more within the competence of governmental experts than of the Study Group to make such a decision and to draw all the necessary consequences, namely the drafting of that series of provisions generally known as "Final clauses" that are a feature of international commercial law Conventions. The title "uniform rules" has therefore for the time being been maintained in the title, although it will not escape the attention of the reader that the Study Group did feel able at its fourth session to introduce one provision, namely Article 15, that in essence had less to do with its endeavours to construct a basic uniform legal framework around the sui generis type of leasing than with the incorporation of this basic uniform legal framework within the traditional structure of an international commercial law Convention.

21. - The nature of the uniform rules, their conception as a basic minimal legal framework, testifies to yet another vital restriction built into the uniform rules, in the interest of their achieving maximum success. The dynamic, hybrid nature of leasing, forever sprouting new varieties to respond to newly perceived market needs, impressed upon the authors of the uniform rules the importance of safeguarding this inherent creative potential and of therefore avoiding the uniform rules smacking in any way

of a legislative straitjacket. The idea of unification in this field was moreover concerned less with the imposition of any legislative ideal than with the removal of those legal obstacles to cross-border leasing constituted by the differences in legal treatment from one jurisdiction to another, thus with the facilitation of leasing at the international level. With this in mind the drafters of the uniform rules set about clarifying a limited number of fundamental characteristics of the sui generis type of leasing capable of distinguishing it once and for all from those neighbouring legal concepts with which it has, for the reasons expounded above, hitherto generally been confused, rather than seeking to achieve a systematic, exhaustive legal regulation of the transaction. Whole areas of the law relating to this transaction were thus left outside the uniform rules, although it should be borne in mind that it was all along the intention of the drafters of the uniform rules that such matters should also be resolved in line with the sui generis approach inspiring the uniform rules, and this concern is indeed reflected in the provisions of Article 15.

22. - The basic legal framework contained in the uniform rules has moreover all along been conceived as being essentially permissive in character, the opinion of the drafters of the uniform rules being that virtually all, if not all of the substantive provisions of the uniform rules could and should be liable to derogation, although a final decision was specifically left to be taken on this matter by governmental experts at a later stage, as can be seen from the note to Article 14. The opinion of the drafters of the uniform rules in this respect was based on their conviction that it would serve no useful purpose to compel an international legal regulation on businessmen in this field. This conviction derived especial force from the apparently infinitely creative potential of the leasing mechanism, already adverted to earlier, and the need for the uniform rules to seek the enhancement of the opportunities for the use of leasing at an international level and not to end up by stifling its development instead.

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23. - The provisions of the uniform rules may be broken down into four parts. The first, comprising the preamble, Articles 1, 2, 3 13 and 14, concerns essentially the scope of application, whether substantive or geographic, of the uniform rules. In the second, which is made up of Articles 4, 7, 8, 9, 10, 12 and 14, the uniform rules address the rights and duties of the parties to a financial leasing transaction inter se. The third part, governing the rights and duties of the parties to the financial leasing transaction with regard to third parties or outsiders, consists essentially of Articles 5 and 7. A fourth part, which is as yet in an embryonic state for the reasons expounded above, concerns those matters connected with the application of the uniform rules as an international Convention:

Article 15 belongs to this part. The comments which follow on individual provisions of the uniform rules refer to the numbering adopted in the text as drawn up by the drafting committee set up by the committee of governmental experts (Study LIX - Doc. 24).

II. - Commentary on the provisions of the uniform rules

Title

24. - As has already been explained above, although the uniform rules are couched in the form of an international Convention, albeit as yet with many of the traditional features of such Conventions missing, their title remains, for the time being at least, "Preliminary draft uniform rules on international financial leasing". This reflects the fact that the committee of governmental experts has not yet adopted a text of the uniform rules but has merely proceeded to a first reading of the text adopted by the Study Group, a first reading which in the event yielded a revised drafting proposed by the aforementioned drafting committee which has however still to be considered by the committee of governmental experts. The text as it emerged from the first session of the committee of governmental experts therefore remains essentially axed on the text adopted by the Study Group. This text qualifies for the term "preliminary draft" in accordance with the tradition followed within Unidroit whereby such a title is conferred on texts bearing the seal of approval of study groups, as opposed to that of committees of governmental experts of that organisation.

25. - Whereas throughout most of its genesis the uniform rules referred in their title to the sui generis form or type of leasing transaction, on the occasion of its final session the Study Group decided that it would be better for the title to refer specifically to the name by which this type of leasing is commonly known, that is financial leasing. This type of lease is then characterised in Article 1 of the uniform rules. The fact that the uniform rules in their title refer specifically to international financial leasing reflects the decision taken by the Study Group at its third session to limit the ambit of the uniform rules to international transactions. The reasons behind this decision are expounded elsewhere. (11) This limitation is not in any case intended to prejudice the potential usefulness of the uniform rules as the basis of legislation to govern domestic leasing transactions in those many States as yet with no legislative infrastructure for such transactions: it would clearly be open to such States so to extend the application of the uniform rules.

25bis - Exception was taken by some French-speaking representatives attending the first session of governmental experts to the Study Group's denomination of the activity addressed by the uniform rules as "location financière". The essential reason underlying this objection had to do with what,

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(11) See § 19 above.

in the eyes of those identifying themselves with French "culture" (11bis), was considered to be the primacy of the term "crédit-bail" to denote this type of activity, given that this was the term that the French legislator had employed when legislating on this subject in 1966 and its subsequent hallowed usage in France, notably in an "arrêté" on the Frenchification of terminology imported into France from abroad. The term "crédit-bail" was felt among this lobby to be better suited to the purpose of bringing out the distinctive nature of financial leasing than "location financière" which, with its undertones of "location" / bailment, might, it was feared, lead some judges, given the novelty of the term, to interpret the rules with a "bailment" mentality and thus defeat one of the principle objectives of the uniform rules: it is precisely because the lessor in a financial leasing situation is not a lessor in the traditional "bailment" sense but is rather a "bailleur de crédit" or finance lessor that the authors of the draft took the view that it would be inappropriate for it to be held liable for defects in equipment selected by the lessee.

25ter - On the other hand, the point was made that the term "crédit-bail" had come under criticism of late in France, some writers considering that it was only apt to refer to a very specific class of financial leasing transaction, namely that covered by the legislation of 1966, and that "location financière" was accordingly to be preferred, as a broader, more general term, capable of encompassing all transactions in which the party purchasing the asset has recourse to a traditional bailment contract in order to amortise the capital it has invested in this purchase.

25quater - Concern was also expressed that employment of the term "crédit-bail" might prejudice the chances of success of the future international instrument with those Islamic jurisdictions under the law of which the granting of loans subject to the payment of interest is prohibited. The argument here ran that, the term "crédit" carrying connotations of just such a prohibited class of loan under Islamic law, "location financière" was to be preferred in that it laid more emphasis on the "bailment" aspect, and correspondingly less on the financial side of the transaction. It was however recalled that a distinction was drawn in Islamic countries between Islamic law as the official source of law and the positive law as applied in such countries which dealt with questions not according to their external form but rather by looking at their substance. Thus, although Islamic law did indeed prohibit the paying of interest, this was not so under the positive law applied in Islamic countries which would rather look to the substance of a given transaction.

(11bis) - The fact remains however that few countries customarily considered as belonging to the Latin linguistic tradition have chosen to employ the term "crédit-bail" when enacting legislation on the subject of financial leasing; four have on the contrary preferred the term "location financière" when passing such legislation: Spain in 1977 ("arrendamiento financiero"), Colombia in 1979 ("arrendamiento financiero"), Portugal in 1979 ("locação financeira") and Venezuela in 1982 ("arrendamiento financiero"). Another, Belgium, employed the term "location-financement" in its 1967 legislation on this subject. The Italian legislator which, notwithstanding repeated failures in its attempts to enact comprehensive legislation for this activity, has nevertheless always spoken, when referring to this activity, of "locazione finanziaria".

Preamble

26. - Enshrined in the preamble, in particular in the first and third paragraphs thereof, is the basic philosophy underlying the uniform rules, namely that, in order to foster the wider use of financial leasing at a cross-border level, it is important to remove the impediments to such cross-border transactions deriving from legal factors, and pre-eminent among such legal impediments must be counted the inadequacy of the legal treatment at present generally meted out to such transactions. The inadequacy of this legal treatment consists essentially in financial leasing being generally forced this way or that into one or other of the traditional contractual schemata, most notably the contract of hire, from which it has evolved and within the comfortable logic of which it has hitherto therefore almost invariably been the tendency to try to accommodate it. The authors of the uniform rules adjudged that it was time that the distinctive set of triangular relationships created by the financial leasing transaction should receive an appropriate legal treatment of its own cast with its particular characteristics in mind. The uniform rules thus set out to distinguish what their authors saw as the sui generis type of leasing once and for all from the aforementioned neighbouring legal concepts, conferring upon it a legal status of its own commensurate with the extent to which it differs from these same neighbouring concepts.

27. - From the time of the first embodiment of a preamble in the uniform rules, at the second session of the Study Group in February 1979, its purpose was understood as being not so much to serve as an exhaustive exposition of the ingredients of the definitive preamble that would preface the future international instrument to be drawn up on the basis of the uniform rules, and which could only really be drawn up when the final shape of such an instrument was better known, but rather as a proclamation that the type of leasing transaction addressed by the uniform rules was henceforth to be treated as a distinct sui generis transaction and not, as had hitherto been the case, as two separate contracts, to wit a supply contract and a contract of hire. This was intended both to prefigure the individual provisions of the uniform rules and thus explain the atypical regulation of the relations between the parties proposed therein, and to serve as an admonishment to those called upon to resolve disputes arising in connection with those countless legal aspects of this transaction not specifically addressed in the uniform rules, that they should fashion their approach to the resolution of these issues in accordance with the philosophy underpinning the uniform rules, that is they should not simply fall back on the application of the rules proper to other types of contract by that same process of analogy that has hitherto bedevilled the formulation of an adequate legal treatment for tripartite financial leasing, but should rather seek a solution in keeping with the sui generis treatment and approach evidenced in the uniform

rules. This last function of the preamble was seen by the drafters of the uniform rules as being of particular importance in view of the limited scope of the uniform rules, already adverted to above. (12)

28. - The text of the preamble to the uniform rules as adopted by the Study Group at its final session accordingly incorporated a specific reference to the sui generis nature of the transaction addressed by the uniform rules. This reference was deleted following the committee of governmental experts' first reading of this text. One member of the committee was of the opinion that the qualification of a legal institution as sui generis was not something that one would normally expect to find in a Convention and suggested that this was something that should rather be left to be debated among the legal writers. Another member of the committee thought that the inclusion of this reference at the very beginning of the future Convention would have the drawback of causing readers of the text to ask themselves what was so peculiar about the transaction addressed by the uniform rules. Yet another member of the committee favoured the deletion of the aforesaid reference on the ground that it sought to perform a task which was more a function of Article 1, namely to describe the specific nature of the transaction addressed by the uniform rules.

29. - While there was general agreement among the members of the committee of governmental experts that it was impossible to have a definitive point of view regarding the preamble at this stage, it was nevertheless their opinion that there might be some merit in being a little more explanatory in the preamble as to the purpose of the uniform rules. As one member of the committee pointed out, the preamble referred to the parties to the future international instrument having "recognised the desirability" of drafting uniform rules without, however, being more specific as to the grounds for this desirability. One member of the committee suggested that this shortcoming might be remedied by making particular mention in the preamble of the desirability of removing the impediments to cross-border financial leasing resulting from the differences between legal systems on fundamental issues. Another, asking himself wherein lay the essential usefulness of financial leasing at a cross-border level, favoured this being brought out in the preamble by a reference to leasing's potential in the context of the development of international commercial exchanges and the enlargement of international technical and scientific co-operation. For the same reason, he thought space should be found in the preamble to state that the uniform rules were essentially addressed to those small and medium-sized firms and those developing countries that had such an urgent need of capital investment. An additional advantage inherent in such a formula would be to emphasize the link between this work and the work on the codification of international commercial law being conducted within both the

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(12) See § 21 above.

United Nations Commission on International Trade Law and the United Nations Conference on Trade and Development in the spirit of the new international economic order. It was however pointed out that it was a mistake to believe that financial leasing transactions were essentially carried out with small or medium-sized firms: such transactions were carried out with firms ranging from those small in size to the largest of multinationals.

30. - The preamble to the uniform rules has all along sought to alert the reader and those who in due course will be called upon to apply and interpret them that, given the different philosophies underlying the treatment of financial leases for accounting and revenue purposes, on the one hand, and for strictly private law purposes, on the other hand, the scope of the uniform rules is delimited by reference to the private law aspects of financial leasing, the authors of the uniform rules having judged that it would be both unrealistic and presumptuous to endeavour to address such divergent concerns in one and the same text. This is not to preclude the possibility of the uniform rules impacting indirectly, albeit involuntarily, on such non-private law aspects of the subject as its accounting and revenue treatment. The committee of governmental experts however decided to replace the words "private law aspects" by the words "civil law aspects", so as to accommodate those legal systems, notably the Socialist legal systems, which do not recognise the existence of any such category of private law relations.

31. - The preamble also echoes an important objective that was ever in the forefront of the minds of the authors of the uniform rules, namely the striking of an equitable balance between the interests of the different parties to financial leasing transactions. This search for balance and equity was conducted both in the context of the two contracts making up the complex tripartite financial leasing transaction and in that of the mutual relations of the parties inter se. The uniform rules thus represent a delicately balanced structure, cast in the image of the economic reality of the transaction and which, whilst inevitably reflecting the central, dynamic role of the lessee, accordingly seeks to achieve an overall apportionment of the rights and duties of all three parties to the transaction in such a way as to mirror their different roles and levels of responsibility in relation to the transaction, or, as one member of the Study Group put it, a hierarchy of liabilities that corresponds to the hierarchy of initiatives taken by the different parties.

32. - Attention has already been drawn to the equitable distribution made under the uniform rules of the liability for product defects under a financial leasing transaction:

"The Convention defines the tripartite transaction as consisting of both

the leasing agreement between the lessor and lessee and the supply agreement between the lessor and supplier. This broad coverage allows the Convention to consider both relationships together in fashioning its rules to achieve symmetry and equity between the parties. For example, the liability of the lessor for defective products may be limited while the supplier's liability is expanded; the lessee is still allowed recovery for product defects but the liability is more equitably distributed between the parties." (13)

Article 1

33. - The opening article of the uniform rules delimits their scope of application by reference to the subject-matter addressed. The subject-matter of the uniform rules already having been generically defined in the title and the preamble as "international financial leasing", this article sets out what may be regarded as a definition of "financial leasing", leaving Article 2 to set forth the conditions that have to be met for a given financial leasing transaction to be regarded as "international" and subject to the uniform rules.

34. - The definition adopted in Article 1 is closely modelled on the definition of "equipment leasing" adopted after protracted negotiations by the European Federation of Equipment Leasing Company Associations (Leaseurope) in 1977. The fact that the reaching of agreement on this definition of the activities pursued by its members caused Leaseurope such difficulty is eloquent testimony of the often widely differing conceptions of leasing from one country to another, even within the relatively limited geographical confines of Western Europe.

35. - Whereas the provisions of Article 1 have many of the characteristic traits of a legal definition, this is deceptive. This is because, as announced in the preamble, the essential purpose of the uniform rules is to confer a distinct legal status on the atypical triangular leasing transaction commonly known as "financial leasing". The contents of Article 1 should thus be seen not so much as a legal definition of "financial leasing" in the broad, loose, flexible sense in which that term is employed and understood in everyday parlance, for to embrace in one definition all the possible variations on the hybrid mechanism generically referred to as "financial leasing" would probably be not only to attempt the virtually impos-

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(13) Amelia H. BOSS, Products Liability and International Leasing Transactions: The Unidroit Draft Convention, in Journal of Products Law 1982, 143 at 147.

sible but also unnecessarily to restrict its future pattern of evolution, but rather as a description of those features of the financial leasing transaction that establish its atypical credentials by comparison with the neighbouring legal concepts with which through its provenance it has so much in common and with which it has accordingly in the past all too often been bracketed.

36. - The decision to concentrate on financial leasing entailed the exclusion from the scope of the uniform rules of operating leases, usually but not necessarily always bipartite transactions, for the reasons set forth above. By implication short-term leasing, sometimes known as renting, is also excluded from the scope of the uniform rules under the terms of Article 1 (2) (c) which provides that in the type of lease governed by the uniform rules the rentals payable under the leasing agreement are structured in such a way as to take account of the amortisation of the whole or, at least, a substantial part of the cost of the asset leased. As will be shown below, this clause is intended to limit the application of the uniform rules to that type of lease in which, the lessor's role and interest in the transaction being purely financial in character, the term fixed for the leasing agreement will be either the equivalent or roughly the equivalent of the economic working life of the leased asset and thus that period of time over which the lessor aims to recoup its capital outlay.

37. - Another type of lease excluded from the scope of the uniform rules is the bipartite financial lease. This results implicitly from the tripartite nature of the financial lease addressed by the uniform rules as this emerges from Article 1 (1). The reasons for this exclusion have already been rehearsed above: essentially these come down to the fact that there is much less need for an international instrument where there are only two parties and effectively all these have to do is to write their own contract.

38. - In the case of a bipartite lease, the transaction is moreover clearly that much more amenable to classification as a traditional bailment contract, whereas, while the employment in the uniform rules of terminology normally associated with bailment contracts, such as "lessor" and "lessee", denotes that the essential but a priori basis of the transaction is a bailment relationship, the descriptive formulation of the type of lease addressed in the uniform rules in terms of a complex triangular relationship, rather than in terms of two separate contracts, enables the uniform rules to bring out, and to focus at once on the fundamental element of its originality, that is on that element which under-

lies the atypical legal regulation which follows: the essentially financial nature of the transaction. As noted by one commentator on the uniform rules, this means that "the lessor's role is that of lender, the lessee's role is that of borrower. Instead of lending money directly for the purchase of equipment and then securing repayment of the debt through the pledge of the equipment as collateral, the lessor purchases the equipment, takes title in its own name, and then grants the use of it to the lessee in return for a promise to pay rentals."(14)

39. - The other side of the coin, as it were, to the lessor's limited financial role in the transaction is the lessee's extended, multifaceted, nay central role in the transaction. This consequently provides the other principal hallmark of the originality of the atypical leasing transaction spelled out in Article 1, namely that it is on the specifications of the lessee that the lessor acquires the item to be leased from the supplier. In reality - and we have already had occasion to note the concern of the drafters of the uniform rules that their text should accurately reflect this economic reality - the technical specifications of the equipment are indeed worked out directly between lessee and supplier and delivery is made directly by the supplier to the lessee. This moreover highlights still further the dynamic role played by the lessee in the transaction, as echoed in Article 1 (2) (a), namely that not only does the lessee specify the equipment but it also necessarily chooses the supplier. It is thus a relationship beyond the contractual pale that underpins to a large extent the logical basis of the atypical chain of rights and duties generated by this leasing transaction, in the sense that the lessee and the supplier are never at any stage co-contractants but are essentially responsible through their dealings for the selection, with a view to subsequent use, of a particular item of equipment, the lessor's role being confined to the injection of the necessary capital for the acquisition of the equipment. It is this quasi-contractual relationship between lessee and supplier which was felt to merit not only the shifting in the uniform rules of many of the rights and duties normally associated under a lease with a lessor onto the lessee but more specifically the recognition - in Article 9 (1) - of the lessor's right to sue the supplier directly. The recognition of this right apart, the only legal link between the lessee and the supplier is in the context of the financial leasing transaction through the lessor. This is the reason why the drafters of the uniform rules decided to articulate their legal framework for this sui generis type of lease in terms of a complex triangular transaction, rather than, as hitherto, in terms of two closely connected contracts. The lessor it is who is the co-contractant common to the two basic legal relationships underlying this complex transaction, bound as it is both to the supplier under the agreement, denominated in the uniform rules as the "supply agreement", providing for the acquisition of the item to be leased, and to the

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(14) Walter E. MAY, International Equipment Leasing: The Unidroit Draft Convention, in Columbia Journal of Transnational Law 1984, Vol. 22, 333 at 341; see also § 16 above.

lessee under the agreement, denominated in the uniform rules as the "leasing agreement", providing for the use of the item acquired under the supply agreement.

40. - Particular importance in the scheme of the uniform rules attaches to the term "transaction" as employed in relation to financial leasing. While the term "contract" is much bandied about in connection with leasing, its very inappositeness is one of the principal arguments for the conferment of a separate legal status on that type of leasing commonly referred to as financial leasing: as we have already had occasion to note, this transaction is not necessarily made up of one contract but, as indicated in Article 1 (1), may equally well comprise and usually does comprise two contracts, denominated in the uniform rules as the supply agreement and the leasing agreement. However, what is involved is not so much two separate contracts as a single complex tripartite transaction setting off the interaction of two mutually interdependent agreements, and one of the principal concerns of the drafters of the uniform rules has been to ensure that the subject of its endeavours would henceforth be treated in this novel way. Treating the transaction as two separate contracts has hitherto proved to be the source of much distortion of the effective economic reality underlying the parties' intentions. The purely financial nature of the lessor's interest in the transaction and the case for its consequent insulation from that liability in contract or tort that would normally flow from its position as bailor would not, for example, emerge from the leasing agreement viewed in isolation: they only make sense when the motives of the parties to the two agreements are seen in the overall context of the single complex transaction that provides the link between the mutual rights and duties of the different parties.

41. - One member of the committee of governmental experts took exception to the uniform rules' employment of the term "transaction". He feared lest employment of this term could give rise to differing interpretations of the type of transaction involved. He considered that the term "transaction" had connotations of something material rather than legal and was as such inappropriate to refer to a legal institution. He thought that, since the purpose of Article 1 was to characterize the activity addressed by the uniform rules, what was called for was rather a legal term. His own suggestion was for replacing the term "transaction" by the term "act".
These strictures were not shared by other members of the committee. First, it was pointed out that Article 1 was not intended to set forth a legal definition of financial leasing, seeking rather to delimit the substantive scope of application of the uniform rules by reference to a particular type of financial lease, which was essentially tripartite in character - and thus excluded the two-party lease where the equipment is leased directly by the manufacturer - and concerned business equipment. The term "transaction" in

its French equivalent as a term apt for the classification of banking contracts had in fact received the blessing of no less an authority than Professor Ripert. However, the purpose of Article 1 being to describe the economic substance of the tripartite financial lease, already announced in the title of and preamble to the uniform rules, the term "transaction" was well-suited to this end: apart from avoiding situating the problem in a legal category the contours of which were already well defined and well known, it expressed a factual situation in which there were or might be one or more contracts involved. It was thus apt to encompass the complex and variable nature of the situations that were liable to arise in financial leasing. As we have had occasion to note earlier, this complexity and variability are invaluable products of that innate flexibility possessed by the basic mechanism at work in this type of leasing.

42. - This complexity and variability were spelled out still more clearly in the text adopted by the Study Group and submitted to the committee of governmental experts at its first session: the former Article 2 (a), now subsumed in Article 1, specified that the type of financial lease addressed by the uniform rules embodied "one or more agreements". This provision was designed to bring out what would normally be the pluricontractual basis of financial leases, made up of two sets of legal relationships, a contract of sale and a bailment contract, each capable materially and legally of expression as a separate contract, whilst at the same time recognising the fact, however egregious and unorthodox to some minds, that the economic finality of the transaction, when viewed overall, and the interpenetration and interdependence of the relations between the three parties involved all point effectively in the direction of a single "contract", setting out the rights and duties of each of these parties one towards the other. This clause, however, lost its separate identity as a result of the amendments made to the text in the light of the committee of governmental experts' first reading of the uniform rules. Doubt was expressed by one member of the committee as to the existence of cases when the transaction would embody merely one agreement. He imagined that there would always be two agreements, the sale contract and the bailment contract. This was true but the idea behind the clause in question was to lay down a permissive rule, enabling the three parties to come together if they saw fit to put the two contracts in one document. Moreover, for large international financial leases, the presence of all three parties being deemed necessary, it was customary to draw up a single contract defining the rights and duties of the parties in consideration of the economic and practical interests of each of them. An observer to the committee of governmental experts took the view that, if the purpose of the clause at issue was simply to state what was already true of any contract, namely that the financial leasing transaction addressed by the uniform rules could be expressed in one or more contractual documents, then he wondered whether it was not merely a pleonasm. Another member of

the committee was of the opinion that the fact that a given financial leasing transaction was laid down in one document did not alter the fact that it was still made up of at least two contracts. It was finally agreed that, so as to do allay any possible doubts that might arise, the wording of Article 1 should make it clear that a financial leasing transaction encompassed both a supply agreement and a leasing agreement, regardless of whether these were embodied in one or more documents.

43. - Up until the first session of governmental experts the opening article of the uniform rules had specifically referred to the "tripartite" nature of the transaction addressed by the uniform rules. This reference encountered criticism among some of the representatives at the aforesaid session. Particularly when viewed in combination with the former Article 2 (a) referred to in the previous paragraph, it could give the impression that there were three parties to one contract, whereas the intention was rather to convey the idea that financial leasing was a complex transaction made up of two contracts each of which had only two parties. The reference to tripartite in this context was moreover somewhat superfluous in that it was clear from Article 1 (1) (" .. one party (the lessor), on the specifications of another party (the lessee) ... acquires ... equipment ... from a third party (the supplier) ...") that the application of the uniform rules was confined to cases where there were at least three parties involved in the transaction. This last point was important also for those jurisdictions in which leveraged leasing was important, since, once it had been decided that such transactions were to be included within the ambit of the uniform rules, the fact that there was always one additional party to such transactions clearly made such a specific reference to the "tripartite" nature of the transaction addressed by the uniform rules unfortunate.

44. - That type of leasing transaction, above all practiced in the real estate field, known as "sale and lease-back" is excluded from the scope of application of the uniform rules by virtue of the opening article's reference to the fact that the equipment to be leased is acquired by the lessor from the supplier: in the sale and lease-back situation the acquisition of the item to be leased to the lessee is effected between lessee and lessor.

45. - The subject-matter of the uniform rules is further delimited in function of the types of equipment which are the subject of the individual leases. The basic choice for the drafters of the uniform rules here lay between real estate and personal property. In the event, it was decided not to attempt to cover real estate leasing in the uniform rules, principally because of what was seen as the limited incidence of such transactions at a cross-border level but also in view of the enormous difficulties that would inevitably arise in any attempt to unify principles of the law of real property and the law of personal property in the same text. The uniform rules thus concentrate on what is generally known as equipment leasing.

In defining "equipment" the uniform rules adopt the definition employed in the aforementioned Leaseurope definition, to wit plant, capital goods or equipment. Such a definition must necessarily be interpreted in the light of the additional delimitation of the substantive scope of application of the uniform rules introduced towards the end of paragraph 1, namely that the equipment must be of a type that can be used by the lessee for business or professional purposes, the intention here being to exclude the leasing of consumer movables, an exclusion justified by the quite different criteria applicable to consumer and non-consumer transactions. However, this definition should also necessarily be interpreted in the light of the decision of the drafters to exclude real estate leasing from the substantive scope of application of the uniform rules. While the drafters were clear in their own minds that the uniform rules were principally designed to cover the leasing of movables, they nevertheless rejected the idea of spelling this out more explicitly in the uniform rules on the ground that this would involve introducing terms like "movables" and "immovables" into the uniform rules with the considerably differing meanings attributed to these notions from one legal system to another. The principal source of difficulty on this score was the uniform rules' reference to "plant". "Plant" is defined in the Shorter Oxford English Dictionary as "the fixtures, implements, machinery, and apparatus used in carrying on any industrial process" (15). While there could be no doubt that plant that was leased as a chattel but subsequently became annexed to land would qualify as equipment and accordingly be covered by the uniform rules in Common law jurisdictions, the same was not necessarily felt to be true where the chattel leased began life as a fixture. The drafters of the uniform rules were not attracted, for the reason adduced earlier in this paragraph, by the idea of adding the qualification of "movable" before the word "plant" and in the end decided that it would be better to leave the matter open. Thus, while the uniform rules were never specifically intended to apply to real estate, their accidental application to real estate could not be ruled out in those cases where this would follow from the interpretation given to "plant" by the courts of a given country. It was the considered opinion of the Study Group that the disadvantages inherent in such an approach were outweighed by the aforementioned advantages of not having to introduce the slippery notions of "movables" and "immovables" into the text of the uniform rules.

46. - The difficulties that would be introduced into the uniform rules by the replacement of the words "plant, capital goods or equipment" by the

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(15) The French text of Article 1 (1) speaks of "outillage" defined in Le Robert as "ensemble, assortiment d'outils nécessaires à l'exercice d'un métier, d'une activité manuelle, à la marche d'une entreprise, d'une exploitation".

term "movables", as advocated by one member of the committee of governmental experts, so as to avoid the need for the enumeration of the different kinds of "equipment" envisaged under the uniform rules, are identical to those alluded to in the previous paragraph. As regards two particular classes of mobile equipment, aircraft and ships, a change in thinking had marked the progressive stages in the preparation of this draft. Whereas the small working group of the Unidroit Governing Council that met in 1975 to examine the feasibility of drawing up uniform international rules on the leasing contract (16) felt that both ships and aircraft should be excluded from the scope of the uniform rules in view of the special nature of the contracts involved and the restricted exploratory working group of the Governing Council that met in 1977 to examine the incidence of the two particular factors on the feasibility of drawing up uniform rules in this area (17) shared the view of the aforementioned group that there was a case for the exclusion of ships and aircraft from the scope of the uniform rules and that the same case could be made out for the exclusion of rolling stock too, it was the opinion of the Study Group from the very outset that, notwithstanding the undeniable difficulty of classifying aircraft, ships and rolling stock in the same category as the general body of capital goods, it would be in accordance with the generally accepted interest of ensuring the uniform rules as broad a scope of application as possible for such items to be included within the ambit of the uniform rules. It was never felt that this inclusion required any specific mention in the text, as, failing the specific exclusion of such items, their inclusion would follow implicitly under the umbrella of the term "capital goods".

47. - As has been mentioned above (18), the type of equipment covered by the uniform rules is delimited by reference to the purpose for which it is designed to be used. The uniform rules apply only in respect of equipment the use of which is granted for business or professional purposes. As we have already had occasion to note, the major effect of this clause is to eliminate the leasing of consumer movables from the scope of the uniform rules. However, the criterion for the "business or professional" nature of these purposes being not the nature of the equipment as such but rather the use to which it is intended under the transaction to be put, it is likely that the uniform rules will apply also in certain cases to goods which ordinarily were not intended to be used for "business or professional" purposes

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(16) See above, § 6.
(17) See above, § 8.
(18) See above, § 45.

and could just as well be used by a consumer, but which, by reason of the party making use of them, that is notably a business, would become subject to the uniform rules, being used for "business or professional" purposes, once again emphasizing the broad scope of application the drafters of the uniform rules intended to give them.

48. - Originally the Study Group had sought to drive home the distinctiveness of the type of lease addressed by the uniform rules by the employment of distinctive indicia to denote the three parties to the transaction. Thus, instead of the traditional appellations "manufacturer", "lessor" and "lessee" the uniform rules at one stage spoke of "supplier", "financier" and "user" respectively. This choice of labels was designed to reflect the essential role played by each party in the overall transaction. The term "financier" was however considered to be dangerous as a label and, while maintaining the term "supplier", for the other two parties the Study Group therefore subsequently reverted to the more classical names of "lessor" and "lessee", preferring to distinguish these parties from the classical lessor and lessee by its description of their atypical functions in the context of the sui generis type of lease.

49. - Article 1 (2) of the text adopted by the Study Group was moved into a new Article 2 as a result of the first reading of the text by the governmental experts. This reflected a feeling that it was preferable to divide the provisions dealing with the substantive sphere of application of the uniform rules on the one hand and those dealing with their geographic sphere of application on the other hand into two separate articles. Concomitant with this was the decision to bring the principal characteristics of the type of leasing addressed by the uniform rules formerly found in a separate Article 2 forward to Article 1, as a second paragraph, on the ground that this and the first paragraph of Article 1 were both provisions that set out to characterise the notion of leasing that it was the purpose of the uniform rules to encapsulate. This feeling was not unanimous, however. One member of the committee of governmental experts, for instance, took issue with those delegates who saw Article 1 (1) as a definition. He saw it rather as limiting the scope of the future international Convention to a particular type of financial lease, namely that financial lease which involves three parties in the way described in Article 1 (1) and which concerns business equipment, so as to exclude the two-party manufacturer-seller lease. What the drafters of the uniform rules saw as the definitional ingredients of financial leasing should feature in the place where they did in the text as adopted by the Study Group, namely in a separate Article 2.

50. - The new Article 1 (2) sets out those essentialia, those characteristic traits of financial leasing which must be present for a given financial leasing transaction to be subject to the uniform rules. However, it

is important to bear in mind that the characteristics listed in this paragraph are merely intended as features illustrative of the type of lease singled out for attention by the drafters of the uniform rules and are not therefore intended to be exhaustive definitional ingredients. The essential importance of this paragraph lies in its spelling out of those elements which determine the sui generis credentials of the financial lease addressed by the uniform rules in relation to the traditional bailment contract and thus provide the premise from which the subsequent articles of the uniform rules can then draw the original consequences of this determination.

51. - The aforementioned characteristics enunciated in Article 1 (2) formerly numbered four but, with the decision to subsume the idea behind the first of these characteristics as proposed by the Study Group in the first paragraph of this article (19), these clauses are now three in number.

52. - We have already had occasion to draw attention in this commentary to the two most important of these clauses, namely clauses (a) and (c). Especial importance within the scheme of the uniform rules, notably as the basis of their shifting of the normal disposition of so many of the rights and duties of the parties under a traditional bailment contract, attaches to clause (a). This departure is justified by the fact that the lessee is itself responsible for specifying the equipment, in the light of and with a view to its own operational requirements, and selecting the supplier, with whom it will work out such matters as the conditions of, and the time to be allowed for delivery, alterations, improvements, the conditions of, and the time to be allowed for payment, while the lessor's objective in the transaction being purely financial in character, its technical involvement will normally be nil. The reasoning behind this is that it would be morally indefensible for a lessee that has had ample opportunity to check on the technical suitability of the equipment required by it prior to delivery then to be able to blame the lessor, whose technical involvement in the transaction would normally be neutral, for its own bad choice when the equipment upon delivery proves to be unsuited to its requirements. This is in line with the aforementioned principle, subscribed to by the authors of the uniform rules, that for each hierarchy of initiatives there must be a corresponding hierarchy of responsibilities. This clause provides the logical premise for the general insulation of the lessor from liability, under Article 7, in respect of those contractual and tortious duties that would ordinarily flow from its position qua bailor of the equipment. It also furnishes the justification for the lessee, under Article 9, being made a third party beneficiary of the duties assumed by the supplier under the supply agreement: the technical specifications regarding the equipment are worked out between supplier and lessee but this factual link is not reflected in a contractual nexus, the effect of which would, failing the provisions of Article 9, be to make it difficult for the lessee to seek redress from such a supplier for its delivery of equipment that failed to measure up to that stipulated for.

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(19) See § 42 above.

53. - The language of this clause was however the subject of considerable criticism at the first session of governmental experts. In the text adopted by the Study Group the choice of the equipment and the supplier was stated to be "the lessee's responsibility". The precise connotations of the term "responsibility" seemed to have generated a certain amount of confusion. There were those who saw the employment of this term in the sense of its strictly legal connotation and therefore wondered to which legal responsibility it could refer, since responsibility in contract would appear to be excluded by the absence of contractual nexus between lessee and supplier. It was explained that the characteristics listed in Article 1 (2) had all along been intended as statements of fact, as factual criteria whereby it was possible to ascertain whether a given transaction was a financial leasing transaction for the purposes of the uniform rules. The legal consequences of these statements of fact were then spelled out in the subsequent articles of the uniform rules. This explanation also served to dispose of a proposal whereby clause (a) would have been expanded so as to bring out more clearly the fact that it was not the intention of the authors of the uniform rules that the lessor should be made to pay for the consequences of the lessee's choice of the equipment turning out to have been a bad one. The tenor of this proposal was that the clause in question should not only state that "the choice of equipment and of the supplier lies with the lessee" but should go on to specify that "and no responsibility shall be incurred by the lessor as a result of these choices." It was agreed that the wording of this provision would be amended so as to remove any idea that it sought to enunciate a rule of legal responsibility, and to convey instead the idea that in choosing the equipment and the supplier the lessee relied on its own skill and judgment and not on those of the lessor, that is to emphasize that it was concerned with the fact of the lessee's reliance on its own skill and judgment rather than on the concept of the legal responsibility corresponding to such reliance on the lessee's part.

54. - Article 1 (2) (b), stating that the equipment is acquired by the lessor in connection with a leasing agreement which either has been made or is to be made between the lessor and the lessee, underlines the fact that the complex leasing transaction addressed by the uniform rules will ordinarily comprise two contracts and brings out the link between these two contracts, the lessor acquiring the equipment from the supplier in pursuance of the agreement it has made with the lessee. The somewhat vague wording "in connection with" is designed moreover to indicate that the lessee's selection of the equipment is not necessarily contemporaneous with, or subsequent to the leasing agreement, but may in fact precede the conclusion of the leasing agreement, further testimony of the flexibility of leasing. One member of the committee of governmental experts moreover took the view that, in so far as the whole of the uniform rules, and notably Article 10 of the text adopted by the Study Group (new Article 9), affected the supply

agreement, it would be good if, with a view to clarifying the meaning of the words "in connection with", there could be some reference in the supply agreement to the leasing agreement. The fact that the draft speaks of the equipment being "acquired" rather than being "purchased" as in earlier versions of the draft reflects the feeling of its authors that to say that the equipment was "purchased" by the lessor would not be entirely accurate to describe the case, frequent in the leasing of plant, where the land on which the plant was to be built was indeed purchased by the lessor but where the plant was then constructed on this land by a third party builder.

55. - Article 1 (2) (c) highlights the financial nature of the leasing transaction addressed by the uniform rules in indicating the link between the duration of the leasing agreement and the period of the working life of the equipment leased. The lessor's calculations in setting the amount of the lessee's rentals under this type of lease are founded on its ability to amortise its capital investment in the transaction over the term of the one leasing agreement, unlike the classical bailment contract, where the lessee's payment of its rentals is merely consideration for its right to quiet possession of the asset leased and the lessor's amortisation of the capital invested by it in the acquisition of such an asset would normally be spread over the terms of more than one contract. Originally this clause as it emerged from the Study Group spoke of the leasing agreement taking the period of amortisation of the equipment into consideration and some members of the Study Group as well as some of the participants at the programme of symposia voiced their concern at the vagueness of the term "take ... into consideration", arguing that the term of any financial lease would automatically take the period of amortisation of the equipment into consideration (writer's own italics). The drafters' choice of language was conditioned by their desire to indicate that, while the term of the leasing agreement took the period of amortisation of the equipment into consideration, it was nonetheless not equal to this period. This choice of language was to be seen as an attempt to bridge the considerable gap between those legal systems for which such a link between the term of the leasing agreement and the lessor's amortisation of its capital investment is fundamental and those others for which too close an approximation would destroy the transaction's chances of being upheld as a bona fide lease and would turn it into a conditional sale / security interest. However, at the first session of governmental experts the feeling was expressed that, since the uniform rules were now only designed to cover financial leasing and were not intended to cover short-term leasing or operating leasing, clause (c) was perhaps in need of some greater precision, as to say that "the leasing agreement takes the period of amortisation of the equipment into consideration" (Article 2 (d) of the preliminary draft uniform rules as adopted by the Study Group) was also true, albeit in a different way, of operating leases. It was agreed that the clause in question required strengthening, either by the insertion of a reference to the

fact that the rentals were not fixed in function of the use-value of the equipment but in function of what was necessary to amortise the lessor's capital investment or by the insertion of a reference to the fact that the leasing agreement was for a term representing the whole or substantially the whole of the working life of the leased asset.

56. - There were those who feared lest the incorporation of such a characteristic might be at odds with the drafters' declared objective of concentrating their attention on the civil law aspects of financial leasing, to the exclusion of its revenue law aspects (20). This clause does not however presume to enter into the merits of one or other of the systems of fiscal amortisation practiced in respect of financial leases: it simply seeks to state the fact that in the type of lease addressed by the uniform rules there is this link between the term of the leasing agreement and the amortisation of the cost of the whole or substantially the whole of the lessor's capital investment in the acquisition of the equipment, with a view notably to distinguishing it from those short-term rentals and operating leases in which this linkage plays a much less important role. It was never the intention of the drafters of the uniform rules that fiscal considerations should be brought into play in the application of this clause.

Article 2

57. - In the same way as the former Article 2 as adopted by the Study Group was relocated in Article 1 as a result of the committee of governmental experts' first reading of the Study Group's text (21), the second paragraph of Article 1 of the text adopted by the Study Group was, in view of its separate function, namely the delimitation of the geographic sphere of application of the uniform rules, transferred to a separate article, the new Article 2. This article sets forth the conditions to be met before a given financial leasing transaction may be regarded as "international" and subject to the uniform rules. (22) The reason behind the Study Group's decision to restrict the scope of application of the uniform rules to inter-

(20) See § 30 above.

(21) See § 49 above.

(22) One representative attending the first session of governmental experts raised the question whether the drafters of the uniform rules had ever considered the desirability of also making the application of the uniform rules dependent on the parties to the transaction having made an express reference in their respective agreements to the uniform rules, on the pattern of the proposal contained in Article 1 (2) (a) and 1 (3) (a) of the United Nations draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/211). This matter, which had in fact never previously been considered by the authors of the uniform rules, did not arouse further comment among the members of the committee.

national transactions has already been discussed above (23). One member of the committee of governmental experts suggested going back on this decision, notably so as to remain faithful to the Unidroit philosophy whereby the drafting of uniform law entailed the harmonisation of the internal laws of the different States on a given subject. His suggestion, not taken up by any other representative, however, was for the time being to encompass both domestic and international transactions and to take a decision at a later stage as to whether to give the uniform rules a broader or a narrower sphere of application.

58. - Once it was decided to tie the uniform rules to specifically international financial leasing it became necessary to decide which should be the criteria for determining whether a given financial lease is to be regarded as international for the purposes of the uniform rules. The criterion normally employed to determine the international character of a legal relationship in modern international commercial law Conventions is that of the place of business of each of the parties to the relationship in question (24). In the text of the uniform rules adopted by the Study Group an additional factor was introduced, namely that of the principal place of business of the parties concerned. This restriction on the scope of application of the uniform rules caused disquiet among certain members of the committee of governmental experts who failed to see why only a principal place of business should be relevant for the purpose of determining the international character of a given financial leasing transaction and why an element of internationality could not also be found in a secondary or, for that matter, a tertiary place of business. (25) According to this current of opinion, the decisive place of business in this context was the place of business which lay at the basis of the transaction covered in Article 1 (1), which, it was suggested, could be either the place of business where the particular agreement was made or the place of business where it was to be performed. The best means of dealing with this problem, it was agreed, was to follow the model to be found in other recent international commercial law Conventions,

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(23) See § 19 above.

(24) See, for example, Article 1 (1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and Article 2 (1) of the Unidroit Convention on Agency in the International Sale of Goods (Geneva, 1983).

(25) However, given the important sums of money involved in international financial leasing transactions, the point was made at the first session of governmental experts that in practice decisions would be taken at the head office of the company involved, by a very high-ranking company officer.

notably the aforementioned United Nations Convention on Contracts for the International Sale of Goods (26) and the Unidroit Convention on Agency in the International Sale of Goods (27): this would mean referring simply to the places of business of the relevant parties in those provisions of Article 2 delimiting the geographic scope of application of the uniform rules (the new Article 2 (1)) and then in an additional provision (the new Article 2 (2)) specifying that, where the relevant party has more than one place of business, the place of business to be taken into consideration for the purpose of determining the international character or otherwise of a given transaction is that place of business which has the closest relationship to the particular agreement and its performance.

59. - As has been stated in the previous paragraph, the traditional criterion employed to determine the international character of a given legal relationship in modern international commercial law Conventions is that of the place of business of each of the parties to the relationship in question. The difficulty with applying this principle to the uniform rules derives from the fact that, whereas in most of the cases addressed by such Conventions the relationship covered is basically a two-party relationship, the transaction addressed by the uniform rules is tripartite. This was considered by the Study Group to necessitate a choice between the three different places of business on which such a choice might fall, to wit the place of business of the supplier, that of the lessor and that of the lessee. The Study Group decided to exclude the impact of the supplier's place of business on the ground that the fundamental legal relationship contained within the complex tripartite relationship is the leasing agreement between lessor and lessee (28) and that it was accordingly more appropriate to take the places of business of lessor and lessee as the decisive criteria for determining whether a given financial lease was international or not.

60. - This finding was much criticised by the governmental experts at their first session. The principal source of their misgivings was the direct right of action conferred on the lessee against the supplier under Article 10 of the uniform rules as adopted by the Study Group. Their argument was that, since no account was taken of the place of business of the supplier or of the supply agreement in the determination of the geographic sphere of application given to the uniform rules under Article 1 (2) of the text adopted by the Study Group, there was a very real danger that this direct right of action would only effectively lie in those cases where the law applicable to the

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(26) cf. Articles 1 (1) and 10 of this Convention.

(27) cf. Articles 2 (1) and 8 of this Convention.

(28) See also El Mokhtar BEY and Christian GAVALDA, Problématique juridique du leasing international in Gazette du Palais 1979, 1er sem., 143 at 144.

supply agreement happened to be the law of a State that was party to the future international Convention (29), since, where this was not the case, and the supply agreement was governed by the law of a State that was not a Contracting Party, it would clearly be open to the supplier to invoke in its defence the fact that there was no contract between it and the lessee and thus defeat the lessee's exercise of the remedies provided under Article 10. (30). One proposal advanced for the solution of this dilemma was that the opening words of Article 1(1) should be amended to read:

"This Convention governs a financial leasing contract"

rather than, as at present, a financial leasing "transaction", so as to make it clear that the uniform rules did not seek to cover the supply agreement concluded in connection with the leasing agreement but only the leasing agreement itself, and, so as to eliminate the problem arising with the enforceability of the direct right of action against a supplier subject to a different law from that of the lessee, so to amend Article 10 that it no longer gave the impression of creating a direct right of action but, situating the remedy in the context of the relationship between lessor and lessee, rather provided for the automatic assignment of the lessor's rights against the supplier under the supply agreement to the lessee. The solution finally advocated by the drafting committee was somewhat different, however. Acknowledging the fact that the fundamental legal relationship in the financial leasing transaction is the leasing agreement, on the one hand it adopted as the basic criterion for the international character of the transaction and thus the application of the uniform rules the fact that lessor and lessee have their places of business in different States, whilst, on the other hand, in recognition of the need to allow for the repercussions of individual provisions of the uniform rules on the supplier, it further required that not only must the States in which the lessor and lessee have their places of business be Contracting Parties but also the State in which the supplier has its place of business.

61. - An alternative connecting factor employed for the application of modern international commercial law Conventions is the case where the rules of private international law of the forum lead to the application

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(29) See also Explanatory report, op. cit., § 94.

(30) It was suggested that the same sort of problem could also arise in connection with Articles 5 and 7 of the text adopted by the Study Group in that these articles touched on the rights of third parties and that it might therefore be necessary to introduce a reference to the law of such third parties in the provisions of the uniform rules delimiting their geographic sphere of application. This suggestion was not taken up, however.

of the law of a State which has adopted the uniform rules (31). This additional basis for the application of the uniform rules is founded on the premise that, once the uniform rules are adopted by a State, then they should govern all financial leasing transactions of an international character as defined in the chapeau of Article 2 (1) in preference to its domestic law which was concerned with only internal financial leasing transactions. Thus, when, by the operation of the rules of conflict, the law of a Contracting State is found to be applicable by the judge seized of the case, then it is the uniform rules which, by virtue of this principle, should apply to the financial leasing transaction. The application of this connecting factor to the particular case of financial leasing nevertheless was seen as raising many a problem, not least that, mentioned during the first session of governmental experts, of the inconsistency inherent in the uniform rules' proclamation of the atypical, sui generis character of the financial leasing transaction addressed by the uniform rules and the implication drawn under Article 1(2) (b) of the text as adopted by the Study Group that a specific category of rules of private international law had grown up applicable to financial leasing transactions, whereas in effect recognition of the fact that there was a type of financial leasing that was sui generis and not amenable to classification under any of the traditional contractual schemata meant inter alia that there were not as yet any rules that could be regarded as being proper to such transactions. However, the fact that in private international law the autonomy of the parties was decisive was considered by some governmental experts to mean that this problem was not insurmountable, the parties themselves being free to agree which law should apply and, should they not choose the applicable law, then under the rule of private international law generally applied in all legal systems the law of the lessor's place of business would be applicable, as the law of the party that was to "effect the performance" characteristic of the transaction (32). One possibility canvassed was, as with the aforementioned United Nations Convention on Contracts for the International Sale of Goods, to allow States to make a declaration that they would exclude the application of the Convention by virtue of such a provision.

62. - The major problem, however, arising in applying this alternative connecting factor to the particular case of financial leasing lay in the fact that, whereas in the United Nations Convention and in the Unidroit Convention referred to in footnote 31 the relations governed were bipartite, the uniform rules encompassed a complex, tripartite relationship. In the

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(31) Cf. Article 1 (1) (b) of the aforementioned United Nations Convention on Contracts for the International Sale of Goods and Article 2 (1) (b) of the Unidroit Convention on Agency in the International Sale of Goods.

(32) Cf. Article 4 (2) of the 1980 E.E.C. Convention on the law applicable to contractual obligations.

form in which the rule was presented in the text adopted by the Study Group, which was essentially much the same as that contained in the aforementioned United Nations and Unidroit Conventions with minor amendments, it was provided that once the conflicts rules of the judge seized of the case indicated the application to the leasing agreement of the law of a Contracting State, the whole tripartite transaction addressed in Article 1 was to be subject to the Convention. This did not seem workable to some minds, because, even if it was the intention of the drafters of the uniform rules to erect financial leasing into a sui generis tripartite transaction seen as a whole, this would not stop the distinct contracts making up the transaction having to be analysed separately at the level of the application of the rules of private international law. This would mean that, even if the conflicts rules of the judge seized of the case might very well indicate the applicability of the law of a Contracting State for one part of the tripartite transaction, say the leasing agreement, his conflicts rules might just as easily indicate the applicability of the law of quite another State, not party to the Convention, for the other part of the transaction, namely the supply agreement, or vice-versa.

63. - Thus, while the embodiment in the uniform rules of such a rule was in itself considered salutary, in so far as it would ensure the application of the Convention where the law of a Contracting State was applicable under the conflicts rules of the judge seized of the case, it was recognised that it would however be necessary to bear in mind that such a rule would only work for that part of the transaction to which the law of a Contracting State was indicated as being applicable under the conflicts rules of the judge seized of the case and that there could therefore be cases where the Convention would not apply to the other part of the transaction where the conflicts rule of the judge seized of the case indicated the applicability to that part of the transaction of the law of another, non-Contracting State. However in view of these difficulties, the drafting committee finally decided not to include such a connecting factor in the uniform rules.

Article 3

64. - This article seeks to resolve the difficulties arising out of the fact that, whereas the inclusion in the leasing agreement of an option to purchase the leased asset in favour of the lessee is in some jurisdictions, mainly Civil law systems, an essential ingredient of the sui generis type of financial lease addressed in the uniform rules,(33) under other legal systems,

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(33) In these countries such a purchase option represented an important part of the financial bargain for both lessor and lessee, the pre-negotiated price at which the option was exercisable reflecting the amount paid by the lessee by way of rentals.

essentially Common law jurisdictions, the inclusion of such an option would prevent the agreement being qualified as a lease at all and would lead instead to its requalification as a hire-purchase or conditional sale transaction (34). The purpose of Article 3 is thus to preserve the application of the uniform rules in those jurisdictions in which the inclusion of such an option to purchase in the leasing agreement would prevent such an agreement from having the character of a lease and change it into something quite different. In other words, where a State becomes party to the future international instrument on this subject even though under its domestic law the inclusion of an option to purchase in the leasing agreement would destroy that agreement's characterisation as a lease it thereby confirms its acceptance of the principle that for the purposes of the uniform rules a leasing agreement may include such an option. Equally this means, of course, that where the State ratifying the future international instrument regards the inclusion of such a purchase option as an essential ingredient of its domestic financial leases it thereby nevertheless confirms its acceptance of the principle that for the purposes of the uniform rules a leasing agreement may also not include a purchase option.

65. - The substance of this provision gave rise to considerable confusion among those attending the first session of governmental experts. There was a small, if significant body of opinion according to which this provision encompassed an idea that went to the essence of the transaction addressed by the uniform rules and as such should rather be embodied among the main characteristics of the transaction set forth in Article 1 (2) supra (35). This attitude stemmed from the legislation in Civil law countries which had elevated the inclusion of an option to purchase to the status of a sine qua non of the sui generis type of leasing transaction. Indeed, as a result, right up until the last session of the Study Group the inclusion of an option to purchase was referred to among the main characteristics of the transaction addressed by the uniform rules. However, to have such a clause feature among the leading characteristics of this transaction would clearly, on the one hand,

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(34) See Explanatory report, op. cit., § 71.

(35) One member of the committee of governmental experts thus suggested that, rather than Article 3 being presented as an exception to the general sphere of application of the uniform rules as delimited in Article 1, its content should be used to complete the provisions of Article 1. He feared lest otherwise those legal systems unfamiliar with the problem of the jurisdictions under which an agreement containing an option to purchase would be prevented from having the character of a lease might be tempted to give this provision a quite different meaning from the one intended.

be to introduce an element of legal uncertainty into the application of the uniform rules and, on the other, be at odds with the acceptability of the uniform rules in those jurisdictions where the effect of such a clause would be to preclude the leasing agreement from having the character of a lease at all. Such a clause, whilst therefore unacceptable as a leading characteristic, was nevertheless acceptable as an optional ingredient of the type of transaction addressed in the uniform rules.

66. - Criticism was also levelled on the occasion of the first session of governmental experts at this provision's employment of the term "applies". We have already mentioned that one delegate saw this clause as an exception to the general sphere of application of the uniform rules as defined in Article 1. Another delegate took the view that to say that the "Convention applies whether or not ..." implied that there was another provision of the uniform rules which would have the effect of excluding their application. Use of the term "applies" was defended on the ground that the purpose of this provision was to ensure that the application of the uniform rules would not be prevented in those jurisdictions in which it might otherwise not have applied because the inclusion in the leasing agreement of a purchase option would have precluded the transaction's characterisation as a lease, for example English and American law. Thus use of the language "applies whether or not" was designed to make it clear that the uniform rules were intended to apply whether or not a purchase option was included in the leasing agreement. The reasoning underlying this solution was that, as the uniform rules are specifically addressed to international transactions and do not therefore purport to interfere with the varied situation existing on this subject from one country to another regarding wholly domestic transactions, there was no good reason why the uniform rules should not apply regardless of the particular solution adopted on this subject in the individual country concerned.

67. - It of course has to be borne in mind that, as alternatives to the exercising of a purchase option, a lessee will have two other possibilites, one stated in the uniform rules, to wit to hold the leased equipment on lease for a further period, normally at a much reduced and in some cases at a peppercorn rental, and the other, not stated bacause it is not in the nature of a special right conferred on the lessee by the leasing agreement but is rather simply the lessee's duty in the event of it either not exercising a purchase option or not taking it on lease for a further period, to wit to return the leased asset to the lessor, who will then usually dispose of it on the second-hand market. There was some discussion during the first session of governmental experts as to the desirability of spelling out more clearly both the nature of these different options and the time at which they could be exercised. To take the second point first, the intention of the drafters of the uniform rules was that the purchase option, where granted, should be exercisable either during or at the end of the leasing agreement.

The idea here then was simply to reflect the situation as it existed in practice. In effect, the option to buy did not necessarily have to be exercisable at the end of the leasing agreement: there were also "options d'achat intermédiaires" whereby the lessee had the right to become the owner of the equipment after, for example, one year of the lease by paying the residual value of the equipment. The lessee was thus left maximum freedom to acquire the equipment at the moment most favourable to its interests: just one more instance of the flexibility built into the sui generis type of lease. So as to preserve this element of flexibility it was agreed that it would be preferable not to lay down any specific time at which a purchase option should be exercisable so as to leave this to the free assessment of the parties.

68. - In the text adopted by the Study Group the corresponding clause spoke of "the right to buy or re-lease the equipment". The term "re-lease" was criticised on the occasion of the first session of governmental experts. The question was raised as to whether this term should be understood in the sense of the conclusion of another leasing agreement of the kind contemplated in the uniform rules, that is a leasing agreement that was sui generis in character, or could equally well cover the case of the conclusion of a traditional lease. It was generally agreed that, as the basic idea of this provision was to leave the parties maximum freedom to define the terms of their agreement as they saw fit, the term "re-lease" was intended to encompass both possibilities. It was also queried whether, in the same way as the lessor had to be owner of the leased asset during the original leasing agreement, it would also have to be owner following such a "re-lease". It was pointed out that this would obviously depend on whether the "re-lease" took the form of a new contract or left the old agreement to subsist, but that in any case this and other conditions of such a "re-lease" would be left to be determined by the parties. In the re-drafting exercise performed by the drafting committee following the committee of governmental experts' first reading, the term "re-lease" was replaced by the expression "hold /the equipment/ on lease for a further period" to clarify the intentions of the drafters of the uniform rules as expounded above.

Article 4

69. - This article deals with the extent to which the parties should, once the financial leasing transaction has been concluded, be free to vary their respective agreements. The term "agreements" is here used in its broadest sense to encompass not only the supply agreement between lessor and supplier but also the specifications given by the lessee to the supplier, admittedly not an agreement in the strict contractual sense. The basic principle underlying this article is that, while there can be no harm in the parties negotiating better terms for themselves, in order to safeguard the interests of the

lessee with regard to the supply agreement and those of the lessor with regard to the specifications agreed between the lessee and the supplier, any attempt to vary the supply agreement, once the leasing agreement has been made, must be sanctioned by the lessee (paragraph 1) and any attempt to vary the specifications given by the lessee to the supplier, once the supply agreement has been made, must have the consent of the lessor (paragraph2).

70. - This article seeks to strike a fair balance between the interests of all the parties involved in the transaction regarding any variations in their respective agreements. Thus it does not provide for the supplier's consent to be given to any variation in the terms of the leasing agreement, as this is clearly a matter of no concern to him. On the other hand, given that it is the lessee who is to use the equipment, it is clearly vital that there should be no room left for collusion between the supplier and the lessor to the detriment of the lessee and for this reason the uniform rules propose to make any variation in the supply agreement subject to the lessee's consent. Equally it is vital that the lessee should not be able to alter the lessor's situation in regard to the transaction negatively without the lessor's consent. Thus, just as it is legitimate for the lessee to seek to have the use of the best equipment available for its particular needs, it is equally legitimate that the lessor should first be given an opportunity to declare its opinion on any consequential variation in the terms of the specifications given by the lessee to the supplier, for instance during the ongoing construction of the item intended to be leased, that might have the effect of increasing its responsibilities, provided that is that the lessor's consent is not in such circumstances withheld unreasonably or in bad faith.

71. - As has been mentioned above, this article is in no way intended to interfere with the parties' right to negotiate better terms for themselves, all the more so as the negotiation of better terms between the supplier and the lessor, for example, could well be to improve the terms of the leasing agreement for the lessee, notably in the shape of lower rental payments. This would notably be the case, say, where the lessor and the supplier agree to vary their original agreement by the terms of a buy-back arrangement, thus enhancing the lessor's guarantee and enabling it to pass this onto the lessee in the form of lower rentals. Such private arrangements between lessor and lessee are to be expected, given that they would often be dealing with one another on a continuing basis over a number of years. However, whereas the rule contained in Article 4 is designed to prevent the variation of the parties' respective agreements inasmuch as the result of such variation would be to worsen the situation of the party not party to such variation, it was not considered feasible or worthwhile to formulate such a distinction between the negative and the positive impact of individual variations on the position of the party not party to the variation.

72. - One member of the committee of governmental experts cast doubt on the need for Article 4 (2), suggesting that it was a matter that could be left to the freedom of the parties and that the lessee's power to give specifications to the supplier could be regarded as deriving from the supply agreement. These doubts were not shared by other members of the committee who, on the contrary, saw merit in the rule embodied in this provision, notably as a gap-filler in those cases where the parties had not themselves provided for variation. The rule was also seen as useful in clarifying two special situations that might well arise. First, it was not infrequent in the case of large, complex equipment, even after both the supply agreement and the leasing agreement had been concluded, for there to be a need for an ongoing dialogue between lessee and supplier regarding the specifications of the equipment. For instance, in the case of the construction of a tanker it would be common for lessor and lessee to agree to have a team of engineers on the spot to monitor the changes of design that would regularly have to be made, some of which could not have been foreseen. However, just as it would be irrational to expect the lessee as the party that would have to use the equipment to agree to changes that would be inconsistent with its intended user of the equipment, so it would be irrational to expect the lessor as owner and the party contracting with the supplier to allow changes that would alter its financial commitment and perhaps might even increase its exposure to liability towards third parties (in respect of rules of safety regarded as being of a public policy nature) without first being consulted. This provision accordingly seeks to ensure that before any variation to the technical specifications agreed between lessee and supplier can have legal effect, it must first be sanctioned by the lessor's consent.

73. - The second point clarified by this article concerns those leasing transactions where the lessee is authorised to buy the equipment as agent for the lessor (an "agency lease"): such authorisation is, by virtue of this provision, confined to the initial purchase and does not, unless otherwise agreed, extend so as to enable the lessee to vary the supply agreement which it has concluded on behalf of the lessor. Without any express rule providing for the lessor's consent in such a case, there might be an implication that the lessee's authorisation to purchase equipment on behalf of the lessor also extended to enable it to modify terms of the supply agreement.

74. - One member of the committee of governmental experts saw a contradiction between this provision, in so far as it required the lessee to seek the prior approval of the lessor to any variation in the technical specifications of the equipment agreed between the supplier and itself, and the general philosophy incorporated in the new Article 1 (2) (a), namely that the lessee relies on its own skill and judgment in specifying the equipment. This point of view was not shared by other members of the committee: there was no contradiction between these two provisions in that, even on the ini-

tial purchase, the lessor's consent was obviously required before it was going to buy, as there was no way that a prospective lessee could, by requesting the purchase of a given item of equipment by the intending lessor, force that lessor to buy if it did not in the circumstances wish to. It would moreover be illogical to recognise a discretion in favour of the lessor to buy or not to buy in the first place and at the same time to subject it to the possibility that the contract that it had entered into could be varied by a third party, the lessee, without any need to seek its consent.

Article 5

75. - One of the thorniest problems arising in connection with leases as indeed with all transactions involving the separation of ownership and possession in respect of property concerns how best to inform innocent third parties coming into contact with leased property, through their dealings with the lessee, that it is subject to a reservation of title, since failing such notification, appearances, that is the fact of the lessor's dispossession, would normally induce most third parties, for instance creditors of the lessee, to believe that they were dealing with the owner, rather than the lessee, of the asset in question. This problem was particularly acute in the case of financial institutions thinking about lending to the lessee on the security of its assets, as a physical inspection of all the equipment of the financial institution's potential debtor in such a case would simply not be feasible.

76. - Consideration was given to the use of a whole range of systems of public notice, going from the simple affixing of a plaque on the equipment, as required under the law of more than one country, to the highly sophisticated computerised system of registration against the lessor already in use in one jurisdiction and likely to be introduced into others in due course. Experience had revealed the limitations of the affixing of plaques as the basis of a foolproof system of public notice, given that such plaques were always relatively easy to remove. Balance-sheets were also considered but rejected as inadequate for this purpose, in view of the fact that they served a quite different function, that of a general public notice, from the function that was had in mind here, namely a notice to a specific kind of third party. The vast majority of opinion within the Study Group recognised the ultimate desirability of a system of registration as the most effective means of giving notice of the lessor's title to third parties. The different models currently employed for leases were all considered. The basic model was the system contained within Article 9 of the Uniform Commercial Code of the United States of America. This was recognised as having much to commend it, notably its flexibility in ensuring the protection of third parties whilst at the same time not unduly tying the hands of the lessor, obliged to regi-

ster only according to the type of equipment. This system had been much improved upon in the Canadian jurisdiction of Saskatchewan, which had extended its computerised registration system created for security interests in personal property to cover leases, deemed for registration purposes to be security interests. The result of applying this registration system to leases, however, is that failure to register the lease means that the lessor's title is not only subordinate to that of subsequent good faith purchasers but also to any other security interest taken in the equipment and to the lessee's trustee in bankruptcy. Under the French system of registration introduced for financial leases in 1972, the lessor had responsibility for filing the essential details of the lease at the office of the registrar of the court where the lessee had its principal place of business and the lessee responsibility for a balance-sheet record of its rental liabilities under the lease. Whereas criminal sanctions were provided for the lessee's non-compliance with its public notice requirements, the sanction laid down for the lessor's failire to file was the unenforceability of its title against third parties acquiring from the lessee in good faith.

77. - Apart from the diversity of public notice systems, there was also the problem that for many countries registration was only considered feasible for large unit goods that were easily identifiable, where registration was effected against a number, such as ships, aircraft and motor vehicles. The largest individual difficulty recognised as obtruding with the embodiment of however minimal a public notice requirement in a future international instrument on the subject was seen as the fact that such public notice systems were at present in force in a very limited number of jurisdictions. The organisational and financial implications of such a requirement, in particular for developing countries most of which were not even endowed with the most basic public notice infrastructure capable of being extended to cover the requirements of the uniform rules, were seen as making such a solution a realistic no-starter.

78. - The Study Group was nevertheless anxious that the uniform rules should give some expression of its conviction that a public notice system was the only foolproof solution to this problem, and thus perhaps give some momentum to the future institution of such systems in the various countries. It therefore proposed a rule under which, where rules as to public notice were laid down in the country where the lessee had its principal place of business, then the lessor's title would only be good against third parties if the lessor had complied with such rules. Thus, if there were no rules as to public notice under the law of the country where the lessee had its principal place of business, the lessor's title would be automatically good against third parties.

79. - This provision, while recognised as being a key article of the

uniform rules in so far as it set out to regulate conflicts over the leased asset arising as between the lessor and third parties which could not simply be determined in the leasing agreement or the supply agreement, nevertheless attracted much criticism on the occasion of the first session of governmental experts. This criticism essentially reflected the very different philosophies underlying the methods of resolving conflicts between the dispossessed owner of property and a third party who had acquired that property in good faith in, on the one hand, Common law jurisdictions and, on the other hand, Civil law jurisdictions. Whereas the former, under the "nemo dat quod non habet" rule, acknowledged the dispossessed owner's general right to assert its title against such third parties, application of the Civil law principle that " en fait de meubles possession vaut titre" meant that in such jurisdictions an innocent third party would take free of the dispossessed owner's title. The provision as it was proposed by the Study Group did not satisfy either group. Civil law jurisdictions were unwilling to make an exception to the aforementioned basic principle of their legal systems whereby third parties acquiring property from a person whom they in good faith believed to be the owner took free of the dispossessed owner's title. This was a principle to which these legal systems were so attached that to have such a clause in the uniform rules departing from it in respect of leases would make the uniform rules totally unacceptable to such jurisdictions. More than one such jurisdiction moreover expressed its unwillingness to introduce a public notice system solely for leases. Common law countries were equally concerned that the lessor's rights as against third parties would, under the rule proposed by the Study Group, run the risk of being subordinated to a public notice requirement imposed not by the law of the place where the goods were situated but by the law of the lessee's principal place of business.

80. - A further difficulty on which stress was laid during the first session of governmental experts was the fact that, when such third parties as those contemplated by this provision were dealing with the lessee, they had no means of knowing that the lessee was holding the equipment in question under an international lease governed by an international set of rules, or indeed that the lessee was holding the equipment on lease at all. This problem was compounded by the fact that, under the rule proposed by the Study Group, such third parties were expected to look to the country where the lessee had its principal place of business which could well be a quite different country from that where the equipment was actually physically located. Furthermore, such a third party would not normally know, save by enquiry, what system of public notice that country had and how it had to make its search.

81. - The Study Group had indeed been greatly exercised by the question of which connecting factor should determine the law to govern the public notice requirement embodied in this clause. The law of the State of the les-

sor's principal place of business had been easily rejected on the ground that, if one of the principal objectives of a public notice system was to put third parties dealing with a lessee of equipment on notice of the lessor's title to that equipment, it was unrealistic to require such third parties to consult a register in the country where the lessor had its principal place of business, as in the circumstances they would not necessarily be aware of the lessor's existence. The law generally recognised as being applicable for the purpose of determining questions of title to property or proprietary rights is the lex rei sitae. However, while merit was seen in making this law applicable for the particular case, not infrequent with leased assets, of their being used in a country other than that where the lessee had its principal place of business, notably under a sub-lease, this advantage was to a large extent outweighed by the fact that an important category of leased assets, particularly in international leases, was mobile and therefore by its very nature liable to move from one jurisdiction to another, thus also increasing the possibilities for a fraudulent removal of the equipment out of the jurisdiction where the lessor had understood that it was to be used. It was clearly not in general feasible to require the registration of the lessor's title to such mobile assets in each and every jurisdiction where they might travel.

82. - The problems inherent in taking the lex rei sitae as the appropriate connecting factor for public notice emerged all the more clearly in the case of construction equipment on lease to a construction firm that moved regularly all over the world. It was considered to be unrealistic for the construction equipment to have to be registered in each of the countries where it happened to be for a shorter or longer time. Therefore, what was to be the position of third party creditors of the construction equipment firm where the latter was declared bankrupt and the equipment had in the meantime moved on to another part of the world? It would probably be the first time they had learned that the construction equipment was merely held on lease by their debtor. Once again they would have been deceived by the apparent solvency of the lessee as represented by the construction equipment it had been using. They would probably not know where the equipment was at the time and would have difficulty in knowing where to look to see whether public notice had been given of the lessor's reservation of title.

83. - It was suggested that one possible solution to the problem might be to envisage two different connecting factors, one for equipment of a type likely to be used in more than one jurisdiction, that is equipment that is intrinsically mobile, and the other for ordinary equipment, that is equipment not likely to be used in more than one jurisdiction. Such a distinction was already drawn both under Article 9 of the Uniform Commercial Code of the United States of America and under the Saskatchewan Personal Property Security Act, S.S. 1978-79. In the case of the two last-mentioned statutes

this distinction was drawn for the purpose of determining the appropriate law of registration. Where the equipment was of a type likely to be used in more than one jurisdiction the appropriate registration law was the law of the lessee's place of business, but in all other cases the applicable law was the lex rei sitae.

84. - The Study Group's preference therefore finally went to the law of the lessee's principal place of business, moreover the place selected for compliance with the public notice requirement laid down under the French decree of 1972. This choice of the lessee's principal place of business represented a departure for French law from the principle of the applicability of the lex rei sitae to questions involving title to property or proprietary rights. The reasons why the French legislator considered that the lex rei sitae was not a suitable connecting factor for leasing were essentially practical reasons. First of all, it would be extremely rare that a lessee would fraudulently dispose of the leased asset to a third party, because of the credit risks it would thereby incur in respect of future transactions, in particular with its suppliers and bankers. The problem to be dealt with in this article was thus in fact not so much that of possible conflicts between the lessor and third parties acquiring the leased asset from the lessee in good faith as rather the case where the lessee is declared bankrupt. To use the lessee's principal place of business as connecting factor was all the more appropriate in the case of the bankruptcy of the lessee, as it would normally be in the country where the lessee had its principal place of business that its bankruptcy would be declared (36). The other reason underlying the French legislator's decision to depart from the principle of the lex rei sitae as the appropriate connecting factor in the case of leasing had to do with the case where either a leased ship was arrested or a leased aircraft attached whilst abroad, in respect of a debt owed by the lessee's principal place of business. It was pointed out that, if the State where the ship was arrested or the aircraft was attached were to be party to the future international instrument on this subject, then it would be for the lessee's representative, that is either the captain of the ship or the commander of the aircraft, to point out to the person carrying out the arrest or the attachment that the ship or aircraft was on lease, whereupon it would be for such person to check this against the public registry of the place where the lessee had its principal place of business. In general the principal place of business of the lessee was, moreover, seen as being preferable as the appropriate connecting factor to the

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(36) Whilst it was legally possible for a secondary place of business of the lessee to be declared bankrupt, this would not normally materialise because, where the lessee's principal place of business was still solvent, it would clearly in most cases do all possible to help its secondary place of business out of its difficulties.

lex rei sitae in that the places to which a third party would have to look would thus be concentrated in one country.

85. - Perception of the multiple difficulties raised by this provision in the form in which it was presented by the Study Group led some delegates to the first session of governmental experts to propose that it be deleted; these delegates took the view that the article in its present drafting probably raised more problems than it solved. This standpoint was also adopted by the representatives of the European Federation of Equipment Leasing Company Associations (Leaseurope) (37). Their basic argument was that the only valid test of the text being drafted was its practical viability. On this score they pointed to the difficulties adverted to above, notably in respect of the third party acquiring from the lessee in good faith. They pointed also to the relatively small number of States that had introduced public notice systems, laying stress on the fact that one of these countries, Belgium, had not even laid down any penalty for failure to comply with its statutory requirement that a plaque be affixed to the leased asset indicating its owner, and that this omission of the legislator had not been rectified by the Belgian Supreme Court when confronted with the question. The courts, they maintained, had in general upheld the lessor's title in bankruptcy cases affecting the lessee. This they had done by treating financial leasing essentially as a type of bailment, albeit sui generis, with the consequence that ownership remained vested in the lessor. They were not convinced that the relatively small number of international leasing transactions justified the establishment of a public notice system. The fact that these transactions involved very large sums of money meant moreover that the various parties involved had close relations with one another so that they would normally be aware of their client's, the lessee's situation. (38)

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(37) Cf. Study LIX - Doc. 21, pp.1 - 2.

(38) In the event that its proposal for the deletion of Article 5 was not carried, Leaseurope proposed, first, that the words "in good faith" should be added after the words "all third parties" so as to remove the possibility at present left open under the article that a third party aware by whatever means, notably public notice, that the equipment was the property of the lessor could defeat the lessor's title, and, secondly, that the connecting factor for the determination of the public notice requirement should be changed from the law of the lessee's principal place of business to the lex rei sitae, on the ground that the real source of deception for third parties was the physical presence of the equipment in a specific place. Cf. also the proposal for the amendment of Article 5 made by the Governing Council of the Asian Leasing Association (Asialease) (Study LIX - Doc. 19, p. 1).

86. - Speaking for a country that had public notice rules of its own applicable to financial leases, the representative of Canada to the first session of governmental experts took the view that, were Article 5 to be deleted altogether, Canadian law would not necessarily be incommoded in so far as it would probably apply its own registration system to resolve conflicts between a lessor and either third parties that had acquired in good faith from the lessee or ordinary creditors of the lessee.

87. - There was nevertheless a widespread feeling that the proper course lay not in the wholesale disappearance of Article 5 from the uniform rules, as for some delegates to the first session of governmental experts this provision was a key article of the uniform rules and, if appropriately limited in its functions, could serve a useful purpose, but rather in its redrafting. One of the principal concerns of such a redraft would have to be the discontinuance of the attempt to regulate conflicts between the lessor, on the one hand, and both third parties acquiring the equipment from the lessee in good faith and the lessee's ordinary creditors, on the other. The entrenched position of those jurisdictions that recognised the right of innocent third parties to defeat the lessor's title was clearly not going to be breached for the sake of the uniform rules. It would accordingly be necessary to limit the aim of the uniform rules to the resolution of those conflicts that arise between the lessor and the ordinary creditors of a lessee that had been declared bankrupt. For, as has been mentioned above, the incidence of cases involving a dishonest lessee disposing of the leased asset to a third party would be extremely rare in practice. The area where difficulties arose in practice was rather where the lessee had been declared bankrupt and it was this problem to which the draft should address itself rather than the extremely delicate one of the third party in good faith.

88. - One possible basis for a redraft of this article, it was suggested by a representative attending the first session of governmental experts, was to be found in Variant II of the then Article 4 of the text of the uniform rules adopted at the third session of the Study Group (39), subject to that text being amended in such a way as to safeguard the lessor's title against the lessee's ordinary creditors in respect of equipment not subject to any public notice requirement. It was pointed out that such a solution would correspond to the solution proposed in the draft European Convention on simple registration of title.

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(39) This text read as follows:

> "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./

89. - It was suggested by another representative attending the first session of governmental experts that in redrafting Article 5 consideration might be given to the introduction of an element the absence of which might, he feared, create considerable difficulty for the application of the uniform rules in the context of his national legal system. Article 5 as proposed by the Study Group basically provided that the lessor's title would be good as against third parties in legal systems which required the giving of public notice provided that the lessor had complied with this public notice requirement. What was missing from this formula, he suggested, was some indication of the time by which the lessor had to effect such public notice. Under the aforementioned law of Saskatchewan as under Article 9 of the Uniform Commercial Code of the United States of America, while there was no time-limit for filing, the lessor, the longer it put off filing, ran correspondingly greater risk of losing its title to any person acquiring an interest in the leased asset prior to its own act of filing.

90. - The redraft proposed by the drafting committee following the committee of governmental experts' first reading of the text proposes alternative rules for the case where a conflict arises between the lessor and the lessee's trustee in bankruptcy or other ordinary creditors following the lessee's bankruptcy. One of these rules covers those cases where there is a public notice requirement for financial leases in the State of the lessee's principal place of business, the other those cases where there is no such requirement in that State. Where public notice rules are laid down in the State where the lessee's principal place of business is located, the lessor's title will only be enforceable against the lessee's trustee in bankruptcy and creditors, other than creditors having a lien or security interest in the leased equipment, so long as the lessor has complied with such rules. On the other hand, where there are no rules as to public notice laid down for such transactions in the State where the lessee's principal place of business is located, the problem of the enforceability or otherwise of the lessor's title in relation to such parties will fall to be settled in accordance with the law of the forum.

Article 6

91. - In the text proposed by the drafting committee following the committee of governmental experts' first reading of the text of the preliminary draft uniform rules as adopted by the Study Group what had all along been virtually the least controversial clause in the uniform rules disappeared. This clause was Article 6, which as adopted by the Study Group read as follows:

> "Where the equipment has become a fixture to land and to the extent that the lessor has priority, under the law of the State where the land is situated, over the claim of any person having an interest in the land

concerned, the lessor may, in the conditions prescribed by the leasing agreement, remove the fixture from the land. Upon removal the lessor shall reimburse any encumbrancer or owner of the land who is not the lessee for the cost of any damage caused by the removal of the equipment from that part of the land to which it was affixed. Such reimbursement shall make allowance for the normal wear and tear of the land in question."

92. - It was a provision which sought to deal with eventual conflicts of interest with regard to equipment which had become a fixture to land arising, notably in the event of the lessee's breach of its contractual duties vis-à-vis the lessor, an event which would normally be occasioned by the lessee's bankruptcy, as between the landowner or encumbrancers of the land and the lessor. The lessor's right to severance and removal of its equipment was intended to extend both to the case where, on becoming a fixture, the equipment lost its separate identity as a chattel and became a part of the land to which it was affixed and the case where, on becoming a fixture, the equipment had nevertheless preserved its separate identity as a chattel, thus upon severance creating fewer problems of damage to the realty to which it had become a fixture than in the other case. The solution proposed in Article 6 had been based on Article 9-313 :5 of the Uniform Commercial Code of the United States of America (40) and on Section 36 (4) of the Ontario Personal Property Security Act of 1967. (41) The drafting of this article was acknowledged to be complex

(40) Subsection 5 of Article 9 : 313 of the U.C.C. reads as follows:

"When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation."

(41) Sub section 4 of Section 36 of this Act reads as follows:

"If a secured party, by virtue of subsection 1 or 2 and subsection 3, has priority over the claim of a person having an interest in the real property, he may on default, subject to the provisions of this Act respecting default, remove his collateral from the real property if, unless otherwise agreed, he reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury excluding diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement, but a person so entitled to reimbursement may refuse permission to remove until the secured party has given adequate security for any reimbursement arising under this subsection."

and would undoubtedly strike some eyes as cumbersome. The Study Group's acceptance of this fact reflected its awareness of the major difficulties which had been encountered by the drafters of the corresponding provision of the aforementioned legislation. It had to be presumed to have been a successful piece of drafting in that context, though, to the extent that the courts had hardly ever been called upon to interpret it.

93. - The original difficulty faced by the drafters of Article 9-313 of the U.C.C. related to use of the term "fixture". The awareness by the drafters of that provision of the difficulties inherent in knowing what was to be considered a "fixture" in a given case, let alone in different jurisdictions convinced the Study Group of the futility of any attempt to presume to define what was to be considered a "fixture" for the purposes of the application of this article. Nor did the Study Group attempt to lay down a priorities rule determining when the lessor's claim in the realty was to be superior to that of any other person with an interest in the same realty, questions of priorities being recognised as being of such complexity that they were best left to be determined by the applicable national law. As has been adverted to above in connection with Article 5, the law generally recognised as being applicable to determine questions regarding title to property or proprietary interests being the lex rei sitae, in this case the law of the State where the realty was situated, it was to this law that Article 6 referred for determination of the matter of the lessor's priority over others with an interest in the realty to which its equipment had become affixed for the purpose of its lessee's business or professional activities.

94. - Subject then to the lessor having priority under the lex rei sitae, the effect of Article 6 was to recognise the lessor's right to remove its property from such realty, at the cost of reimbursing the owner or encumbrancer of the land, other than the lessee for obvious reasons, for any damage occasioned by the act of severance, allowance moreover being made for the normal wear and tear of the land.

95. - Article 6 proved to be the source of considerable controversy on the occasion of the first session of governmental experts. The observers representing Leaseurope first of all tabled a proposal for its amendment in such a way as to establish the lessor's entitlement to reimbursement by the lessee of any compensation it may have had to pay to the owner of the realty to which its equipment was affixed for damage that may have resulted to this realty through the act of severance (42). One representative proposed the

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(42) This proposal would have had the effect of amending the text of Article 6 to read as follows:

" ...it was affixed. Nevertheless it disposed of the means to be reimbursed by the lessee for all amounts paid in this way." Cf. Study LIX - Doc. 21, p. 2.

wholesale deletion of the article on the ground of the unacceptability of the exception it proposed creating in favour of finance lessors to the fundamental principle of Civil law systems conferring priority on real property rights over personal property rights. An observer also favoured its deletion, as he felt that the problem that this article sought to deal with could well be left entirely to the lex rei sitae, in that the equipment being affixed to realty there was no danger of the lessor losing track of its property. Other representatives made various proposals for the redrafting of the article, generally with a view to seeking a compromise solution satisfactory to those representatives who had proposed its deletion (43).

96. - The amendment proposed by Leaseurope was, according to its proponents, designed to make the article more balanced in better reflecting the level of responsibility of the different parties involved in the transaction. It thus sought to express, on the one hand, the fact that the lessor's role in the transaction was a limited, financial role and, on the other, the fact that, as it was the lessee's own choice to affix the lessor's property to the realty of a third party, so it should be the lessee that should pay for the negative consequences of this choice when it became bankrupt.

97. - This amendment concerned a matter that would in any event normally be the subject of discussion between the parties. As such it was intended to be no more than suppletory of the parties' freedom of contract (43 bis). The main object of including such a provision in the uniform rules would accordingly be to cover those cases where the parties had omitted themselves to provide for this matter. One member of the committee of governmental experts, while not objecting to the tenor of the proposed amendment when understood in this light, nevertheless took the view that the lessor's entitlement to such reimbursement would have to be qualified, in such a way as to make it clear, first, that it would only be entitled to reimbursement where its severance and removal of the equipment were in conformity with the leasing

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(43) Another proposal for deletion, this time of the last sentence of the article as proposed by the Study Group, on the ground that all matters relating to the quantum of damages were generally best left to domestic law and that, moreover, the result obtained would be much the same either way, was tabled by a member of the committee but lapsed in view of the drafting committee's decision to propose the wholesale deletion of the article.

(43 bis) It should always be borne in mind that it was the opinion of the Study Group that virtually all, if not all of the substantive provisions of the uniform rules should be liable to derogation (cf. § 22 supra) but cf. also Article 14 infra.

agreement - that is, its action was lawful - and, secondly, that its right of recovery should be limited to what was reasonable - that is, to the cost of damage that could not reasonably have been avoided in the exercise of its right of removal.

98. - Another member of the committee of governmental experts proposed that the rule set forth in the first sentence of Article 6 be restricted to the relationship between lessor and lessee, as to the extent that the rule also applied to a third party, that is an encumbrancer or the owner of the realty, it would not give much help, in that it simply referred the solution of the problem to private international law ("to the extent that the lessor has priority... over the claim of any person having an interest in the land concerned").

99. - The major difficulty arising with this article nevertheless concerned the difference of approach of the Civil law and the Common law systems to the matter of the lessor's right to enter upon the land of a third party to remove the equipment being used on that land by its lessee in connection with its trading activity. Whereas in Common law jurisdictions the lessor was entitled to exercise the remedy of self-help in order to recover its property, the most that a lessor would have in Civil law jurisdictions would be a claim against the owner of the realty which it would have to pursue in the courts (44). Moreover, the priority of real property rights over personal property rights was such a fundamental tenet of Civil law systems that one member of the committee of governmental experts considered that to propose creating an exception to this principle in favour of the finance lessor, so as to enable the latter to remove its equipment from the realty to which it had become a fixture, would be to contemplate the carrying out of a veritable revolution that would shake such legal systems to their very foundations. He doubted therefore whether his own authorities would be willing to contemplate setting in motion such a revolution for the sake of an economic activity that he considered to be of limited importance. The immediate problem for Civil law jurisdictions arose out of the application of the old Roman law maxim accessorium sequitur principale to the case envisaged in Article 6.

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(44) Under the law of the Federal Republic of Germany the lessor would have to found such a claim on the unjust enrichment that would otherwise result to a third party, to wit the landowner or an encumbrancer of the land. However, such a third party could consent to the lessor's severance and removal of the equipment, in which case there would be no need for the lessor to take the matter to court. See also below, § 101.

Whereas the effect of this article seemed to the eyes of the aforementioned representative to be, legally speaking, to make the lessor the master of the situation, in the sense of deciding whether to enter upon the land of a third party to recover its equipment, according to the maxim accessorium sequitur principale it was the landowner who had the choice whether to request the destruction of any fixture placed on its land by a third party at the expense of that party or to appropriate the fixture for itself while compensating the third party for the cost of the fixture. Another potential problem area arising out of the application of this article was seen as lying in its derogation in favour of the lessor to the principle of the equality of the creditors of the lessee in the event of the latter's bankruptcy.

100. - In the light of the debates on this article, some delegates voiced their concern at the apparent unwillingness of other delegates to follow through their earlier recognition of the sui generis, atypical nature of the transaction addressed by the uniform rules. In their opinion it was essential in drafting a future international instrument on this subject to get away from the ideas of the classical contractual schemata, the unsuitability of which for the type of lease addressed by the uniform rules had provided the initial impetus for the whole exercise in clarification.

101. - Two elements appeared to lie at the root of the confusion engendered by this article. The principal element was what to the aforementioned representative of a Civil law system appeared as the subordination of the landowner's well entrenched right to dispose as it saw fit of any fixture affixed to its land to an exceptional right to be conferred on finance lessors to breach the landowner's aforementioned right for the purpose of severing and removing such of its personal property as had become affixed to the landowner's real property in connection with the lessee's exercise of its trading activity. A second element of confusion surrounded the unusual employment in this provision of the term "priority" which, to some minds, seemed to summon up the idea of public notice and the ranking of creditors in the case of the lessor's bankruptcy. To take the second point first, it was pointed out that the article was rather concerned with the resolution of eventual conflicts between "owners" : the purpose of the article was to reach a compromise, on the basis of equality, between the competing rights of these two "owners". As regards the first point, it was explained that the article in no way sought to overturn those cases where, under the lex rei sitae, the landowner had an overriding right which extinguished the equipment lessor's right of severance and removal. Indeed, it was pointed out that both Article 9 of the Uniform Commercial Code and the Ontario Personal Property Security Act of 1967, on which, as mentioned above (see § 92), this article had been modelled, preserved the landowner's right to buy out the secured party, in this case the equipment lessor's interest, as under Civil law systems.

102. - The only way in which the uniform rules proposed under Article 6 to add to the situation prevailing under the lex rei sitae lay in its attempt to envisage the case where the lessee and the landowner in their contract might agree to derogate to the maxim accessorium sequitur principale so as to enable the equipment lessor to recover its equipment. The equipment lessor nevertheless at all times remained res inter alios acta in the legal relations between its lessee and the landowner. Recognition of the extent to which the contractual conferment of this right on the lessor was dependent on the freedom of contract of the lessee and the landowner in their relations inter se was implicit in the right of the landowner or encumbrancer of the land confirmed in Article 6 to require payment by this third party of compensation for the cost of any damage occasioned by the act of severance. The article therefore safeguarded the landowner or encumbrancer's position in ensuring that the equipment lessor's recovery of its equipment should not be to the detriment of the landowner or encumbrancer, as the case might be.

103. - With a view to accommodating the difficulties voiced by representatives of Civil law systems, one member of the committee of governmental experts proposed a compromise solution. One feature of this was, in response to the view reported above at § 98, to separate the different legal relationships involved in this question. His proposal compromised three limbs. Under the first of these, as between the equipment lessor and the lessee, the former would be entitled to recover its equipment from the realty to which it had become a fixture, in the conditions specified in the leasing agreement. Secondly, in any case where the lessee itself had the right to sever the equipment under its contract with the landowner, the equipment lessor should enjoy the same right vis-à-vis the landowner. A propos of this limb of his proposal the representative concerned pointed out that, if the lessee were already entitled to remove trade fixtures from the land, then it should not matter to the landowner whether such removal was carried out by someone else, in this case the equipment lessor, provided that it was compensated for any damage occasioned to its property by the act of severance. Under the third limb of his proposal, the question was referred to local law : the equipment lessor would thus also be entitled to remove its equipment in any other case where this was permitted under the lex rei sitae or, alternatively, where the lex rei sitae attributed title to the fixture to the landowner and the latter decided to retain the fixture, would be entitled to be compensated for the value of its equipment (45).

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(45) Another compromise solution proposed by another member of the committee was that Article 6 should be completed by a clause stating that it did not change the rights or priorities given by local law to the landowner, lessor or lessee as regards fixtures.

104. - This proposal satisfied one part of the Civil law lobby, indeed earning praise from one representative of a Civil law system, who was particularly attracted to its underlying basic idea of leaving the problem of the choice of ownership to the applicable local law and concentrating rather on the consequences of the choice made by the applicable local law, in the sense that if the latter recognised the lessor's right to remove its equipment then the lessor had to compensate the landowner or any encumbrancer for the cost of any damage occasioned by the act of severance, whereas if the applicable local law vested ownership of the equipment in the landowner or an encumbrancer, then the latter had to compensate the equipment lessor for the full value of the equipment. It was a balanced provision which reflected in equal measure both the landowner's interests and those of the lessor. Given the narrow financial nature of the lessor's role, it achieved the important objective of ensuring its entitlement to either the recovery of the equipment, thus avoiding the possibility of it losing its title and simply becoming just another creditor of the lessee in the event of the latter's bankruptcy, or compensation for the full value of the equipment in the event of the applicable local law recognising title to the equipment in the landowner and of the landowner electing to keep the equipment.

105. - However, this provision even as amended under the aforementioned proposal still attracted the most implacabale opposition of that member of the committee of governmental experts who had earlier called for its deletion (see § 99 above) and who maintained this call on the ground that it was not possible to conceive of disturbing such a fundamental principle of Civil law systems as that granting priority to the owner of realty over the owner of personal property affixed to that realty for the sake of financial leasing alone. He wondered moreover what useful purpose the rule would serve if the lessor's right to remove were only to be effective to the extent permitted by the lex rei sitae. He furthermore entertained doubts as to the correctness of what he saw as the tendency of other members of the committee to proceed on the basis that the priority of the owner of realty over the owner of personal property affixed to that realty was not a matter of public policy and therefore freely negotiable between the respective parties. He also raised the spectre of a possible clash between this provision and Article 10 of the Unidroit draft Convention on the hotelkeeper's contract, in that Article 10 (1) granted the hotelkeeper "the right to detain any property of commercial value brought to the premises of the hotel by a guest" "as a guarantee for payment of the charge for the accommodation and services actually provided". He regarded it as quite conceivable that such property might include a motor car on lease, in respect of which the draft Convention proposed giving the hotelkeeper a lien in the aforementioned circumstances, whereas the effect of Article 6 would be to displace this priority in favour of the finance lessor that had leased the motor car (46).

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(46) However, cf. Article 10 (4) of the same draft Convention which specifies that:

"The internal law of the place where the hotel is situated shall

106. - Whichever of the compromise solutions proposed above (see § 103 and footnote 45) were to be preferred, attention was nevertheless drawn to a significant limitation on their effectiveness, namely that they would only be effective where the State where the realty was situated was a party to the future international instrument.

107. - Given the impasse reached on this article, the drafting committee decided to propose its deletion to the committee of governmental experts.

Article 7

108. - At first sight this article might appear to involve a fairly radical departure from the law of most countries. In fact, it does little more than reflect the situation existing in practice, in that financial leases invariably contain detailed provisions absolving the lessor from responsibility for defective or non-conforming equipment and requiring the lessee to indemnify the lessor against claims brought by third parties. It reflects the general philosophy underlying the uniform rules, namely the special nature of financial leasing, in excluding the lessor's liability in contract or tort in most situations (47) where it would otherwise normally be liable in its capacity as bailor of the equipment (Article 7 (1)). It is the lessee, we have seen in Article 1 (2) (a) above, who relies on its own skill and judgment in selecting both equipment and supplier, and who typically conducts negotiations with the supplier as a reasonably informed user. If there is any reliance on the knowledge and representations of another party in this context, it is the lessee's reliance on the supplier's knowledge of the equipment and its representations in this regard, so much so indeed that it is the supplier who may be considered as placing the equipment into the stream of commerce. The finance lessor, on the other hand, will in most cases have no technical expertise with regard to the equipment's characteristics; it will not therefore in most cases be involved in the selection of the equipment or of the supplier; it will never take delivery of the equipment and normally have no reason to see it. Its role is limited to supplying the necessary finance for the acquisition of the equipment.

109. - Before analysing the extent of the immunity granted the lessor under this article, it is important to be clear about what is not intended to be included in this immunity. In so far as it absolves the lessor in general of those duties in contract or tort that would ordinarily flow from its position as bailor of the equipment, it would not, for example, affect the consequences of non-delivery which precede the bailment and are effectively dealt with elsewhere in the uniform rules. It is an exoneration that

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determine the effects which third party rights may have on the hotelkeeper's rights of detention and sale and on the proceeds of such sale".

(47) But cf. § 111 *infra*.

is confined to those liabilities that would flow as a matter of law from the lessor's notional delivery of the equipment under the leasing agreement from the lessor notionally putting the equipment into the stream of commerce. It is not therefore intended to affect those liabilities that would be imposed by contract, whether by express terms of the leasing agreement or by terms implied in fact. Equally the general immunity conferred upon the lessor under this article is not intended to extend to breaches of statutory duty, in that it is questionable whether States would be prepared to accept an exclusion of those special duties imposed by statute over and above those imposed by the general law of tort.

110. - The fact that the general immunity conferred under this article is stated to extend only to those contractual or tortious duties that would ordinarily flow from the lessor's capacity as bailor moreover indicates that it is not the intention of the uniform rules to affect any liability that might be imposed on a finance lessor qua owner of the equipment leased (Article 7 (3)). Whereas, as was adverted to in the preceding paragraph, there were under most jurisdictions relatively few liabilities that would in this context flow from ownership as such, most liabilities being rather imposed on the lessor qua legal supplier of the equipment, there was special international legislation, notably the International Convention on Civil Liability for Oil Pollution Damage adopted in Brussels in 1969 and amended in London in 1984, which would have the effect of imposing liability on a finance lessor as owner. It was clearly desirable to avoid the incorporation in the future international instrument on this subject of a rule that would run counter to such special international legislation. Otherwise States that might have wished to become parties to the international instrument being prepared on financial leasing might find themselves unable to do so because of its inconsistency with existing special international legislation to which they were already parties.

111. - Moreover, as is spelled out in Article 7 (2), the authors of the uniform rules considered that there were two cases in which the lessor should not be able to raise the general immunity granted it under Article 7(1). The first such case was where the lessor had, for whatever reason, been obliged to abandon, to whatever degree, its technical neutrality in relation to the equipment, and had in fact influenced the choice of the supplier or the choice or specifications of the equipment (Article 7 (2) (a)). The second exception to the principle of the lessor's general immunity arises in respect of the lessor's continuing duty to ensure the lessee's quiet possession of the equipment (Article 7 (2) (b)).

112. - As regards the first of these exceptions, it was considered logical that, as a corollary to the rule that the lessor should benefit from the aforementioned general immunity from liability where and to the extent

that its role in the transaction was purely financial and therefore neutral in relation to the choice of the supplier or the choice or specifications of the equipment (see § 108 supra), it should forfeit this immunity and be liable to both the lessee and third parties precisely where and to the extent that it intervened regarding, or influenced the choice of the supplier or the choice or specifications of the equipment. Admittedly, under the philosophy lying at the root of the uniform rules, such cases would be infrequent. However, in international leasing transactions the sums of money involved were so high and the transactions so complex (48) that the lessor would sometimes become involved in the techincal area which was normally the exclusive preserve of lessee and supplier. The question of the degree of such intervention required to defeat the lessor's right to raise its immunity was recognised as being a matter best left to be resolved by the applicable national law. It is to be anticipated that this would be one of the provisions of the uniform rules that the parties would be free to contract out of (see Article 14 infra) and to that extent the impact of this exception is likely to be greater on the lessor's immunity of action from a third party that has sustained injury or damage by reason of a defect in the equipment than on the lessor's immunity of action from the lessee (49).

113. - The reasoning behind the second exception to the principle of the lessor's general immunity under Article 7 was that, given that quiet possession goes to the essence of a lease, the lessor must remain liable for any disturbance of the lessee's quiet possession resulting from the lawful act of a third party, that is where the lessor did not have the right to dispose of the equipment or where its right to do so was qualified in some way, and because of that a third party was entitled to claim possession by virtue of a paramount title, for example where its use was in breach of a patent or trademark.

114. - After examining the cases not covered by the general immunity

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(48) The example offered to the Study Group was that of a ship being converted into a tanker and the ongoing stream of change-orders relating to the specifications of the vessel. As these could clearly alter the scale of the lessor's financial commitment, it would not in such cases be abnormal for the lessor to have its own engineers on the spot to pass on such change-orders on the lessor's behalf.

(49) But quaere the impact of the increasing tendency for lessors to conclude financing agreements with particular suppliers on the application of this exception to the general immunity conferred under Article 7 (1). See also § 119 and footnote 51 infra.

conferred upon the lessor under Article 7 (1), we now have to address ourselves to the subject-matter of this general immunity. This general immunity is examined below, first as regards its impact on the liability that would ordinarily attach to the lessor in contract or tort towards the lessee, and secondly in its impact on that liability in tort that might otherwise attach to the lessor vis-à-vis third parties.

Lessor's liability to lessee

115. - Article 7 (1) has the effect of excluding those contractual terms implied by law from the supply of equipment, notably the duty to ensure that the equipment supplied is of merchantable quality and fit for its known purpose. As has been explained above, the need to exclude the lessor's liability in respect of those duties arises from the fact that most jurisdictions treat the lessor as the legal supplier in relation to the lessee, even though it does not physically deliver the equipment. Breach of this duty would normally entitle the lessee to damages as against the lessor and might give it a right to reject the equipment and withhold payment of its rentals or even terminate the leasing agreement completely. Where the equipment proves to be not only defective but also unsafe and causes death or personal injury to the lessee, or damage to the property of the lessee, the latter would usually have a concurrent claim in tort, though in most jurisdictions this would be dependent on proof of negligence on the part of the lessor. In some jurisdictions, notably the United States of America, the lessor might in addition find itself in certain circumstances exposed to a suit alleging strict liability on the ground that it was the lessor who was to be considered as having introduced the defective equipment into the stream of commerce.

116. - The reasons underlying the authors of the uniform rules' decision to exclude the lessor's liability in contract or tort towards the lessee in most situations have already been rehearsed above (see § 108). It suffices to recall here that, by way of justification of the exclusion of the lessor's liability to the lessee in respect of the implied warranty of merchantable quality, the lessor will not normally be a merchant as to the type of equipment leased but will generally be only a merchant in the extension of credit. Equally, with regard to the exclusion of the lessor's liability towards the lessee in respect of the implied warranty of fitness for the equipment's known purpose, it has to be remembered that the lessor will not normally have shown any skill or exercised any judgment upon which the lessee has relied in the selection of the equipment.

The case for the exclusion of the lessor's liability towards the lessee in tort, on the other hand, was considered to lie in the fact that the lessee would normally not be involved in the selection of the equipment, have no technical expertise with regard to its physical characteristics nor take

delivery of it nor even see it. It was in short the feeling of the Study Group that, given the lessor's limited, non-technical role in the whole transaction and the fact that, if there is reliance by the lessee on the knowledge and representations of another party in relation to the equipment, it is upon the supplier's knowledge of the equipment and representations in this regard, it is the supplier rather than the lessor who should in principle be liable to the lessee if the equipment proves to be defective or otherwise not in conformity with the supply agreement. It is to be noted that the lessee's remedies against the supplier in this connection are spelled out in Article 9. It is to be anticipated that the general immunity conferred on the lessor in contract in relation to the lessee will probably have its greatest impact on the application of the doctrine of strict liability for defective goods. This general immunity will, moreover, in principle preclude the lessee from claiming contribution or indemnity from the lessor in respect of liability incurred by the lessee to a third party as a result of a defect in the equipment.

Lessor's liability to third parties

117. - A finance lessor will not as a rule incur liability to third parties who sustain injury or damage as a result of defects in the equipment. There being no contractual nexus between the lessor and such third parties, such a claim would only lie in tort and in most jurisdictions it would be necessary for the third party to show that the lessor had been guilty of negligence, for instance in leasing equipment that it knew or ought to have known was unsafe. Given the lessor's technical neutrality in most financial leases, the burden of proving such negligence on the part of a finance lessor is usually a heavy one. Moreover, in most Common law jurisdictions such liability would attach to the lessee as possessor of the equipment. The major impact of the general immunity conferred upon the lessor in tort under this article is once again likely to be in those jurisdictions, such as the United States, where, on the ground that the lessor is notionally delivering the equipment under the leasing agreement and therefore notionally putting it into the stream of commerce, a lessor might find itself in certain circumstances exposed to a suit alleging strict products liability. As we have mentioned above, it was the opinion of the Study Group that such liability was not appropriate in the case of a typical finance lessor who, given its technical neutrality, cannot reasonably be held responsible for the introduction of the equipment into the stream of commerce.

118. - The main proposal for the amendment of this article tabled on the occasion of the first session of governmental experts emanated from Leaseurope. This proposal sought to replace the term "lessor" as employed in Article 7 (1) and 7 (2) (a) by the term "owner-lessor". Its aim was to

exclude that strict liability imposed on the lessor qua owner both under special international legislation (see § 110 supra) and under the expanding body of domestic products liability legislation. The reasoning adduced in support of this proposal was that, "/i/f the lessor accepts to restrict his prerogatives to those of a creditor supported by a title of ownership, it goes without saying that the lessee as the counterpart must accept all the objections of a debtor respectful of this title" (50). It was the unanimous feeling of the committee of governmental experts that it would be going too far to propose that the lessor could not incur any of the liabilities that would be imposed on it qua owner (51), not least because of the inconsistency with existing international Conventions that would be implicit in such a decision but also in view of the general principles of the law of tort. The lessor had decided to use its title to the equipment as a guarantee for the lessee's payment of its rentals and had therefore to bear the responsibilities attached to ownership. Whilst it was quite feasible for the lessor and the lessee to agree in their contract that, in the event of the lessor incurring liability in tort towards third parties injured by the equipment, the lessee should indemnify the lessor, it was not possible in an instrument that was intended to have the force of law to deprive third parties of their remedies against the lessor as owner.

119. - Disquiet was for the same reason voiced in certain quarters regarding the immunity for liability conferred upon the lessor under Article 7 vis-à-vis third parties, in so far as the effect of this immunity would be to deprive such third parties of their remedies against the lessor. According to this current of opinion, it would be better if the uniform rules avoided interfering with the rights of third parties injured by the equipment and concentrated on regulating the relations between lessor and lessee. Concern was also expressed lest to exclude the lessor's liability in tort to third

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(50) Cf. Study LIX - Doc.21,p.3. Another argument advanced to justify the extension of the immunity from liability conferred under Article 7 to cover liability incurred by the lessor as owner was taken from an analogy with the situation where, instead of leasing the equipment, the lessee decided to purchase the equipment outright. Financial leasing was in fact a direct alternative to outright purchase for prospective lessees/buyers. Whereas under such a direct purchase, the buyer would only have a limited guarantee period in which to pursue claims against the seller, under a financial lease the lessor's exposure to such claims was apparently limitless in time, a difference which was alleged to work injustice on finance lessors.

(51) Cf. § 110 supra.

parties under Article 7 (1) might diminish the lessor's interest in ensuring that the equipment was adequately insured in this regard (see footnote 52 infra). It was , moreover, pointed out that some legal systems considered any provision that would have the effect of excluding a party's liability in tort as being contrary to public policy, suggesting that this prohibition was all the stronger in the case of an international Convention. Reference was moreover made to Article 3 (4) of the 1973 Hague Convention on the Law Applicable to Products Liability, according to which:

> "This Convention shall apply to the liability of ...
> (4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product".

It was suggested that this provision might be read as exposing the lessor to liability towards a third party injured by the equipment leased on the ground that the lessor, by its activity of leasing equipment, had put a product into the "commercial chain" which had caused damage. The arguments for the exclusion of the lessor's liability in tort vis-à-vis third parties qua bailor of the equipment have already been fully rehearsed (see § 117 supra). These essentially come down to the fact that the lessor's ownership is devoid of most of the normal attributes of ownership, that is it is merely pro forma ownership (52). The lessor's role is limited to the supply of the necessary finance. A lender/financer does not normally carry the responsibilities in contract or tort in respect of which Article 7 seeks to give the lessor a general immunity. In practice, financial leasing is for prospective users a direct alternative to an outright purchase. Thus, the eventual user, whether under a lease or a purchase, is in either case ready to bear the totality of the risks arising in connection with the equipment, as regards the eventual pursuit of a claim in contract, availing itself of the guarantees transferred to it through the lessor in the case of a financial lease or inuring to its benefit directly under a purchase, and as regards any liability incurred in tort in respect of damage occasioned by the equipment through its use of the equipment either as though it were owner, in the case of a financial lease,

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(52) It has nevertheless always to be borne in mind that, as provided for in Article 7 (2) (a), lessors, particularly in international transactions, are not always completely disinterested in their ownership of the equipment. Thus leasing agreements invariably make it a duty for the lessee to insure the equipment leased, notably against civil liability arising out of damage caused by the equipment. While the insurer is not selected by the lessor, it must have its approval. The lessor is moreover a co-beneficiary and additional beneficiary of the insurance policy taken out by the lessee. Another aspect of the lessor's potential interest in its ownership of the equipment may be seen in the increasing tendency for lessors to enter into financing agreements with particular suppliers of equipment. Cf. §§ 111-112 supra.

or indeed as veritable owner in the case of an outright purchase. Such an immunity both in contract and tort was as such to be seen as corresponding to the logic of the financial leasing transaction, as reflected above all in the essentially financial nature of the transaction for the lessor. It was in line with this logic that the risks arising in connection with the equipment should be borne by the party that had the possibility of selecting and looking after the equipment.

120. - As has been mentioned above, the principal reason for insulating the lessor from liability incurred towards third parties qua bailor of the equipment leased was to forestall the argument that, because the lessor was notionally supplying the equipment to the lessee under the leasing agreement, it might be regarded in some jurisdictions as putting the equipment into the stream of commerce and as such might thereby incur the liability of a producer. While there was recognition of the fact that the category of case in which the lessor would be at risk in this regard was relatively small, it was nevertheless considered wise to avoid such risks given the ever expanding concept of strict product liability in certain jurisdictions.

121. - The potential disincentive to the lessor's continuing interest in the adequate insurance of third party risks arising in connection with the equipment that it was feared might result from excluding the lessor's liability towards such third parties under Article 7 (1) was discounted, on the ground that it would always be in the lessor's interest to ensure that its equipment was adequately covered against such risks given the important economic guarantee which the equipment represented for it. It was evidently in the lessor's interest to avoid the disappearance of the equipment with a view to its being able to lease it to another party or sell it on the second-hand market in the event of the lessee's default.

122. - Some of the disquiet felt at the exclusion of the lessor's liability towards third parties under Article 7 (1), no doubt, arose from what to certain minds appeared the somewhat artificial distinction drawn between the lessor's liability qua bailor and qua owner. There was some doubt whether this difference would prove workable in practice. The distinction, however, was brought into focus if one bore in mind that it was not in every lease that the lessor would be the owner of the equipment. Thus under a sub-leasing arrangement the intermediate lessor was not owner of the equipment but was notionally supplying it under the lease. The significance of the distinction implicitly drawn under Article 7 (1) between liability incurred by the lessor qua bailor and that incurred by the lessor qua owner emerged clearly in this case, in that ownership and the status of lessor were not vested in the same person. Thus in such a sub-leasing situation the intermediate lessor would benefit from the general immunity conferred under Article 7 (1), whereas the head lessor, not in its capacity as lessor but as owner, would be exposed to liability such as that imposed under the special international legislation referred to supra (at § 110).

123. - Nevertheless, in order to appease the anxieties of those concerned lest the drafting of Article 7 (1) might give the impression that it sought to exclude the liability of the lessor in contract and tort incurred in its capacity of owner, it was decided to introduce an additional paragraph, the new Article 7 (3), making it clear that nothing in Article 7 (1) was intended to affect the lessor's liability arising in its capacity of owner (53).

124. - One representative attending the first session of governmental experts found the tenor of the exception to the lessor's general immunity provided for in Article 7 (2) (b), making the lessor a guarantor of title in the case where, for instance, a supplier had supplied equipment under a defective title, somewhat anomalous in view of the basic approach to the lessor's position adopted elsewhere in the uniform rules. It was explained that this provision was to be seen in terms of the need, reflected in the preamble to the uniform rules, for balancing the interests of the different parties. The authors of the uniform rules were conscious of the need to ensure that the rights and immunities conferred thereunder should not all be perceived to run in the same direction. It was their feeling that the question of title was a matter on which the lessor could be left to satisfy itself or, where it was not able to do so, that this was a risk which the lessor should be prepared to assume. As the one who purported to have acquired title to the equipment, the lessor should guarantee the lessee's quiet possession.

125. - The other exception to the general immunity conferred upon the lessor under Article 7, now contained in Article 7 (2) (a) caused the governmental experts greater difficulty. First of all, one representative objected to the employment of the adjective "technical" to qualify the level at which

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(53) Another solution proposed, which was in the event not adopted, was designed to show who it was that bore the risks arising in connection with the equipment (i.e. the lessee) without, however, worsening the position of third parties, who, in the event of the lessee being unable, for whatever reason (the most obvious reason would be bankruptcy), to compensate them, could then, in the last resort, go against the lessor, who would be able to insure itself in any case against such risks. The idea of this proposal would have been to delete the references to "or third parties", "and tortious" and "or tortious" in this article and to add a new paragraph providing that:

"To the extent that the lessor is liable in tort by reason of its ownership or use of the equipment, the lessee shall wholly indemnify the lessor".

the lessor would, according to the language employed in the corresponding provision of the text adopted by the Study Group, have had to intervene to forfeit its immunity from liability under Article 7 (1) (54). This clause had necessarily to be read in conjunction with the new Article 1 (2) (a) in that, as an exception to the general immunity conferred upon the lessor under Article 7 (1), it had to be seen as an exception to the factual situation set forth in Article 1 (2) (a), which was itself the justification of the lessor's general immunity under Article 7 (1). The sphere of autonomy reserved to the lessee in a financial leasing transaction as reflected in Article 1 (2) (c) might go beyond merely technical matters regarding the choice of equipment and supplier. In fact that provision speaks rather of "specifying the equipment and ... selecting the supplier" without any limitation to the technical aspects of such specification and selection. Clearly such technical considerations regarding the characteristics of the equipment would be a most important part of this sphere of autonomy reserved to the lessee under the uniform rules. However, it was at the same time important to ensure that the lessor would also forfeit its general immunity in all those other cases, of a non-technical nature, in which it interfered effectively with the sphere of autonomy reserved to the lessee under Article 1 (2) (a).

126. - Implicit in the criticism levelled at the text of Article 7 (3) as adopted by the Study Group referred to in the previous paragraph was also criticism of that text's reference to the lessor's intervention "in the choice of the equipment" alone. Just as Article 1 (2) (a) referred not only to "specifying the equipment" but also to "selecting the supplier", so it was felt that Article 7 (2) (a) should likewise refer to the lessor's intervention in not only the choice of the equipment but also in the choice of the supplier, or, as one delegate put it, in the choices of the lessee.

127. - This proposal, however, seemed to some minds to raise a dilemma in that, since it was provided under Article 1 (2) (a) that in choosing the equipment and the supplier the lessee relied on its own skill and judgment, it might be argued that, in a case where in choosing the equipment and the supplier the lessee did not rely solely on its own skill and judgment, the financial leasing transaction in question fell outside the ambit of the uniform rules altogether. Not all members of the committee of governmental experts shared this perception of an inherent contradiction between the two clauses. Thus one member of the committee pointed out that it was customary with international Conventions for subsequent articles of such Conventions to

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(54) Article 7 (3) of the 1984 text read as follows:

"The lessor owes the lessee and third parties 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 intervened, at a technical level, in the choice of the equipment."

be understood and analysed as exceptions to principles laid down in earlier articles of the same text.

128. - It was nevertheless recognised as being undesirable to restrict the potential cases for the application of the uniform rules by creating an inference that, where the lessor intervened in the sphere of autonomy reserved to the lessee under Article 1 (2) (a), the nature of the transaction would change to such an extent as to make it no longer amenable to treatment under the uniform rules but bring it within some other legal category. This risk was all the greater, it was pointed out, in the case of international leases where, for the reasons expounded above, the lessor's neutrality with regard to the choice of the equipment and the supplier, might be less absolute (55).

129. - Different proposals were tabled with a view to accommodating the resolution of this problem. One such proposal was to amend the wording of Article 1 (2) (a) so as to read:

> "the lessee relies primarily on its own skill and judgment in specifying ...."

This proposal met with the objection that it would so substantially alter one of the fundamental ingredients of the transaction addressed by the uniform rules as to undermine the basic assumption on which such legal consequences as the lessor's general immunity under Article 7 were founded. It would furthermore introduce an element of legal uncertainty into the text in the manner in which these fundamental ingredients were presented. According to this line of thought, it was moreover essential to the basic philosophy of the uniform rules that the lessee relied on its own skill and judgment in all matters affecting the choice of the equipment and the supplier, since otherwise there might remain some aspects of these choices in respect of which the lessor's intervention would not attract the full consequences of Article 7 (2) (a), namely the forfeiture of its general immunity.

130. - Another proposal tabled for the solution of the problem raised

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(55) Although, to the extent that the underlying philosophy of the uniform rules is founded on recognition of the essentially financial nature of the transaction and the limited financial role played by the lessor, it might be considered that this reasoning was still fundamentally valid even where the lessor found itself, for example in the case cited in footnote 48 supra, obliged to take an interest in the construction of the equipment, to the extent that its interest was limited to the financial consideration of whether the changes proposed as part of the on-going process of construction were such as to make the transaction that it was financing substantially a different enterprise from the one it had had in mind at the beginning.

in § 127 was for the deletion of Article 7 (2) (a), on the ground that it opened the door to all sorts of problems regarding the degree of intervention that was required before the lessor should be considered as having forfeited its general immunity. (56) This proposal attracted no support. On the one hand, Article 7 (2) (a) was seen as representing a measure of protection for lessees, who in some cases, particularly with the increasing tendency of lessors to conclude special financing agreements with particular suppliers, might be seen as the weaker party in terms of bargaining power, either in relation to the lessor alone or to the lessor and supplier jointly as linked by such special financing agreements as the ones just mentioned. It was important that the lessee should not feel it was at the mercy of the lessor either alone or in conjunction with the supplier. On the other hand, given the less than absolute technical neutrality of the lessor in many international leases to which allusion has already been made, another reason why it would be undesirable to delete this clause would be so as not unduly to restrict the cases in which the future international instrument would actually be applied by converting the principle contained in Article 1 (2) (a) into an absolute rule. The question of the evaluation of the degree of the lessor's intervention in the individual case was felt to be a matter that had to be left to the interpretation of the courts of each State. Nevertheless the words "to the extent that it has influenced" were felt to give some guidance here, indicating that what was had in mind was not, for instance, the case of the lessor simply giving the lessee some friendly advice but rather where its intervention was in the circumstances considerable in nature.

131. - Various other forms of wording were put forward for the resolution of the problem raised in § 127. For instance, it was proposed that the wording eventually adopted in Article 7 (2) (a), " to the extent that it has influenced the choice ..." should read: "to the extent that it has assisted the lessee in its choice..." This proposal was rejected on the ground that the term "assisted" had connotations which were not always appropriate to the case contemplated under Article 7 (2) (a). Another proposal was that the aforementioned phrase should be specifically linked to Article 1 (2) (a), indicating that it covered an exception to the principle set forth in the latter clause. This proposal would have read: "to the extent that,by way of exception to the principle stated in Article 1 (2) (a), it has influenced the choice ..." A further proposal was to amend the chapeau of Article 1 (2) so

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(56) For instance, should it be sufficient for the lessor's general immunity to be forfeited where the latter gave the address of a supplier of equipment to the lessee saying that it had heard that that particular supplier was reliable ?

as to indicate that the main characteristics of financial leasing listed thereunder were cumulative or alternative. The solution finally adopted was to insert the word "typically" into the said chapeau so as to indicate that the main characteristics listed under Article 1 (2) were characteristics which financial leasing transactions typically possessed. Whilst it was recognised that this amendment would introduce a small element of uncertainty into the text, this disadvantage was considered to be outweighed by the added flexibility it built into the scope of Article 1 (2). Such flexibility, whilst unfamiliar to the draftsmen of legislation in some jurisdictions, could, it was felt, be accepted in an international Convention. The need for all three of the main characteristics of financial leasing listed under Article 1 (2) to be present for the application of the uniform rules would, nevertheless, in the meantime subsist. The significance of the introduction of the qualification "typically" was to indicate the need for flexibility in determining whether in the particular case a particular characteristic was made out.

132. - The order of the paragraphs making up this article was revised by the drafting committee in compliance with the view expressed by an observer attending the session of governmental experts who felt that, in so far as the new Article 7 (2) (a),formerly Article 7 (3), was a direct exception to the rule laid down in Article 7 (1) and the exception set out in the new Article 7 (2) (b),formerly Article 7 (2), was only a limited exception to the rule laid down in Article 7 (1), addressing only the lessor's duties towards the lessee, the former Article 7 (3) should go ahead of the former Article 7 (2) so as to emphasize its link with Article 7 (1).

Article 8

133. - This article spells out the lessee's duty of care in relation to the equipment from the moment that it is delivered into the lessee's hands until the time that it is returned to the lessor at the end of the leasing agreement. Paragraph 1 details the lessee's duty of care during the leasing agreement, while paragraph 2 specifies the condition in which the lessee must return the equipment to the lessor at the end of the leasing agreement, in the event that it does not exercise any option to purchase that it may have under the leasing agreement or does not want to take the equipment on lease for a further period.

134. - The duty of care imposed on the lessee is that of a normal user. The standard of care that must be displayed by the lessee to this end is specified to be "proper" care. This standard of care is further clarified by the additional requirement that the lessee must keep the equipment in the same

condition as it was in at the time of delivery, after allowance has been made for fair wear and tear. (57) In effect this means that the lessee is under a duty to keep the equipment in good working order. The practical significance of this provision will however be limited inasmuch as leasing agreements invariably contain detailed provisions as to possession, care and use of the equipment.

135. - There was also discussion within the Study Group of whether the uniform rules should cover the question of what should happen where the equipment is accidentally destroyed at some stage during the leasing agreement. While the value of the equipment would normally be covered by insurance, this still left the problems of how the insurance monies should be applied and what should be the effect of the destruction of the equipment on the leasing agreement: if the insurance monies were to be applied in restoring the equipment, the question arose as to whether a new contract came into existence between the parties to the original leasing agreement or whether the original agreement should go on applying to the restored equipment. It was the opinion of the Study Group that this was a matter best left to be settled by the parties in their contract.

Article 9

136. - This article, formerly Article 10 in the text adopted by the Study Group, proved to be the cause of lengthy debate at the first session of governmental experts. On the one hand, there were the proponents of the novel scheme contemplated under the text proposed by the Study Group, namely giving the lessee an independent, direct, statutory right of action against the supplier where the lessee sustains loss or damage through the supplier's failure to deliver the equipment in accordance with the terms of the supply agreement (58).

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(57) One member of the committee of governmental experts pointed out that in her country it would be unusual for there to be an exception for fair wear and tear in the leasing agreement, in that the lessor, upon recovery of the equipment, would want either to sell or to re-lease it. Whilst it was recognised that a leasing agreement would indeed not normally exclude fair wear and tear, two factors had to be borne in mind: first, the fact that Article 14 was designed precisely to permit the parties to vary such duties as they saw fit, and, secondly, where the leasing agreement was silent on this matter, the general rule would be that the lessee was not responsible for fair wear and tear. This article accordingly reflects what would be the general rule of law on this matter where the lease was silent without preventing the parties from agreeing otherwise.

(58) Cf. Article 10 (1) of the preliminary draft uniform rules adopted by the Study Group (Study LIX - Doc. 17).

Ranged against these were essentially the representatives of two States that, in view of the difficulties inherent in the direct right of action solution, proposed that the problem of the lessee's recovery of its loss in this regard should rather be handled by the technique of the lessor's assignment to the lessee of its rights under the supply agreement against the supplier.

137. - The problem addressed by this article is the situation where there is failure by the supplier to make delivery of the equipment in conformity with the terms of the supply agreement. The wide immunity from liability conferred upon the lessor under Article 7 (1) - justified by the fact that the choice of the equipment and the supplier was made by the lessee, who will moreover typically conduct negotiations directly with the supplier - clearly presupposes that the lessee should nevertheless have an adequate avenue of redress for the necessarily deleterious consequences for itself of such breach of the supply agreement by the supplier. The authors of the uniform rules were of the opinion that, given that, in the atypical circumstances of financial leasing, it is the lessee that negotiates the essentials of the sale contract directly with the supplier and appears in many ways as the purchaser, the lessee should be given the means to seek compensation for its loss directly from the person responsible for this situation. The conversion of this principle into an effective right of action exercisable directly by the lessee proved to be the source of great difficulty.

138. - In effect, unless some form of collateral contract can be deduced in the circumstances from the negotiations between the lessee and the supplier, there is no contractual nexus between these two parties. As a result, it has hitherto proven very difficult for the lessee to bring proceedings against the supplier. The techniques employed to get round this problem have varied according to the legal system. Some jurisdictions have treated the supply agreement as creating stipulations for the benefit of a third party, the lessee. The techniques generally employed have, however, involved the lessor agreeing either to assign its claims against the supplier under the supply agreement to the lessee or to enforce its own rights as buyer against the supplier for the lessee's benefit,or else the lessor, when placing the order for the equipment, contracting as agent for the lessee as well as on its own behalf. Both these techniques were adjudged by the Study Group to be inadequate inasmuch as the claim pursued by or in the right of the lessor can only be for such loss as would have been recoverable by the lessor, whereas the aim of the lessee was naturally to recover its own measure of loss. It was not difficult to see the potential divergency between the measure of loss of the lessor and that of the lessee in the event of the supplier's failure to deliver the equipment in conformity with the supply agreement. In the case of the equipment proving, for instance, to be partially unfit for the purpose for which it was intended, since, under the hell and high water clause customarily included in financial leasing agreements, the lessor will normally be entitled to recover its rentals come what may, the supplier will be able to assert in its defence

against the lessor that the latter has not sustained any financial loss, save to the extent that the value of the equipment for re-leasing or re-sale purposes has depreciated in proportion to the extent to which it had proved to be partially unfit for the purpose for which it was intended. The lessee, on the other hand, will have a quite different measure of loss from the lessor, its loss being essentially consequential in nature. The lessee will sustain a loss in trading income through the equipment not being delivered in conformity with the supply agreement. Should the equipment be machinery for the production of items of clothing, for example, the lessee will not be able to produce as much as it had anticipated if the equipment turns out to be defective. Such a loss of production will also have a negative impact on the lessee's trading image, and might notably cause it to lose customers. Such consequential loss sustained by the lessee would not correspond to the lessor's measure of loss.

139. - The lessee might thus in certain circumstances find itself entitled to nothing more than nominal damages if restricted to recover only against the supplier as the lessor's assignee. It was to meet these problems, notably the privity problem, that the Study Group proposed that the uniform rules should create a new statutory direct right of action against the supplier in favour of the lessee. Admittedly, there was the risk with the text approved by the Study Group that the cases in which the direct right of action would effectively lie might be considerably restricted by the fact that that text did not take the State where the supplier had its place of business as a connecting factor for the applicability of the future international instrument. Thus in those cases where the State in which the supplier happened to have its place of business was not a Contracting Party, there was a risk that the lessee's exercise of its direct right of action might prove not to work. As we have pointed out earlier, an attempt was made to remedy this deficiency in the context of Article 2, by virtue of which the applicability of the uniform rules is henceforth made dependent on the supply agreement and the leasing agreement being both governed by the law of a Contracting Party or on the States in which lessor, lessee and supplier have their respective places of business all being Contracting Parties.

140. - This amendment did not satisfy certain delegations attending the first session of governmental experts that took the view that there was still a risk of the direct right of action proving to be ineffective where the supply agreement turned out to be subject to the law of a non-Contracting State and that the problem of the lessee's enforcement of its rights against the supplier would be dealt with better by obliging the lessor to assign its rights under the supply agreement to the lessee. The reasons adduced in support of this proposal and against the direct right of action proposed by the Study Group were: first, that it was simpler than the direct right of action; sec-

ondly, that it had the benefit of having worked well in their own jurisdictions; thirdly, that it would not interfere with the supply agreement and the warranties in respect of the equipment for which the lessor was liable under their law; fourthly, that otherwise the supplier might well take the position that the only party to whom it had to answer in respect of the supply agreement was its co-contractant, the lessor; fifthly, under Article 9 (1) of the uniform rules as adopted by the Study Group the lessor was declared, within certain limits, not to 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, so that the rights which the lessor held under the supply agreement had to be transferred to the lessee as it was not possible that the lessee should effectively find itself without any rights; sixthly, that, whilst Article 10 (1) of the text adopted by the Study Group provided that the lessee's exercise of the direct right of action against the supplier should not prejudice the lessor's own rights of action against the supplier, there was a danger that the aim of this provision might be contradicted by Article 10 (2) of the same text, giving the lessee 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, since it was possible that in some circumstances it might rather be in the interest of the lessor to seek a reduction in the price of the equipment tendered, leaving the supplier with something of a dilemma; seventhly, the exclusion clauses in respect of certain categories of far-reaching damage that were typical of the standard forms of contract that would normally be used by the supplier and the lessor and which were to a certain extent upheld, thus raising another problem for the effectiveness of the direct right of action; finally, the extremely restricted cases in which such direct rights of action have hitherto been recognised, whether at a domestic or an international level, in favour of a party that is not party to the contract in question. Another problem raised in connection with the conferment upon the lessee of a direct right of action concerned the nature of the right conferred, that is whether it was a substantive right or only a right that derived from the law of procedure. The significance of this question lay in the fact that, depending on the answer given to this problem, the effectiveness of such a direct right of action might depend on the lex causae which might well not be a Contracting State.

141. - Not all jurisdictions, it transpired, had the same problem as those under the law of which a lessee would be restricted as assignee to the measure of loss recoverable by its lessor as assignor against the supplier. Under the principle of Drittschadensliquidation as applied in Austria and the Federal Republic of Germany one party can thus recover the loss of another party who, while not a party to the contract in question, has a close connection thereto.

142. - The assignment solution posed many problems for those jurisdictions which did not have this possibility and under which the lessee would not be able to recover more than the measure of loss of its assignor. Among the problems that were raised in this regard was the possibility that the lessor's recoverable measure of loss against the supplier might be subject to qualification, for example a right of set-off in favour of the supplier, as a result of which the lessee's remedies under the assignment would also be so limited. In this regard it was suggested that, to the extent that such a right of set-off enjoyed by the supplier vis-à-vis the lessor paralysed the lessee's remedies under the assignment from the lessor, the assignment could be considered not to be effective and the lessor to be liable to that extent to the lessee. Another difficulty in the assignment solution was what was regarded as the impossibility for the lessor to be obliged to assign all its rights under the supply agreement to the lessee. Indeed, as was mentioned above, the previous draft expressly provided that the lessee's exercise of its direct right of action should not prejudice the lessor's own rights of action against the supplier under the supply agreement. Some of the lessor's rights, it was argued, the lessor could not reasonably be expected to abandon, notably the right to terminate the supply agreement, the effect of which would be to revest title to the equipment in the supplier, whereas for the lessor its title was an essential element of its security in the transaction. The lessor would moreover, on termination of the supply agreement, have to return those tax indemnification benefits which it would have obtained under some jurisdictions through its ownership of the equipment, whereas it was on the basis of these benefits that the lessor had been able to offer the lessee better rental terms.

143. - This led to a general discussion among the governmental experts of the various rights of the lessor which would under the aforementioned proposal have to be assigned to the lessee. It was suggested that the lessor's remedies vis-à-vis the supplier in the event of the latter's failure to deliver in conformity with the supply agreement were three in number, namely the right to sue for the tender of conforming equipment, the right to sue for a reduction in the price of the equipment and the right to terminate the supply agreement and to receive back the price it had paid for the equipment. Whereas one delegate doubted whether it was justifiable for the right to sue for a reduction in the price of the equipment to be assigned to a person who had not paid that price in the first place, another delegate expressed his surprise that, while the lessee was granted one of the remedies which a buyer under the Civil law would normally have, namely the right to sue for specific performance of the supply agreement, under Article 10 (2) of the text adopted by the Study Group, this text did not grant the lessee two other remedies traditionally available to a buyer in a Civil law jurisdiction, namely the right to terminate the supply agreement or to sue for a reduction in the price of the equipment.

144. - The observer representing Leaseurope took up this last point as evidence of what to him seemed an imbalance in the uniform rules. The lessee under Article 10 (3) had the right to terminate the leasing agreement and recover its rentals, he pointed out. He suggested that the uniform rules might be better balanced were the lessee to be given the right to terminate the supply agreement and to sue for a reduction in the price of the equipment, with the leasing agreement being kept in existence until the court had decided these points, and the lessor then to be given the right, where the supplier had in the meantime become insolvent, to sue the lessee for the deleterious consequences of its own bad choice. The reasoning behind this suggestion was that the lessee was normally responsible for the choice of both equipment and supplier and, as such, in the last resort should support the deleterious consequences of its own choice.

145. - A member of the committee of governmental experts, on the other hand, took the view that the specific remedies appropriate to the lessee in the circumstances of this article were damages. He saw the situations covered by this article as being two in number, first, where the lessee wished to reject the equipment for non-conformity to the terms of the supply agreement and, secondly, where it wished to retain the equipment, even though it was defective and would therefore result in it sustaining loss. In either case, in his opinion, the lessee's claim against the supplier should be limited to damages. In the first case, the lessee would not be liable to pay any more rentals; it would have no legitimate interest to interfere in the supply agreement; its only loss would be for that consequential loss which it would sustain through having to reject the equipment vis-à-vis the lessor. In the second case, where the equipment was retained by the lessee, the latter would also have no legitimate interest to interfere in the supply agreement, a fortiori because not even the lessor would have the right to reject the equipment once it had been accepted with knowledge of its defects. The lessee's interest in such a case would be to recover that loss that it had sustained through the equipment being defective whilst it nevertheless had to go on paying its rentals. The lessee's ultimate remedy would therefore be to seek the termination of the leasing agreement and in either case to sue the supplier for damages, while the practical unacceptability for the lessor of seeing the equipment become the property of the lessee meant that it was impossible for the lessee to be given the right to terminate the supply agreement. Such a remedy would be all the more egregious in that the ultimate responsibility for the equipment not working properly or not finally being delivered could be seen as being the lessee's, in the sense that the choice of the equipment and the supplier was essentially its own.

146. - While there was much vigorous defence of the direct right of action on the ground that it was essential to be mindful of the whole, underlying purpose of the uniform rules, namely to confer a distinct, sui generis legal status on financial leasing, and therefore to avoid constant enmeshment in problems founded in the traditional contractual schemata and techniques, it was also argued that the direct right of action would probably be impossible

to sell in an international Convention and that it might accordingly be wiser to reflect anew on the proposal already referred to above at § 57, to wit to see the uniform rules as the basis of the harmonisation of internal laws in this field. This, it was suggested, would make it correspondingly easier to be creative and bold, in such ways as the dissociation of the different rights normally regarded as belonging to one person, the purchaser, under a sale contract between both lessor and lessee, and thus to enshrine a genuinely new legal institution.

147. - One compromise solution put forward, based on a term of the standard supply agreement of the proponent's own country, was that the lessor's rights under the supply agreement should be treated as being also enjoyed by the lessee as though the latter were buyer. This had much in common with another proposal suggesting that the lessee should be treated as though it were, for the purposes of this article, a party to the supply agreement. Another compromise solution proposed would, it was pointed out, involve a reversal of the assignment solution: this proposal was that, where the supplier knew the purpose for which the lessee required the equipment - which would clearly normally be the case since in financial leasing the specifications of the equipment are, as we have noted earlier, negotiated directly between the supplier and the lessee - and the loss that the lessee sustained was therefore reasonably foreseeable by the supplier, the lessee should be entitled to require the lessor to bring legal proceedings to recover both its own loss as also any further loss sustained by the lessor. The objection raised in respect of the direct right of action, namely that the supplier would face the likelihood of two different claims being brought by two different parties in respect of the same damage on two separate occasions (59), would fall as a result of this proposal, since both claims would come before the court at the same time. The lessee would be able to recover its own measure of loss and not merely that of an assignee from the lessor and the lessor, if indeed it had sustained any additional loss, which in many cases it would not have done, would be able to recover its own measure of loss.

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(59) This argument rested on the premise that the supplier would normally expect its only interlocutor to be the lessor as its co-contractant, but this reasoning may be criticised since in practice the specifications of the equipment are negotiated directly between the lessee and the supplier, and the supplier, even if it does not know the lessee has a direct right of action against it, nevertheless accordingly fully expects to find the lessee as its adversary in the event of litigation.

148. - The solution eventually proposed by the drafting committee was a blending of the two proposals mentioned in the previous paragraph. It provides that, where the supplier knows the purpose for which the lessee requires the equipment, the duties owed by the supplier to the lessor under the supply agreement shall also be owed to the lessee as though it were a party to the supply agreement and as though the equipment were to be supplied directly to the lessee for its professional or business purposes, as in fact it always would be under a financial lease. In common with the corresponding provision of the text adopted by the Study Group, the uniform rules thus treat the supply agreement as creating stipulations for the benefit of a third party, in this case the lessee. In acknowledgement of the opposition to the idea that the lessee should be entitled to terminate the supply agreement maintained throughout the discussion on this article, the drafting committee tempered the effect of this article by a second paragraph laying down that nothing in this article entitled the lessee to terminate the supply agreement (60).

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(60) Cf. Section 209 of the Uniform Personal Property Leasing Act of the United States of America approved on 9 August 1985 by the National Conference of Commissioners on Uniform State Laws, promulgation of which is suspended for one year, during which time the Act will be rewritten as an article for inclusion in the Uniform Commercial Code:

"Section 209. Lessee under finance lease as beneficiary of supply contract.

(a) The benefit of the supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, under the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but, subject to the terms of the supply contract and all of the supplier's defenses or claims arising therefrom.

(b) The extension of the benefit of the supplier's promises to the lessee does not: (1) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (2) impose any duty or liability under the supply contract on the lessee.

(c) Any modification or rescission of the supply contract by the supplier and the lessor is effective against the lessee unless, prior to the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the supply contract is modified or rescinded after the lessee enters the finance lease, the lessee has a cause of action against the lessor, and against the supplier if the supplier has notice of the lessee's entering the finance lease when the supply contract is modified or rescinded. The resulting judgment shall put the lessee in as good a position as if the modification or rescission had not occurred."

Article 10

149.- The provisions contained in this article were formerly, in the text adopted by the Study Group, split up in two separate articles, namely Articles 9 and 11 of that text. It was the view of the committee of governmental experts that, since the provisions of these two articles all concerned the lessee's remedies against the lessor in the event of the tender of non-conforming equipment, non-delivery or late delivery, they would be more clearly presented in a single article. One of these remedies, namely the lessee's right to reject the equipment as against the lessor, was formerly to be found in Article 9, whereas the other two remedies, to wit the withholding of the payment of its rentals and the termination of the leasing agreement, were previously set out in Article 11. As a result of effect being given to this proposal by the drafting committee, it should be noted in particular that the former Article 11 disappeared.

150.- The first sentence of the former Article 9 (61) and the introductory conjunction of the following sentence were criticised by two delegations on the occasion of the first session of governmental experts. In keeping with the policy of fixing liability primarily on the supplier adverted to earlier in the context of Article 7, this clause absolved the lessor from liability towards the lessee for non-performance or imperfect performance of the leasing agreement where this resulted from the supplier's breach of the supply agreement, although subject to the liability imposed on the lessor in relation to the lessee under the former Article 11 (62). This provision was criticised at the first session of governmental experts on the ground that it placed the lessor in an over-privileged position in relation to the lessee, in that the lessor would only incur a positive liability towards the lessee where the non-performance or imperfect performance of the leasing agreement resulting from the supplier's breach of the supply agreement had in fact been brought about by the lessor's own fault, which would normally mean that the lessor had failed to pay the purchase price promptly (63). With a view to affording the lessee a greater measure of protection, one of these delegations accordingly proposed

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(61) The relevant part of the text of Article 9 (1) as adopted by the Study Group read as follows:

"Except as provided by Article 11 of 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,".

(62) Cf. Explanatory report, op. cit., § 89.

(63) Cf. also § 140 supra.

either that the offending sentence be deleted or that it be reformulated in a positive manner as follows:

"The lessor shall ensure that the supplier delivers the equipment in accordance with the supply agreement". (64)

The clause in question was accordingly deleted from the text of the uniform rules as a result of the redrafting exercise performed by the drafting committee at the conclusion of the committee of governmental experts' first reading. (65)

151.- The first two paragraphs of Article 10 deal with the lessee's right to reject the equipment vis-à-vis the lessor either where the equipment fails to conform to the terms of the supply agreement, in other words is or proves to be defective, or where delivery is still not tendered within a reasonable time after the due delivery date or, if no delivery date was fixed, within a reasonable time after the making of the leasing agreement. The logic behind this provision is that it would be wrong to require the lessee to wait for delivery indefinitely or to have to make do with non-conforming equipment. In determining the due delivery date regard is to be had, in the first place, to the date fixed in the leasing agreement and, only if this contains no date, then in the second place to the date set in the supply agreement. The priority given to the date fixed in the leasing agreement reflects the fact that the remedy being granted to the lessee under these paragraphs is against the lessor. As has been explained above in the context of the previous article, the reason why the drafters of the uniform rules considered it appropriate to grant the lessee this right to reject vis-à-vis the lessor rather than vis-à-vis the supplier stems from the fact that the effect of the lessee being granted such a right vis-à-vis the supplier would have been to divest the lessor of its security in the transaction, namely its title to the equipment, and revest title thereto in the supplier.

152.- Paragraph 2 of this article makes the lessee's right to reject vis-à-vis the lessor exercisable by notice. Such notice must be given to the lessor within a reasonable time after the lessee has discovered the non-conformity or ought to have discovered it. The lessor nevertheless has the right to cure the non-conformity by a first tender, provided that this is made within a reasonable time after notice to reject. A propos the lessor's right to make a fresh tender, it was felt that it might be desirable to restrict this right to re-tender so as not to subject the lessee to the possibility of an endless series of non-conforming tenders, each made within a

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(64) Cf. comments submitted by the delegation of the People's Republic of China (Study LIX - Doc. 23) at p. 2.

(65) Although cf. Article 10 (4) infra.

reasonable time after notice of rejection of the previous tender. It was feared that this might unfairly limit the lessee's chances of looking elsewhere for the equipment that it required. It was nevertheless explained that this provision sought merely to give the lessor a parallel right to cure a non-conforming tender by making a fresh tender to the corresponding right given to a seller under the United Nations Convention on Contracts for the International Sale of Goods.

153. - One member of the committee of governmental experts was unhappy with the employment of the term "a reasonable time" which erred, he thought, on the side of vagueness. It was explained that this notion, drawn from the Common law, had been imported into international Conventions in the commercial law sector, such as the United Nations Convention on Contracts for the International Sale of Goods (66), and afforded a necessary measure of flexibility in so far as it would be impossible to specify a single period apt for all transactions and all circumstances. It suffices in this connection to bear in mind the evident differences in distance involved in one contract and another. It was therefore judged that this was a matter which was best left to be assessed by the judge in the light of the particular circumstances of the case. One such circumstance that the judge might wish to take account of in this context might, for example,be whether the lessor or the supplier had, following the tender of non-conforming equipment, offered to have the equipment put right.

154. - By way of explanation to another member of the committee of governmental experts who voiced his concern lest the lessee's right to reject was intended to be restricted to an early stage after the tender of non-conforming equipment, whereas the defect could in fact emerge substantially later, albeit still within the customary period of guarantee, it was pointed out that this reading perhaps resulted from the use of the term "tender" in the corresponding provision of the text adopted by the Study Group (Article 9 (1) (b)) which might be misconstrued as restricting the right to reject to a reasonable time after the moment of physical delivery, whereas the intention of this clause was rather to safeguard the lessee's right to reject within a reasonable time "after /it/ has discovered the non-conformity or ought to have discovered it". The expression "tender is not made" employed in the former text of this provision was therefore amended by the drafting committee to read "delivery is not tendered".

155. - Another amendment made to the text of the provision corresponding to Article 10 (2) in the text adopted by the Study Group (Article 9 (2)) was the result of a proposal made by a delegation attending the first session of governmental experts that sought the deletion of the expression "with

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(66) Cf. Article 39 (1) of that Convention.

reasonable diligence" in relation to the lessee's discovery of the defect justifying its right to reject (67). The reasoning behind this amendment was to keep the text in line with a comparable provision of the United Nations Convention on Contracts for the International Sale of Goods (Article 39 (2)). Effect was given to this proposal by the drafting committee.

156. - Paragraphs 3 and 4 of Article 10 correspond to Article 11 (1) and (2) of the text adopted by the Study Group. Paragraph 3 gives the lessee the right to terminate the leasing agreement and recover any rentals and other monies paid in advance where the supplier fails to deliver the equipment whether under the circumstances contemplated in paragraph 1, that is where the equipment delivered is defective, is delivered late or is not delivered at all, or in the case contemplated in paragraph 2, that is where there is still not a delivery of conforming equipment even after the expiry of a further reasonable time following the giving of notice to reject (68). The right to terminate the leasing agreement and recover any rentals and other monies paid in advance is thus complementary to the lessee's right to reject. The reason why these rights are set forth separately is that it would not be right to allow the lessee to terminate the leasing agreement and recover any rentals and other monies paid in advance while there was still an opportunity, under Article 9 (1) and (2), for the making of a conforming tender.

157. - Paragraph 4 specifies that the lessee is not entitled to withhold its rentals, nor does it have any other claim against the lessor, for non-delivery, delay in delivery or the delivery of non-conforming equipment except to the extent to which this has been brought about by the lessor's fault (69). As this limitation on the lessee's remedies against the lessor was, moreover, clearly designed to be consistent with the specific remedies conferred upon the lessee vis-à-vis the lessor under Article 10 (3), it is submitted that it would be opportune to introduce Article 10 (4) by a clause indicating that its provisions are without effect on the remedies conferred upon the lessee by Article 10 (3). It should be noted that the

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(67) Cf. comments submitted by the delegation of the People's Republic of China (Study LIX - Doc. 23) at p. 2.

(68) The lessor would be left to seek recovery of such down payments or progress payments as it had made to the supplier under the supply agreement on its own.

(69) Cf. § 150 supra regarding what is to be understood an constituting the lessor's fault.

gist of what was previously contained in a separate second sentence of the provision corresponding to the relevant part of Article 10 (4) in the text adopted by the Study Group (Article 11 (2)) (70) is now subsumed in the words "or have any other claim against the lessor" in Article 10 (4). These words leave open the possibility for the lessee to sue the lessor for damages for any additional loss, over and above the compensation represented by its recovery of any rentals and other sums paid in advance, that it may sustain through non-delivery, delay in delivery or the delivery of non-conforming equipment to the extent that this was due to the lessor's fault.

158. - Looking at Article 10 (3) and (4) from the lessee's point of view, their overall effect is that, if the lessee wishes to keep the leasing agreement on foot it must continue to pay its rentals, even in the face of the supplier's failure to deliver the equipment, late delivery of the equipment or tender of non-conforming equipment, save where this results from the lessor's fault, in which case the lessee becomes entitled to withhold payment of its rentals (71). Where the supplier has either not tendered delivery at all within the time specified in Article 9 (1) or, even after the expiry of the further reasonable time permitted for a fresh tender of conforming equipment under Article 9 (2), the supplier has still failed to make a tender of conforming equipment, then the lessee is no longer obliged to keep the leasing agreement on foot but may elect to terminate it, whereupon it becomes entitled to recover all rentals and other monies paid in advance. This will normally be the limit of the lessee's claim against the lessor arising out of the supplier's failure to deliver in conformity with the terms of the supply agreement, except where this is properly attributable to the lessor's fault, as explained above (72).

159. - In considering the apportionment of risk made as between the two interested parties, lessor and lessee, under this article, it is important to bear in mind that the reason why the lessee has to go on paying its rentals, even in the face of non-delivery or the tender of non-conforming equipment is, provided that this breach of the terms of the supply agreement is not properly attributable to the lessor's fault, that the leasing agreement has to go on operating so long as there is still an opportunity for

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(70) The second sentence of Article 11 (2) as adopted by the Study Group read as follows :

"It shall have no other claim against the lessor for non-delivery, delay in delivery, or the delivery of non-conforming equipment except to the extent to which this results from the lessor's fault."

(71) Under the text adopted by the Study Group (cf. Article 11 (1)) the lessee's entitlement to withhold payment of its rentals in such a case was further circumscribed by the amount justified by the actual loss that the lessee had sustained thereby.

(72) Cf. § 157 *supra*.

the making of a conforming tender. This follows from the philosophy underlying the entire draft, namely that, given the lessor's limited, financial role in the transaction, the parties responsible for the choice of the equipment and the discussion of all technical matters pertaining thereto, including the terms of delivery, are the lessee and the supplier. However, once there is no longer any possibility of a conforming tender under Article 10 (2), and it has thus become clear that there is no consideration moving from the lessor for the lessee's payment of its rentals, namely the delivery of the equipment contracted for in the supply agreement, the lessee's proper remedy is to terminate the leasing agreement and to recover any rentals and other monies it has disbursed to the lessor. (73)

160. - The observers representing Leaseurope at the first session of governmental experts proposed that the text of paragraphs 3 and 4 should be completed in various ways. (74) Effect was given to some of these proposals. That relating to the specification of the non-conformity as being caused "either by an obvious or hidden defect" was not, however, adopted.

161. - The one point that caused some controversy in the context of Article 10 (4) was the previous text's employment of the term "fault". It was explained that this term had a very precise connotation in Civil law systems covering only those cases of negligence that could be termed wilful negligence, so that, to include it in the text of Article 10 (4) would mean that it would be virtually impossible for the lessor to be regarded as being at fault. The term "responsibility" having been rejected as a possible solution on the ground that it referred to duty rather than to the breach of a duty or liability, the solution eventually adopted was to replace the term "fault" by the term "act or omission."

Article 11

162. - The former Article 11 adopted by the Study Group disappeared as the result of the drafting committee's fusion of its provisions with those left standing of the former Article 9. (75)

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(73) Quaere whether the lessee's right to withhold payment of its rentals should be extended to the situation where, in accordance with its right under Article 10 (1), it has rejected the equipment but has either held the supply agreement open for performance by a conforming tender or the lessor is still within time to make a conforming tender under Article 10 (2), since the lessee in such a case has rejected the equipment vis-à-vis the lessor and has not yet had the cure of non-conformity. Cf. Explanatory report, op. cit, § 97.

(74) Cf. Study LIX - Doc. 21 at pp. 3 - 4.

(75) Cf. § 149 supra.

Article 12

163. - This article deals with the consequences of a lessee's default in the performance of its duties under the leasing agreement, notably the range of remedies this event opens up for the lessor. As such it may be considered as constituting those elements of a liquidated damages clause which local law should not cut down. It sets out to detail the measure of the lessor's loss. It is in no way intended to limit the parties' freedom to stipulate a liquidated damages clause of their own in the leasing agreement, and as such was intended to be open to derogation under Article 14.

164. - The uniform rules did not essay a definition of "default", on the ground that, given the limited objectives of this article and the underlying philosophy of the draft, namely the establishment of a basic, rather than an exhaustive legal framework for the sui generis type of leasing transaction, this was a matter best left to the parties in their contract, all the more so since consumer transactions were excluded from the scope of the uniform rules under Article 1 (1) so that both parties to the type of leasing agreement had in mind here could safely be considered to be professionals. It was nevertheless pointed out that, in the type of leasing done at the international level, the rule as regards what should be considered as an event of default differed considerably from contract to contract, the essential factor behind this differentiation lying in the degree of creditworthiness of the individual lessee. Thus, the stronger the lessee, the more the lessor will be prepared to restrict the circumstances deemed under the lease to constitute default, which thus might be limited to non-payment of rentals or bankruptcy, whereas the weaker the economic situation of the lessee the more a lessor is going to be inclined to press for a more extensive interpretation of the events constituting default. It is moreover not that a lessor will press for the enforcement of its contractual rights and remedies upon the mere first occurrence of an event deemed in the contract to constitute default: leasing agreements customarily provide for the lessor to give the lessee notice in such circumstances that an event has occurred which with the passage of time will nevertheless become a default justifying its invocation of the rights and remedies set out in their agreement. This again was accordingly considered to be a matter that could be left to be settled by the parties' agreement.

165. - The first remedy listed in Article 12 (1) (a) is for the lessor to terminate the leasing agreement, although this right is only exercisable, under Article 12 /(4)/ (76), following the expiry of a further reasonable

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(76) The numbering of the second, third and fourth paragraphs of Article 12 could not be finalised at the first session of governmental experts owing to the uncertain status of Article 12 /(2)/ reinstated by the drafting committee subject to the approval of the committee of governmental experts: cf. § 175 infra.

period of time after the lessor's giving the lessee notice of its duty to remedy its default, that is, in so far as this may be remedied. This restriction on the lessor's right to terminate the leasing agreement is clearly designed to meet just that concern mentioned in the previous paragraph, namely that the lessee's mere failure, for instance, to pay one of its rentals right on time should not automatically bring down on it straight away the full force of the sanctions laid down in the leasing agreement. Clearly there will be some cases where the lessee will be unable to remedy its default, for instance following its bankruptcy, and in such cases the serving of such notice on the lessee and, in particular, the need to await the expiry of a further reasonable period of time, may accordingly be dispensed with. The word "reasonable" is employed on a number of occasions in the uniform rules, as it was considered inappropriate to set specific time-limits in an instrument designed to be of international application, (77) all the more so given the inevitable variations there would be in the necessary administrative regulations to be complied with from one country to another in respect, notably, of the transfer of funds and the differences in distance depending on the countries involved. It was argued that the importance of this remedy might be relative in that under most leasing agreements by the time there is a default the lessor is under no continuing obligation, although an exception would be where the leasing agreement anticipated future delivery of equipment.

166. - The second remedy granted to the lessor on the lessee's default, under Article 12 (1) (b), is,after termination of the leasing agreement, to take repossession of the equipment. This can be quite important where the lessee is unwilling to part with possession and given the reluctance of Common law jurisdictions to entertain applications for specific performance. The point was indeed raised, although not discussed, whether, so as to meet this difficulty for jurisdictions of a Common law tradition, the lessor should not in addition be granted some form of injunctive relief to compel delivery of the equipment where the lessee refuses to part with possession. Where a lessee is in default, repossession may often represent for the lessor, notwithstanding the fact that it is not a merchant and does not ordinarily deal in such equipment, its best guarantee of salvaging some of its investment, as the straitened circumstances that may well have determined the lessee's default are just as likely to affect its ability to meet a claim in damages.

167. - The lessor's right to repossess the equipment was made contingent by the committee of governmental experts on its first having terminated the leasing agreement. This amendment again reflects the concern adverted to earlier (78), namely that repossession should not be used by the lessor as

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(77) Cf. § 153 supra.
(78) Cf. § 164 supra.

a means of exerting pressure on the lessee to pay its rentals (79) but should only be possible where the lessor has already terminated the leasing agreement. This concern was heightened by the language employed in the opening chapeau of Article 12 (1) as adopted by the Study Group, stating that the rights and remedies specified in the subsequent sub-paragraphs (a - e) could be exercised separately or cumulatively, in other words in any combination chosen by the lessor. This language was intended as an expression of the concern referred to earlier (80), namely that the list of remedies set forth in this paragraph was not intended to be exhaustive, so as to leave the parties free to negotiate such additional remedies as they saw fit. (81) However, so as to lessen the room for possible misconstruction, it was in the end decided to delete the words "separately or cumulatively" which had previously appeared in the opening chapeau of Article 12 (1).

168. - The third remedy recognised in favour of the lessor, under Article 12 (1) (c), is to recover all accrued and unpaid rentals, that is as of the date of default, together with interest thereon.

169. - Under Article 12 (1) (d) the lessor is moreover entitled to recover such compensation as will place it in the position in which it would have been at the normal expiry of the leasing agreement had the lessee fulfilled its terms. This remedy was made expressly subject by the committee of governmental experts to the lessor's duty to take all reasonable steps to mitigate its loss. This duty had always been implicit in the minds of the members of the Study Group and indeed it was always the intention that the lessor's remedies under sub-paragraphs (b), (c) and (d) should be read in conjunction with one another. The remedy provided for in littera (d) was designed not to give the lessor an additional remedy on top of those already conferred under the previous two sub-paragraphs, but rather to provide for the case where the leasing agreement was silent or ambiguous as to the lessor's measure of loss in the event of the lessee's default. The aim of the drafters of the uniform rules had all along been to ensure that the net effect of the compensation recoverable by the lessor should place it in the position in which it would have been had it received the total number of

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(79) It was pointed out that, while such a concern might in some cases be justified in the context of a domestic leasing transaction, it was somewhat less likely in that of an international leasing transaction. Quaere whether a French lessor would go to the lengths of seeking to repossess equipment leased in Ecuador for a fortnight to exert such pressure.

(80) Cf. § 163 supra.

(81) One instance of such an additional remedy was given during the New York symposium: the lessor's right upon default to exercise any cross-default rights it might have under other leasing agreements with the same lessee.

rentals agreed to be paid under the leasing agreement. Previous drafts had indeed attempted to spell out this amount in greater detail. The basic idea had nevertheless all along been that, in computing the amount of compensation recoverable by the lessor, the latter would have to give credit to the lessee for any gain it had made, first of all, through receiving the outstanding rentals sooner than anticipated under the leasing agreement and secondly, following repossession, from selling the equipment or re-leasing it in a commercially reasonable manner. Any surplus realised by the lessor would, on this method of calculation, in conformity with the practice followed in these matters, invariably be handed back to the erstwhile lessee (82).

170. - This, the committee of governmental experts took the view, needed to be spelled out expressly. One representative expressed his disquiet at what he saw as yet another article unfairly tilted in favour of the lessor. Whereas he could see the logic behind this imbalance in previous articles, in terms of the lessor's limited, essentially financial role in the transaction compared with the lessee's active role in the choice of equipment and supplier, he failed to see it in an article that was concerned with the mutual relations of lessor and lessee. With a view to correcting this imbalance, he proposed seeking inspiration in a clause, that was in the event deleted, from the former Article 11 (1) adopted by the Study Group:

"and only to the extent that the lessee has sustained loss thereby",

replacing the reference to the lessee by one to the lessor, so as to indicate that the compensation recoverable by the lessor from the lessee should in no circumstances exceed the loss it had actually sustained as a result of the lessee's default.

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(82) At one stage the Study Group even toyed with the idea of specifying that the lessor should also give credit against the amount it would receive by way of the discounted value of the unpaid rentals for such residual value as the equipment would have had on the expiry of the leasing agreement. This idea was not pursued because of the widely divergent attitudes adopted in the matter of the role of the residual value in leasing agreements in Civil law jurisdictions, on the one hand, and in Common law jurisdictions, on the other. In Civil law jurisdictions the residual value is fixed in the leasing agreement as the price at which the lessee is entitled to exercise the purchase option generally granted it under the leasing agreement, whereas in Common law jurisdictions the fact that this is only possible at the risk of converting what was intended as a lease into a conditional sale means that the residual value cannot be fixed in the leasing agreement and reverts to the lessor upon the expiry of the leasing agreement.

171. - On a broader theme he moreover proposed that the uniform rules should carry onto the international plane the struggle already being waged at the national level against the practice of minimum payment clauses. He pointed out that judges in his country had recently been given a discretionary power to modify (83) such clauses, although he admitted that he was aware of the difficulties of a constitutional order that such a power would create for many jurisdictions, for instance Austria, the Federal Republic of Germany and Japan.

172. - Another member of the committee of governmental experts stated that he would, in respect of international leasing transactions, be reluctant to give a general power to the courts to revise upwards or downwards the minimum payment clauses agreed by the parties or indeed to seek in whatever way to ban the provisions by which the parties seek to define the compensation to be paid in the event of a breach of their agreement. The transactions addressed by the uniform rules did not concern consumers: consumer leases had already been excluded in Article 1 (1) (b). Concerns of consumer protection were not appropriate to transactions concluded between professional parties, all the more so in the special context of an international lease. The purpose of an agreed liquidated damages clause of the kind envisaged in Article 12 (1) was not to hold a threat over the lessee but to avoid the delay and expense of protracted litigation for the purpose of computing the lessor's measure of loss in the event of the lessee's default, a calculation which would otherwise be very difficult and time-consuming.

173. - It had, moreover, to be borne in mind that, the lessor's role in the transaction being typically and above all financial, it represents a very serious upset for its financial calculations when, upon the lessee's default, that is through no fault of its own, it thus finds itself obliged to repossess the equipment at an unforeseen moment during the term of the leasing agreement. This upset will moreover be compounded by various other factors, responsibility for which should not reasonably be attributable to the lessor. For instance, the equipment will frequently have been constructed specially to the lessee's particular specifications, rendering the lessor's task of finding someone willing to take it off its hands all the more difficult, particularly at a price that will bear some relation to its calculations when it embarked on the transaction.

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(83) It was pointed out that, whereas the effect of the exercise of this power would normally be to lower the amount of compensation granted the lessor under such clauses, this was not necessarily always the case and indeed in one case in the country in question an appellate jurisdiction had on the contrary increased the lessor's entitlement to compensation in its exercise of this discretionary power.

174. - What had in the previous text of Article 12 (1) featured as sub-paragraph (e) (84) was deleted by the committee of governmental experts. The former Article 12 (1) (e) was drafted as an exception to the rule set out in Article 4 (1). It sought to safeguard the lessor and the supplier's right to vary their agreement without the lessee's consent in the event of the lessee's default under the leasing agreement in those cases where the triangle was completed and the leasing agreement had been concluded but where the lessee was not in a position to give its consent to such a variation. This would most obviously be the case where, even before the equipment had been delivered, the lessee announced its inability to pay its rentals, for instance by the filing of bankruptcy proceedings. Commercial efficacy was felt by the Study Group to require that the lessor should not find itself with its hands tied and an expensive item of equipment unusable. One member of the committee of governmental experts, supported by an observer, considered that this provision seemed foreign to Article 12 (1) inasmuch as, unlike the other provisions of this article, it was not concerned with strictly lessor - lessee relations. The aforementioned observer moreover felt that its maintenance would be at variance with the committee's expressed intention to avoid interfering with the supply agreement, and thereby with the law of sale.

175. - The clause provisionally reinstated by the drafting committee as Article 12/(2)/had been deleted by the Study Group at its final session, ostensibly in the light of the legislation passed in recent years, both at the national and at the supranational level, giving the courts a wide measure of discretion in revising minimum payment clauses, referred to earlier (85). Subject to the dissenting voice of one representative attending the first session of governmental experts and with one small amendment, namely the removal of the word "wholly" before "unreasonable", it was felt to merit such reinstatement as performing a useful function in the context of this article. The extent to which the courts will enforce a claim for liquidated damages under a leasing agreement causes enormous legal problems in most jurisdictions, particularly in Common law jurisdictions which forbid the recovery of penalties. This clause in no way seeks to oust the manifest right of the courts to review the bargain struck by the parties. Its merit lies in its enunciation of the principle that, given the current practice of lessors to attempt to articulate their measure of damages in the form of such a liquidated damages clause, the court should have regard, in the first place at least, to the provisions agreed between the parties on this matter, subject always of course to its finding the remedies provided thereunder to be in the circumstances

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(84) The text of Article 12 (1) (e) as adopted by the Study Group read as follows:

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

(85) Cf. § 171 supra.

unreasonable. Clearly the factors involved in the court making such an evaluation are complex. For instance, the economic conditions may well have changed by the time that the lessor comes to repossess its asset following the lessee's default so that the lessee's rental obligations as stipulated under the leasing agreement may be either higher or lower than the current market price for a similar period of time. The elusiveness of proving the fairness of a given liquidated damages clause in the light of such imponderables was, up until its final session, considered by the Study Group as confirming the case for the parties' negotiation of a remedy in anticipation of default. The words "unless the court finds that it is unreasonable" were designed to remind the parties, in particular a lessor in a powerful bargaining position, not to overreach in their negotiation of such a remedy. Given the difficulties alluded to above regarding the computation of fair compensation in the wake of default rather than in anticipation of the same, the court in finding as to the unreasonableness or otherwise of the individual liquidated damages clause stipulated by the parties was intended by the drafters of the uniform rules to have regard to the situation at the time when the leasing agreement was entered into, rather than the situation as it had developed by the time of default.

176. - The effect of Article 12 /(3)/ is to alter the range of remedies exercisable by a lessor upon the lessee's default in those cases where the leasing agreement includes, as it often will, an acceleration clause entitling the lessor upon the lessee's default to require accelerated payment by the lessee of all or any of the outstanding rentals due under the agreement. In recognition of the injustice that would be wrought by allowing the lessor thus both to benefit from such an acceleration clause and to terminate the leasing agreement and repossess the equipment, Article 12 /(3)/ effectively requires the lessor in such a case to elect between the exercise of one or the other of these remedies. Thus where the lessor elects to terminate the leasing agreement and repossess the equipment, it is debarred from seeking to enforce such an acceleration clause. It should also be noted that, under Article 12 /(4)/, the same protection as that given the lessee in respect of the lessor's termination of the leasing agreement referred to earlier (86) is given to the lessee in respect of the lessor's enforcement of an acceleration clause. Accordingly, the lessor can only accelerate its entitlement to outstanding rentals following the expiry of a further reasonable period of time after it has given the lessee notice of its duty to remedy its default, in so far as it may be remedied. (87)

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(86) Cf. § 165 *supra*.

(87) *Idem*.

Article 13

177. - This article deals with the important question of the lessor's assignment of all or part of its rights in the equipment or under the leasing agreement, and as such seeks to facilitate matters for those jurisdictions that place legal restrictions on the transfer of contractual rights. Certain representatives attending the first session of governmental experts wondered whether such a provision was not superfluous, or else needed to be completed, in that it did not add very much to the situation already prevailing under national law for many countries. It was pointed out that this was to ignore the fact that the greatest potential usefulness of the uniform rules might well lie in the assistance it would afford to those many developing countries at present wrestling with the difficulties of taking advantage of the benefits of leasing without any appropriate legal infrastructure. (88) It was also an important provision for those countries where a particular species of financial lease, the leveraged lease is common. In leveraged leases, whereas legal title to the equipment, and hence entitlement to the tax indemnification benefits associated with ownership, vests in the lessor, the latter will, by reason of the huge amounts of money involved, put up only a part of the capital cost represented by the purchase of the equipment. For the rest of the cost it will have recourse to one or more lenders who will assure their position by requiring an assignment to themselves of the stream of rentals provided for under the leasing agreement. It was feared that, without a provision on the lines of Article 13, there was a risk that such transactions might, by virtue of involving more than the three parties specified in Article 1 (1), fall outside the scope of the uniform rules, whereas for those countries for which leveraged leasing was important it was vital that such transactions should come under the uniform rules, all the more so given the important share of these countries' international financial leasing taken up by leveraged leasing.

178. - Such a transfer by the lessor can clearly only affect its rights and not its duties under the leasing agreement, as is specified in the second sentence of Article 13. (89) This clause was, moreover, felt adequately to

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(88) Reference was made to the striking pace of the growth of leasing in such developing countries, as evidenced in the Explanatory report, op. cit., at §§ 5 - 6.

(89) The clause "/s/uch a transfer is valid" which had opened this sentence in the draft adopted by the Study Group was deleted by the committee of governmental experts as being redundant in view of the first sentence of this article.

meet the concern expressed by one member of the committee of governmental experts that it should be spelled out that the lessor's transfer could not affect the lessee's rights.

179. - The lessor's transfer of all or any of its rights in the equipment or under the leasing agreement is not, moreover, to be used as a means of circumventing the application of the uniform rules: the second sentence of Article 13 thus provides that such a transfer may not alter either the nature of the leasing agreement or its legal treatment as provided in the uniform rules. Thus, where, prior to the assignment, the uniform rules were already applicable, for instance, by virtue of the lessor having its principal place of business in a State different from that of the lessee and both of these States being Contracting States (Article 1 (2) (a)), the uniform rules would not cease to be applicable merely because, subsequent to the assignment, both the lessor and the lessee found their principal places of business suddenly to be in the same State. This result reflected the Study Group's conviction that it was not possible to legislate for fraud at the international level. Equally, a financial lease not subject to the uniform rules as originally concluded, that is a wholly domestic transaction, could not, by virtue of the lessor's transfer of its rights under Article 13 to a party having its place of business in another State be transformed into an international financial leasing transaction potentially subject to the uniform rules. This rule was also significant for those States, like France and Senegal, under the law of which lessors had to be either banks or financial institutions: the transferee from a lessor in such a jurisdiction would therefore have to fulfil the same capacity as the transferor.

180. - One delegation attending the first session of governmental experts proposed that this article should also provide, in a second paragraph, for the lessee's right to transfer its rights in the equipment or under the leasing agreement, "where this would not be to the detriment of the lessor and would not result in a change in the condition of the leasing agreement" or, alternatively, "subject to the consent of the lessor". (90) In support of its proposal, this delegation explained that, for example, in the context of the national plan of a planified country, circumstances might change during the currency of the leasing agreement, as a result of which the original lessee would drop out of the picture. This point was reinforced by this delegation's concern that the lessor and the lessee should be seen under the future international instrument to have been treated on an equal footing, failing which it might prove difficult for lessee countries like its own to accept the instrument.

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(90) Cf. comments submitted by the delegation of the People's Republic of China (Study LIX - Doc. 23) at p. 4.

181. - Another delegation was willing to accept this proposal, pointing out that in cases where it might create difficulty it would always be open to the parties to exclude the right under Article 14. He did not moreover see why, if the lessor were to be free to transfer its rights without having to seek the lessee's consent, the lessee's transfer of its rights should be subject to the lessor's consent, unless, that is, such consent was required under the leasing agreement, as it typically would be. His point of view was not, however, shared by other members of the committee. One such member indeed saw a fundamental difference between the lessor's transfer of its rights and such a transfer by the lessee. The lessor's receipt of its lessee's rentals represented for the lessor virtually its only interest in the transaction and it would be almost immaterial to the lessee whether it paid its rentals to one party or another, provided that this discharged its duties in this regard under the leasing agreement. The only problem would be one of minor adjustments to take account of the change in the person entitled to receive the rentals. With a transfer by the lessee, the implications were quite different. The need to inquire into the new lessee's creditworthiness made the lessor's approval of such a transfer by a lessee absolutely crucial. Another member of the committee stated that he was unable to support a proposal to introduce such a right for the lessee to transfer its rights. Such a right would run counter to the standard forms of contract used in leasing agreements in his country and would furthermore be contrary to the ordinary rules of law governing equipment leases. It was finally decided to forgo inserting a new paragraph affirming the lessee's entitlement to transfer its rights in the equipment or under the leasing agreement.

182. - One observer wondered whether the committee should not consider the possibility, however seemingly remote, of the lessor's bankruptcy and its impact on the lessee's entitlement or otherwise to continue the leasing agreement. He suggested that the lessee's position should be protected in this regard in the uniform rules and accordingly proposed introducing a new sentence in this article, under the terms of which, where the lessee had entered into a leasing agreement and the lessor had subsequently become insolvent, the lessee should be entitled vis-à-vis the general body of the lessor's creditors or any person in whom ownership of the equipment had been vested as a result of the insolvency proceedings, either to continue the leasing agreement or purchase the equipment. It was pointed out that, while this was a real problem area and there were indeed cases of lessors becoming insolvent, even fraudulently in one case cited by one member of the committee of governmental experts, the insolvency area was so difficult as to make it better for the uniform rules to steer well clear.

Article 14

183. - This article is a provision found in most international com-

mercial law Conventions. It reflects the idea that such Conventions should not as a rule deprive the parties of their freedom to choose alternative rules to govern their transaction. No decision has yet been taken regarding which provisions of the uniform rules are to be regarded as mandatory. It was felt that this was a decision best left to be taken later when their final shape was clearer. There was nevertheless a feeling within the Study Group that virtually all the provisions of the uniform rules should be amenable to exclusion, derogation or variation. The uniform rules have all along been intended as a basic, permissive legal framework essentially designed to distinguish leasing from the various neighbouring legal concepts with which it has hitherto invariably been confused, and as such are not therefore intended to be an exhaustive regulation of the legal problems arising in connection with financial leasing.

Article 15

184. - This article is another provision now become a common feature of international commercial law Conventions. It is addressed principally to those called upon to decide cases involving the application or interpretation of the uniform rules, i.e. judges and arbitrators. These are, on the one hand, exhorted to have regard to the international character of the uniform rules and to the need to promote uniformity in their application, in other words to seek not to interpret them in the light of the legal principles and traditions of their own legal system and, on the other hand, to ensure the observance of good faith, so vital to the development of international commerce (Article 15 (1)). Article 15 (2) seeks to ensure that the sui generis status conferred on the particular type of leasing covered by the uniform rules will not be jeopardised as regards all those many issues which have not been specifically dealt with in the uniform rules. Clearly it would be unfortunate if the objectives of the drafters of the uniform rules were to be thwarted by judges and arbitrators filling in these gaps on the basis of the solutions of their national law, the general inappropriateness of which to the sui generis type of lease provided the starting point for Unidroit's whole exercise in clarification. Article 15 (2) accordingly provides that matters not expressly settled in the uniform rules but which are nevertheless governed by the same shall be settled in conformity with the general principles on which they are based and in conformity with the law applicable by virtue of the rules of private international law: this with a view to avoiding judges in such cases automatically having recourse to their own domestic law.

185. - At the first session of governmental experts one representative proposed the deletion of the reference to good faith. This proposal was, however, withdrawn in deference to the place already accorded to this same prin-

ciple in the corresponding provision of the United Nations Convention on Contracts for the International Sale of Goods. Another representative proposed the deletion of the whole article, on the grounds that, first, unlike the sale contract, there was no general body of principles yet recognised as being applicable to financial leasing and, secondly, that the reference to the applicable law under the rules of private international law, while quite understandable with regard to a relationship under a sale contract, could well create many a problem with a transaction like financial leasing that consisted of more than one relationship. The article was however defended, not just on the basis that a similar provision was to be found in all the major recent international commercial law Conventions, but also so as to indicate the desire of the drafters of the uniform rules that, for all those matters not expressly covered in the uniform rules but which are nevertheless governed by the same, those called upon to decide such matters should fashion their approach to such matters in accordance with the sui generis, distinct legal status conferred on financial leasing under the uniform rules rather than, by falling back on their domestic rules, simply reverting to the unsatisfactory situation of before, where financial leasing had to be fitted into one or other of the traditional contractual schemata.

186. - There was some disagreement as to whether, in the light of what has just been said, these general principles on which the uniform rules are based should be placed on equal footing with the law applicable under the rules of private international law for the purposes of settling questions concerning matters which, while governed by the uniform rules, are not expressly settled in them. Given the important role that rules of conflict played in determining the sphere of application of the uniform rules, it was the opinion of one representative that these two sources should be placed on an equal footing.