UNIDROIT 1986
Study LIX - Doc. 26
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT CONVENTION ON INTERNATIONAL FINANCIAL LEASING

COMMENTS

by Governments and professional associations on the text of the preliminary draft uniform rules on international financial leasing as this emerged from the first session of governmental experts

Rome, April 1986

I. INTRODUCTION

1. - At the request of the Unidroit committee of governmental experts for the preparation of a draft Convention on international financial leasing at its first session, held in Rome from 15 to 19 April 1985, the Unidroit Secretariat drew up an explanatory report (1) on the text of the preliminary draft uniform rules on international leasing as it emerged from this session. (2) This explanatory report set out inter alia to reflect the main problem areas identified during the committee's first reading of the text drawn up by a Unidroit study group. (3) By a Note of 3.I.1986 circulated among Governments, international organisations and professional associations, Unidroit invited the making of comments on the text resulting from the committee of governmental experts' first reading. As of 3.IV.1986 comments had been received from the Governments of the Netherlands, the United Kingdom and the United States of America and from three professional bodies, one a regional federation, the European Federation of Equipment Leasing Company Associations (Leaseurope) (4), the others two national professional associations, the Italian Leasing Association and the Japan Leasing Association.

2. - In addition the Commission of the European Communities, mindful of its duty under Article 229 of the Treaty of Rome to assure appropriate contacts with other multilateral Organisations like Unidroit, convened a meeting on the coordination of banking legislation on financial leasing in Brussels on 11.III.1986. The representatives of Community member States present at this meeting proceeded to an exchange of views on the preliminary draft uniform rules as they had emerged from the first session of governmental experts.

3. - It is the purpose of this paper to reflect the comments received from Governments and professional associations referred to above and, where relevant, to intersperse these with the comments raised by the governmental experts attending the EEC coordination meeting also referred to above.

II. GENERAL OBSERVATIONS

4. - The review of the preliminary draft uniform rules conducted by interested parties in the United States of America under the auspices of the Department of State revealed general satisfaction with the progress that had been made thus far and a sense that a Convention with rules on international financial

---

(1) Cf. UNIDROIT 1985, Study LIX - Doc. 25.
(2) Cf. Appendix to UNIDROIT 1985, Study LIX - Doc. 24.
(3) Cf. UNIDROIT 1985, Study LIX - Doc. 17.
(4) The comments of Leaseurope are set forth in UNIDROIT 1986, Study LIX - Doc. 28 and will not therefore be dealt with in this paper.

leasing would be a contribution to the growth of international trade and the development of international economic law if the project could be carried through to its conclusion.

5. - In their comments, specified to be of a preliminary nature, the Ministry of Justice of the Netherlands reported that, with reference to the aim of the uniform rules, namely the removal of legal impediments to international financial leasing, some organisations in their country had pointed out that truly cross-border leasing occurred only very seldom and doubted whether a Convention dealing with private law aspects of the subject would change this situation. The impediments to truly cross-border leasing were considered by these organisations to be of a practical rather than a legal nature, differences of currency as well as distances between countries playing an important role. As far as there were legal impediments, it was felt that these lay in the field of revenue law rather than in the field of private law.(5)

---

(5) However, cf. Preliminary analysis of the replies to the questionnaire on the leasing contract (with special reference to international leasing) (UNIDROIT 1976, Study LIX - Doc. 3) at §§4, 5, 70, 86. The upshot of the replies featured in these paragraphs was, while recognizing the incidence of other factors, such as fiscal and customs difficulties, in preventing cross-border leasing from developing to its full potential, to note the difficulties resulting from " /t/he disparate treatment from country to country concerning what is to be regarded as a genuine leasing contract for legal purposes, irrespective of the parties' denomination of their agreement ..... Connected with this is the question of where title resides ..... and when it passes."

It should also be borne in mind that, even if truly cross-border leases do not occur as often as they might but for these difficulties, the sums involved in those cross-border leases that are actually mounted represent a considerable amount of international capital investment. The July 1984 News Bulletin of the American Association of Equipment Lessors (AAEL) reported the results of an informal survey carried out by the AAEL which showed that American lessors financed $8-10 billion of equipment outside the United States during 1983. Mr Tom M. Clark in his address to the September 1984 Copenhagen annual working meeting of Leaseurope, entitled "International leasing practice", made the first attempt, on the basis of the AAEL survey, to estimate the extent of cross-border leasing activity. On his assumption that the international activities of leasing groups of other countries, principally the United Kingdom and France in Europe together with Japan and Australia elsewhere, were roughly comparable in overall size to those of American lessors, he concluded that, just as United States domestic leasing represents about 50% of the world market, so the total figure for new international leasing business in 1983 might be put at upwards of $15 billion, which would mean

6. - The views expressed at the EEC co-ordination meeting reflected a general sentiment that the drafting of the uniform rules needed to be tightened up. The delegate of the United Kingdom for instance indicated that his Authorities would be particularly anxious to ensure that the sphere of application provisions of the uniform rules were drafted with sufficient clarity that it would be possible to know with certainty the cases when the uniform rules should apply.

7. - This same delegate moreover pointed out that the commercial attractiveness of the future Convention would be decisive for his Authorities in deciding whether or not to become a Contracting Party.

8. - The Italian Leasing Association noted that the draft submitted to the committee of governmental experts at its first session was the result of almost a decade of effort by a study group manned by experts from both Common law and Civil law systems. It further noted that the revision of this text carried out as a result of the committee of governmental experts' first reading did not amount to merely formal corrections or alterations but rather represented a substantial shift in the underlying approach and philosophy of the uniform rules both as regards the qualification of the legal nature of the transaction addressed therein and as regards the regulation of the principal characteristic legal issues raised by the transaction, however in the process sometimes reopening old problems, previously worked out after long struggles in the January 1985 draft.

The Association pointed out that the major difficulties encountered in the various sessions of the study group flowed in fact from the attempt to reconcile the structural and operational differences - from a legal point of view - of financial leasing in the Common law and Civil law systems and, in this regard, to harmonise the position in respect of the characteristic features of financial leasing taken, on the one hand, by representatives of those

---

more than the total new domestic business of members of Leaseurope's 16 national associations in 1983 (and the companies represented in Leaseurope account for about 80% of the financial leasing business conducted in Western Europe).

Moreover, while the uniform rules address specifically international leasing transactions for reasons expounded elsewhere (cf. UNIDROIT 1985, Study LIX - Doc. 25, op. cit., §19), it would not be unreasonable to anticipate that their greatest potential usefulness may well lie rather as the basis for filling the legislative vacuum at present bedevilling this field in most countries. The uniform rules would thus perform much the same function as the 1929 Warsaw Convention on international carriage by air, which, whilst addressing specifically international carriages, nevertheless in time was subsequently enacted as national law virtually all over the world (cf. also UNIDROIT 1985, Study LIX - Doc. 25, op. cit., § 177).

States which had already legislated for this activity and, on the other, by those in whose States financial leasing is still an atypical phenomenon.

It went on to recall that the study group had thus debated at length the legal definition and qualification of the transaction, the question of public notice rules, the regulation of the rights and duties of the different parties to the transaction, etc. The fact that the differences of opinion on certain points had proven to be insurmountable was not moreover due to any negligence or weakness on the part of the members of the study group but rather testified to the fact that to have accepted certain rules would have been to distort and to disregard the quid proprium of the transaction according to the qualification and regulation that it received in certain countries.

The April 1985 draft, on the other hand, once again proposed, not only for individual articles but also in its overall approach, adopting solutions that were not always in line with the domestic (be it legislative or otherwise) law of the States which, it was hoped, would wish to become parties to the future Convention, thus diminishing the degree of harmonisation of the different national laws which an international Convention was designed to achieve.

Indeed the whole philosophy underlying the uniform rules had been considerably altered by the fact that the uniform rules no longer bring out clearly and expressly the fact that the transaction is necessarily trilateral, that the lessor's intervention is limited to that of a financial intermediary, that the choice and specifications of the equipment and the supplier are necessarily made by the lessee and are necessarily the lessee's responsibility, and purport to regulate the rights and duties of lessor and lessee as though the lessor were a traditional bailor/hirer and not a financial intermediary. The effect of this change, it should be noted, is to modify one of the main points on which there was complete unanimity among the participants at the sessions of the study group, as indeed there could only be, namely that the transaction was more of a financing in nature than a bailment, with all the attendant consequences as regards the rules that should be applicable thereto. The Italian Leasing Association accordingly felt it was necessary to lay stress once more on this fact which is common to the experience of all countries which are familiar with financial leasing, whether by way of legislation or not, and that is the fact that the distinct financial role played by financial leasing transactions shapes and determines in a manner peculiar by comparison with, and distinct from any other contractual schema the lessor's ownership and the duties that attach to him in terms of this ownership. The Italian Leasing Association accordingly saw no sense in qualifying the same party in the uniform rules as "bailor", "lessor" and "owner": this was ambiguous both terminologically and substantively, an ambiguity that pervaded the whole draft but was particularly

evident in Article 7. The finance lessor as such is not a bailor (in so far as the transaction is not a normal bailment), whereas he is definitely absolute owner of the equipment, and the duties flowing from such ownership in fact correspond to the role of simple financial intermediary played by the finance lessor. To disregard such particular characteristics of the transaction was tantamount to leaving out of consideration the difference that exists between financial leasing and a lease stricto sensu; it amounts moreover, in substance, to regulating a transaction and phenomenon different from financial leasing.

Regardless of one's view on the legal qualification of financial leasing and whilst in no way purporting to make the uniform rules conform to Italian experience, the Italian Leasing Association nevertheless doubted whether the overall approach of the April 1985 draft corresponded to those atypical features which characterised financial leasing in the different countries interested in the uniform rules. It is clear that uniformity and harmonisation cannot be arrived at by means of a set of rules that are at odds with the quid proprium of the institution as it is characterised in a given legal system (for example, regarding liability and the presentation of the lessor's ownership, etc): this would raise a question mark over the desirability of becoming a party to the future Convention or at the very least having recourse to the provisions of Article 14. In this regard, the Italian Leasing Association, while noting that the problem of determining the scope of application of Article 14 remained to be solved, took the view that it should not affect the essential requirements for a given transaction to be subject to the uniform rules, since otherwise the Convention would lose all value.

On the other hand, the Italian Leasing Association recalled that it was precisely with this article in mind that the authors of the uniform rules had felt justified in proposing those general (but not generic) formulae designed to embrace (and accordingly to harmonise) the structural and operational differences of financial leasing existing in the various countries interested in this project, thus enabling each such country to recognise therein the institution of financial leasing as regulated and / or practised in its own commercial sector.

It was the opinion of the Italian Leasing Association in conclusion that the committee of governmental experts should reexamine the desirability of restoring certain of the rules contained in the previous draft but above all its underlying philosophy inspired by the concept of financial leasing as a financing and not as a bailment, with all the attendant consequences flowing therefrom as regards the rules that should be applicable thereto, especially as regards the liability regime and the peculiar nature of the lessor's ownership.

III. OBSERVATIONS ON INDIVIDUAL ARTICLES OF THE PRELIMINARY DRAFT

Article 1

9. - The Netherlands found that Article 1 (1) did not seem to be correct. The order in which the agreements were entered into was different from what the text suggested. The leasing agreement was entereed into first; after that the supply agreement was concluded. Also it was only the supply agreement which was entered into on the specifications of the lessee; this did not apply to the leasing agreement.

10. - The United States of America believed that ambiguities as to the coverage of the Convention would be diminished if the definition were free of the language describing the main characteristics that the financial leasing transaction "typically" possesses (Article 1 (2)). It was not clear to what extent the presence of some or all of these main characteristics was necessary for the Convention to apply or whether the absence of one or more would make the Convention inapplicable.

The term "capital goods" (Article 1(1) (a)) was not a standard one in U.S. legal practice and created some non-clarity.

11. - The Belgian delegate to the EEC co-ordination meeting was unhappy with the employment of the term "le plus souvent" in the chapeau of the French version of Article 1 (2). He feared lest this wording left the door open to an unreasonable degree of uncertainty regarding the precise sphere of application of the uniform rules. The United Kingdom delegate to the same meeting did not consider that the same strictures applied to the English text of the same provision, which employed the temm "typically".

12. - The Spanish delegate to the EEC co-ordination meeting was unhappy with the expression "professional purposes" as employed in Article 1 (1) (b), explaining that the term "professional parties" in Spanish carried a connotation that the parties needed to have a university degree.

Articles 1 and 2

13. - The Italian Leasing Association, for the aforementioned considerations of a general nature and with a view to a truer, more accurate definition and qualification of the financial leasing transaction, indicated its preference for the text of both Article 1 and Article 2 as these appeared in the January 1985 draft rather than as they appeared in the subsequent draft. This was because the former text was considered to bring out better the financial nature

of the transaction, its necessarily trilateral structure and the consequences that flow from these characteristics as regards the material performance of the relationship and the liabilities incumbent on the different parties, supplier, lessor and lessee. In the opinion of the Italian Leasing Association, this was more important than questions of the formal division of the contents of the provisions of these articles between one article and another, another modification to the old text made in the April 1985 draft.

Article 2

14. - Several participants at the Department of State study group which studied the preliminary draft from the point of view of the United States of America expressed concern about the indefiniteness of the "place of business" concept. Sometimes in U.S. practice it was deemed to refer to the place of economic activity and at other times it was considered to refer to the place of the administrative headquarters. Clarity on this point would, it was concluded, be helpful.

Article 4

15. - The Netherlands stated that this article seemed to be superfluous, arguing that in most cases the agreements entered into would cover this matter.

16. - The Japan Leasing Association, noting that Article 4 (1) stipulated that "once the leasing agreement has been made, the supply agreement may not be varied without the consent of the lessee", proposed that this provision should not apply to the terms of payment for the equipment contained in the supply agreement.

When a supply agreement is concluded between lessor and supplier, the characteristics of a financial leasing agreement may require them to reflect the lessee's intentions with regard to the type of the equipment, its specifications, its price and the terms of its delivery, but the terms of payment can be determined without confirming the lessee's intentions. Therefore, the terms of payment can also be altered without reference to the lessee's interests.

If the consent of the lessee were to be required for an alteration even in the terms of payment, then in Japan there would be a risk that the supply agreement itself could be regarded virtually as an agreement between lessee and supplier, and there were also apprehensions that the lessor might be denied his legal position as buyer and owner.

Article 5

17. - The United States of America considered that problems could arise for creditors of lessees from the way in which this article, as drafted, would function. For example, a filing in Mexico at the lessee's principal place of business would satisfy the Convention but would mislead the lessee's creditors in Texas where the equipment was used and located. This disposition would make it harder for creditors of the lessee to search the appropriate files before advancing funds to the lessee. It would be helpful to require public notice at the place where the equipment is principally located.

It also seemed doubtful to the United States that existing special rules with respect to public notice in the case of aircraft, ships and motor vehicles should be overridden by this Convention, as would now be the case.

18. - The Netherlands took the view that this article should be deleted, stating that it took into consideration the public notice systems existing in some Anglo-Saxon countries, but left out of consideration altogether the "possession vaut titre" rule prevailing in other legal systems. Besides, the wording of the article left open some questions. For example, does the word "title" indicate that invariably the lessor is the owner of the equipment?

According to Dutch law he often but not necessarily always is.

19. - The Italian Leasing Association's remarks on this article were analogous to those that it had made with regard to Articles 1 and 2, that is that, in substance, it preferred the text of Article 5 as set out in the January 1985 draft recognising the general enforceability of the lessor's title, subject to its having complied with the rules on public notice laid down under domestic law. In this it was particularly thinking of the special public notice regime established in France for financial leasing transactions.

20. - Considerable criticism was addressed to Article 5 at the EEC co-ordination meeting. It did however have to be borne in mind that this provision was relatively new in its drafting, having been proposed by the drafting committee at the conclusion of the committee of governmental experts' first reading of the text to take account of the multiple difficulties encountered by the former Article 5 (6). The French delegate to the co-ordination meeting took the view that the essential problem lay in the fact that the provisions of Article 5 had been over-compressed and that the various ideas which it sought to express needed to be better separated out. The delegate of the Federal Republic of Germany was concerned about the use of the word "enforceable" in this context. He was not sure as to its precise meaning and whether it meant, for example, that there might be cases where the lessor could defeat the trustee in bankruptcy's right to the equipment hitherto leased by the bankrupt les-

(6) Cf. UNIDROIT 1985, Study LIX - Doc. 25, § 79 et seq.

see. He pointed out that a thoroughgoing reform of the law of insolvency was underway in his country, as a result of which it was possible that lessors would be required to shoulder a portion of the loss sustained by unsecured creditors and it would be for the trustee in bankruptcy to realise the equipment. He hoped it would be possible for this article to take account of this planned reform of the law of his country. The Chairman of the meeting, representing the Commission of the Communities, was of the view that it would be difficult to do anything more in this regard than to make the lessor's title subject to the applicable law. This led to a discussion regarding which law this might be, the point being made that in some jurisdictions this would be the law of the party that had been declared bankrupt but that in other jurisdictions this would not necessarily be the case. The delegate of Italy to the co-ordination meeting thought that there might be other cases than just cases of bankruptcy which could usefully be brought under the ambit of this provision, for instance winding up proceedings and cases where the lessee was not insolvent but in difficulty and the official receiver or his equivalent might wish to go on using the equipment, which, in his opinion, he ought to be entitled to do provided that he complied with the terms of the leasing agreement. The delegate of the Federal Republic of Germany to the EEC co-ordination meeting moreover anticipated the concern reflected in the comments of the United States of America above, namely that Article 5 as at present drafted could be read as implying the need for double registration of ships, aircraft and motor vehicles already subject to special rules in function of their nature as ships, aircraft and motor vehicles.(7)

Article 6

21. - Whilst it was recognised in the United States of America that Civil law rules on fixtures differed from those that prevailed in the United States and that it did not prove possible to achieve uniformity on this issue, it was nevertheless suggested that an article making explicit reference to the law of the location of the equipment might put parties on notice that the rules on the question would differ according to location.

Article 7

22. - The United States of America considered that the thrust of this article in excepting the lessor from liability for damages from faulty equipment

---

(7) The Unidroit representative at the co-ordination meeting explained that it had never been the intention of the authors of the uniform rules in effect to lay down such a double registration rule in respect of aircraft, ships and motor vehicles but that it had always been the feeling of the study group that this did not need to be spelled out explicitly.

was correct. However, clause 3 appeared to undercut the thrust of Article 7(1).

The present draft language "to the extent that it has influenced" (Article 7 (2) (a)) seemed unnecessarily vague and opened the possibility that a court might believe that the article called for the imposition of partial damages if the lessor's influence was a minor one. The word "solely" added before "from its position" (Article 7 (2) (a)) would make it clearer that too much action by the lessor could continue to make it liable towards third parties.

23. - The Italian Leasing Association, recalling its comments made under its general observations - relevant not merely to the April 1985 draft - for which reason it considered that it would be desirable to remove any reference to the bailment contract (and therefore to the term "bailor"), noted in connection with Article 7 (1) that the present draft constituted further recognition of the distinctness of financial leasing from all other contractual schemata, principally bailment.

It also found that the term "influence" in Article 7 (2) (a) was lacking in specificity and that, in view of the seriousness and importance of the legal consequences, it ought to be made more specific. In substance, the idea that needed to be spelled out was that only where the choice of equipment and supplier was made freely by the lessee could it be justifiable to transfer the burden of the risks and liabilities that were normally incumbent on the owner of the asset to the lessee. Accordingly, the lessor's intervention in these choices ought to be such as to preclude any freedom of decision by the lessee.

The Italian Leasing Association, moreover, failed to appreciate the meaning of Article 7 (3): on the one hand, it seemed to contradict the contents of the previous paragraphs whilst, on the other, it seemed to serve no useful purpose, in so far as the individual national laws (in the private law, criminal law and administrative law fields) impose certain forms of liability on the owner as such, regardless of its "title" to its property (for example, Article 2053 of the Italian Civil Code).

24. - When Article 7 (1) used the words "in contract", it was not clear, to the mind of the Japan Leasing Association, what kind of fact it assumed concretely.

Further, in reference to the part of Article 7 (2) (a) which states "where ... it has influenced", the same Association did not see why alterations had been made to the contents of the corresponding provision of the January 1985 draft, and notably the employment of the term "a technical level".

25. - The delegate of the Federal Republic of Germany to the EEC co-ordination meeting detected a possible conflict between the present wording of Article 7 (3) of the uniform rules and Article 3 (2) of the 1985 EEC Directive on Products Liability, providing that any person importing a product into a Community country with a view to leasing it was to be considered as a producer for the purposes of the Directive and was to be liable to the same extent as if it were a producer. He accordingly thought that it would be necessary to expand the exception to Article 7 (1) laid down in Article 7 (3) so as to read something along the lines of:

> "3. - Nothing in this article shall affect the liability of the lessor in its capacity of owner of the equipment or as importer of the equipment for the purposes of Article 3 (2) of the EEC Directive on ....."

This same delegate, in conclusion, wondered whether in view of the scope of the exception stated in Article 7 (3) and the fact that the lessor's and lessee's contractual duties one towards the other were dealt with in Article 10, Article 7 served any useful purpose and could not simply be deleted.

Article 8

26. - The Netherlands found this article to be superfluous, in that it covered a matter that would always be dealt with in the contractual arrangements.

Article 9

27. - The Netherlands found the solution suggested odd from a legal point of view. If the matter could not be left to contractual practice, a provision to the effect that the lessor undertakes to institute legal proceedings on behalf of the lessee was preferable.

Article 10

28. - This provision seemed to the Netherlands to be based on Anglo-Saxon practice, whereas at least in the Netherlands it was the lessee who ordered the equipment and likewise the lessee who chose the equipment. If these were the facts, then, in its view, a provision like Article 10 would not be fair.

29. - To the mind of the Italian Leasing Association, the text of this article did not seem to be perfectly consistent with the previous articles nor to reflect the effective regulation and unfolding of the relationship at a practical level. In fact, Article 1 (2) (a), even if not in precise terms, indicates that the choice of the equipment and the supplier falls within the province of the lessee, thus in some way bringing out the lessor's role as a

mere financial intermediary, its duty being to acquire the equipment the specifications for which it has received from the lessee (Article 1 (2) (b)). This brings out the distinction between the (financial) relationship between lessor and lessee and that between lessee and supplier (cf. Article 9).

In effect, in the trilateral financial leasing transaction the financial risks were borne by the lessor, while those risks inherent in, or dependent on matters relating to the equipment or the supplier were borne by the lessee who was responsible for their choice and specifications.

This was why the Italian Leasing Association considered that, except in the case where the lessor had undertaken to deliver the equipment - something which did not normally happen in financial leasing transactions - non-delivery or late delivery of the equipment were events the responsibility for which should be borne by the lessee and which could not in any case justify the interruption or the suspension of the payment of the rentals under the finance lease. They took the view that the lessor should in any case be repaid the sums already paid to the supplier, against whom the lessee would in its turn have a right of action.

Article 10, on the other hand, in particular Article 10 (3), seemed to the Association to correspond rather to a bailment than to a financial "logic", and this had led to a distortion of the quintessence of the relationship, to a lack of consistency and coherence in the rules laid down in the present draft and to a clear and marked divergence from the manner in which the transaction actually unfolded in Italian practice (as moreover recognised by the case-law both of the lower courts and of the Supreme Court) and in general in both Civil law and Common law countries.

30. - The use of the term "reasonable time" attracted the criticism of the delegate of Italy to the EEC co-ordination meeting, on the ground that the moment in time that really needed to be considered in this context was rather that after which the lessee would effectively have no further interest in continuing with the leasing agreement.(8)

31. - The queries of the delegate of Luxembourg to the co-ordination meeting indicated that the distinction between the different cases dealt with, on the one hand, in Article 10 (1) and, on the other, in Article 10 (2) perhaps needed to be brought out more clearly in the drafting of these provisions.

---

(8) The Unidroit representative at the meeting had recalled that this notion of a "reasonable time" had become a standard feature of international commercial law Conventions 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. Cf. also UNIDROIT 1985, Study LIX - Doc. 25, § 153.

32. - The delegate of the Federal Republic of Germany to the co-ordination meeting supported the proposal made by the Unidroit Secretariat in the explanatory report prepared in the wake of the first session of governmental experts (9) to the effect that, as the limitation placed by Article 10 (4) on the lessee's exercise of its remedies against the lessor was clearly designed to be consistent with the specific remedies conferred upon the lessee vis-à-vis the lessor under the previous paragraphs of the same article, it would be necessary to preface the provisions of Article 10 (4) by a clause indicating that its provisions were without effect on the remedies conferred upon the lessee under the other paragraphs of the article.

33. - Doubt was moreover expressed at the co-ordination meeting as to the wisdom of the decision to fuse the provisions of the former Article 10 and Article 11 as these appeared in the January 1985 draft in a single article, to the extent that this fusion did not perhaps, in the light of the foregoing considerations, appear to have been entirely to the benefit of the draft's clarity.

Article 12

34. - The Italian Leasing Association had difficulty in understanding the reasoning behind Article 12 (3). Once more - indeed above all in regulating this aspect of the relations between the parties - it considered that it was necessary to take account of the financial nature of the transaction and therefore of the need for the lessor to have the possibility of limiting it own loss, so as to ensure that it be placed in the same position as it would have been had the lessee performed the leasing agreement to the letter (Article 12 (1) (d)). Clearly where the lessor regains physical possession of the leased asset, it is under a duty to give credit to the lessee-debtor for the amount realised over and above the aforementioned amount by the sale or re-lease of the equipment. Article 12 was a clause generally incorporated in the standard forms of contract of Italian leasing companies.

35. - The Japan Leasing Association pointed out, first, that the provisions of Article 12 for termination of the leasing agreement in the event of default did not correspond to the realities of leasing transactions in Japan.

In Japan any default by the lessee would result in it facing demand for repossession either (1) by terminating the leasing agreement or (2) by enforcing a term of the leasing agreement accelerating payment of the rentals.

Consequently, the Japan Leasing Association thought that paragraph 1 of this article should be changed to read: "In the event of default by the lessee, the lessor may:

---

(9) op. cit., § 157.

(a) subject to paragraph 4 of this article, terminate the leasing agreement or enforce a term of the leasing agreement accelerating payment of the rentals."

The Japan Leasing Association proposed, secondly, that the part of paragraph 1 (d) of Article 12 which says "to the extent that the lessor has taken all reasonable steps to mitigate its loss" should be deleted because uncertainties attached to the content and scope of "all reasonable steps."

Thirdly, it proposed that paragraph 3 of Article 12 should be deleted for the reasons mentioned above in connection with Article 12 (1) (a).

36. - There was a feeling among more than one delegate attending the EEC co-ordination meeting that the provisions of Article 12 (1) (d) were perhaps in need of clarification in the light of the comment made in the aforementioned explanatory report (10) that

> "/t/he 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",

as it was felt that there could well be cases, for example loss of trading profit sustained by the lessor as a result of the lessee's default, where it would be legitimate for the lessor to have an interest in seeking additional compensation to that provided for under litterae (a), (b) and (c). It was pointed out, in this regard, that the lessee had also to assume a part of the commercial risk attaching to the transaction.

Article 14

37. - The United States of America noted that the Convention created a carefully balanced scheme as between lessors and lessees. The right to opt out of most of its provisions should be carefully limited to avoid unfair use of economic power. Thus the bracketed clause should be filled in with a fairly extensive list of provisions from which the parties may not derogate; it might also be possible to reverse the article and provide a short list of provisions from which parties may derogate.

38. - The Government of the United Kingdom was of the opinion that considerable attention should at an early opportunity be devoted to identifying which provisions of the future Convention were to be of a mandatory nature and which were to be of a non-mandatory nature.

---

(10) op. cit., § 169.

39. - This was an issue that also surfaced at the EEC co-ordination meeting where the Unidroit representative had explained that it had all along been the view of the authors of the draft that such a decision was only feasible at such time as it became possible to have a more complete picture of the future Convention. He pointed out that there had nevertheless all along been a feeling within the study group that, the uniform rules being in the nature of a basic, permissive legal framework designed essentially to distinguish financial leasing from the various neighbouring legal concepts with which it had hitherto almost invariably been confused and thus to promote its use at a cross-border level by the enhanced degree of legal certainty which it was anticipated would result from such an exercise, virtually all the provisions of the future Convention should be amenable to exclusion, derogation or variation. The delegate of the United Kingdom to the co-ordination meeting nevertheless took the view that there should be no possibility under Article 14 of contracting out of those provisions concerning the definition of the transaction nor out of any provisions regarding jurisdiction.

Article 15

40. - The United States of America considered that it would be wise in this article or elsewhere to preserve the provisions in those international agreements on aircraft, ships and motor vehicles thatdeal with public notice to ensure that this Convention is not considered to supersede those provisions.