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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

Draft final provisions capable of embodiment in a draft Convention to
be built around the preliminary draft uniform rules on international
financial leasing as these emerged from the first session of
governmental experts

(drawn up by the Unidroit Secretariat)

Rome, March 1986

I. INTRODUCTION

1. - In accordance with a request made by 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 (UNIDROIT 1985, Study LIX - Doc. 24, § 4), the Unidroit Secretariat has drawn up a set of draft final provisions designed to be capable of embodiment in the text of a draft Convention to be built around the preliminary draft uniform rules on international financial leasing as these emerged from the aforementioned first session.

2. - The draft final provisions set out below are to a large extent modelled on the corresponding provisions of the 1983 Geneva Convention on Agency in the International Sale of Goods (hereinafter referred to as the "Geneva Agency Convention"), the most recent example of an international Convention to be adopted at a diplomatic Conference convened under the auspices of Unidroit. It should however be borne in mind that the close relationship between the subject-matter of that Convention and that of the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "Vienna Sale Convention") led to the adoption in Geneva of a number of solutions designed to ensure exact concordance between the two Convention (cf. Article B, below), which might not however necessarily be considered appropriate for other Unidroit Conventions, notably the one under preparation on international financial leasing.

3. - Inspiration in the drawing up of these draft final provisions has accordingly also, where appropriate, been sought in other recent models, notably the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (hereinafter the "1984 Protocol") (cf. Articles J and K, below) and the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (hereinafter the "1985 Hague Convention") (cf. Article D, below).

4. - Whilst it is true that the final provisions of Unidroit draft Conventions have traditionally not been the subject of lengthy discussion at governmental expert level, these draft final provisions are nevertheless laid before the committee of governmental experts for its consideration.

II. SECRETARIAT PROPOSALS FOR THE FINAL PROVISIONS OF A DRAFT CONVENTION ON INTERNATIONAL FINANCIAL LEASING

Article A

1. - This Convention is open for signature at the concluding meeting of the Diplomatic Conference
..... and will remain open for signature by all States at..... until..... .
2. - This Convention is subject to ratification, acceptance or approval by States which have signed it.
3. - This Convention is open for accession by all States which are not Signatory States as from the date it is open for signature.
4. - Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

Commentary

The provisions of this article are essentially based on those of Article 22 of the Geneva Agency Convention, which were themselves based on precedents to be found in recent United Nations Conventions, such as the Vienna Sale Convention. In view of what is considered to be the desirability of incorporating an article on the functions of the depositary of the future Convention, on the lines of Article 17 of the 1984 Protocol (cf. Article K, below), the drafting of paragraph 4 departs from that of the Geneva Agency Convention in favour of that of the corresponding provision, Article 12 (3), of the 1984 Protocol.

Article B

1. - This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
2. - For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Commentary

This article is essentially modelled on Article 33 of the Geneva Agency Convention. In line with Article 99 of the Vienna Sale Convention, this requires the deposit of ten instruments of ratification, acceptance, approval or accession for the entry into force of the Convention and furthermore stipulates that such entry into force should only take effect twelve months after the date of deposit of the tenth such instrument.

Article B as drafted by the Secretariat, on the other hand, proposes a return to previous Unidroit practice as exemplified in the 1973 Washington Convention providing a Uniform Law on the Form of an International Will, Article XI of which provides for the entry into force of that Convention six months after the date of deposit of the fifth instrument of ratification or accession.

Article C

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning matters governed by this Convention, provided that the supplier, the lessor and the lessee have their places of business in States parties to such agreement.

Commentary

The effect of this provision, based on Article 90 of the Vienna Sale Convention and Article 23 of the Geneva Agency Convention, would be, in certain cases, to displace the application of the prospective Convention, entirely or in part, in favour of existing or future international agreements, whether universal or regional in character, containing provisions concerning matters governed by it. This might be the case, as regards Article 7, for example, with the 1969 International Convention on Civil Liability for Oil Pollution Damage and the EEC Directive concerning liability for defective products of 25.VII.1985, and, as regards Article 5, with the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

This provision would also cover the case of any future Convention that might supersede that now under preparation unless, that is, it were to be deemed opportune to include in the present final clauses provisions establishing a revision procedure.

To the extent that one effect of Article C would be to weaken, to a certain extent, the universal character of the future Convention and thus to

create a potential element of uncertainty for the parties, it is proposed that Article C would only apply when all three parties have their places of business in States parties to the other agreement containing provisions concerning matters governed by the Convention on international financial leasing under preparation by Unidroit.

Article D

1. - If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. - These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. - If, by virtue of a declaration under this Article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
4. - If a Contracting State makes no declaration under paragraph 1 of this Article, the Convention is to extend to all territorial units of that State.

Commentary

In recent years a number of formulae have been employed in international private law Conventions to meet the difficulties sometimes experienced by States with federal systems of government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

The drafting of Article D follows that of Article 24 of the Geneva Agency Convention and also corresponds closely to the most recent expression of the inclination of States in this regard, namely Article 26 of the 1985 Hague Convention.

Article E

1. - Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

2. - A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States.

3. - If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Commentary

With minor adaptations, this article is based on Article 26 of the Geneva Agency Convention which was itself heavily influenced by the drafting of Article 94 of the Vienna Sale Convention. As with Article C above, the possibility that this article, which in effect amounts to a reservation clause, opens up for Contracting States to restrict the application of the prospective Convention, could be a source of potential uncertainty for the parties to international financial leasing transactions as to which law would be applicable in a given case, and it is for this reason proposed that paragraphs 1 and 2 of Article E should only operate when all three parties, supplier, lessor and lessee, have their places of business in States concerned by the declaration or declarations.

Article F

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph 1 (b).

Commentary

Both the Vienna Sale Convention (Article 1 (1) (b)) and the Geneva

Agency Convention (Article 2 (1) (b)) make provision for the application of the Convention not only when the specific objective connecting factors have been satisfied but also when the rules of private international law lead to the application of the law of a Contracting State. These models have been followed, albeit in amended form so as to take account of the tripartite nature and pluricontractual basis of the financial leasing transaction, in Article 2 (1) (b) of the uniform rules which provides for the application of the prospective Convention when "both the supply agreement and the leasing agreement are governed by the law of a Contracting State".

At both the Vienna and Geneva diplomatic Conferences, however, a number of States, especially Socialist States which have special legislation regulating foreign trade relations, called for the possibility to enter a reservation in respect of the application of the two Conventions in accordance with the rules of private international law in cases where they would not otherwise be applicable. The drafting of Article F is based on that of the reservation clauses contained in Article 95 of the Vienna Sale Convention and Article 28 of the Geneva Agency Convention.

Article G

1. - Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. - Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
3. - A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article E take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.
4. - Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.
5. - A withdrawal of a declaration made under Article E renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

Commentary

Precedents for the provisions of Article G are to be found in many international Conventions, the drafting of this article itself reproducing word for word Article 31 of the Geneva Agency Convention.

Article H

No reservations are permitted except those expressly authorised in this Convention.

Commentary

The wording of Article H follows that of Article 32 of the Geneva Agency Convention and is intended to prevent States making reservations other than those presently contemplated by Articles D, E and F or any other reservations which may be permitted under the prospective Convention.

Article I

Alternative I

This Convention applies when the leasing agreement is concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, paragraph 1 (a), or of the Contracting State referred to in paragraph 1 (b) of that Article.

Alternative II

This Convention applies when the leasing agreement and the supply agreement are both concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, paragraph 1 (a), or of the Contracting State referred to in paragraph 1 (b) of that Article.

Commentary

One of the most difficult problems to be solved in the context of private law Conventions involving tripartite relations is that of determining which transactions will be subject to the provisions of the Convention once the requirements for its entry into force have been met. The position is complicated in this instance by the fact that Article 2 provides that the Convention will, subject to the introductory wording of the article, apply (a) when the

supplier, the lessor and the lessee have their places of business in Contracting States (Article 2 (1) (a)) or (b) when both the supply agreement and the leasing agreement are governed by the law of a Contracting State, in other words by virtue of the operation of the rules of private international law of the forum (Article 2 (1) (b)).

However, even when one or other of these requirements has been satisfied, it will still be necessary to ascertain at which point the application of the Convention will be triggered off in respect of a given transaction. Neither the corresponding provision of the Vienna Sale Convention (Article 100) nor that of the Geneva Agency Convention (Article 34) are, alas, of more than indirect persuasiveness in this context, the former being concerned with a bipartite transaction and the connecting factor for the application of the latter being that only one of the three parties, that is the agent, should have its place of business in a Contracting State.

It is nevertheless submitted that the most persuasive parallel for **present purposes** is to be found in Article 100 (2) of the Vienna Sale Convention which takes the conclusion of the sale contract as the appropriate trigger for the application of that Convention. The difficulty in applying this analogy to the context of the uniform rules of course lies in the fact that they treat of tripartite relations and of a transaction made up of more than one contract. The alternative solutions proposed in Article I seek to reflect, on the one hand, the opinion of the authors of the uniform rules that the fundamental legal relationship contained within the triangular financial leasing transaction is the leasing agreement between lessor and lessee ⁽¹⁾ (Alternative I) and, on the other, the concern expressed at the first session of governmental experts that due account should nevertheless be taken in the provisions determining the application of the prospective Convention of the impact of certain clauses of the uniform rules on the position of the supplier and on the supply agreement ⁽²⁾ (Alternative II).

Article J

1. - This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.
2. - Denunciation is effected by the deposit of an instrument to that effect with the depositary.

(1) Cf. also El Mokhtar BEY and Christian GAVALDA, *Problématique juridique du leasing international in Gazette du Palais* 1979, 1^{er} sem., 143 at 144.

(2) Cf. Preliminary draft uniform rules on international financial leasing: Explanatory report prepared by the Unidroit Secretariat (Study LIX - Doc. 25) at §§ 60, 139, 140.

3. - A denunciation takes effect on the first day of the month following the expiration of twelve months after the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it takes effect upon the expiration of such longer period after its deposit with the depositary.

Commentary

The provisions of Article J are essentially based on Article 16 of the 1984 Protocol, although in the wording of paragraph 3 inspiration was also sought in the corresponding provision of the Geneva Agency Convention (Article 35 (2)).

Article K

1. - This Convention shall be deposited with the Government of
2. - The Government of shall:
 - (a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) each declaration made under Articles D, E, F;
 - (iii) the withdrawal of any declaration made under Article G, paragraph 4;
 - (iv) the date of entry into force of this Convention;
 - (v) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;
 - (b) transmit certified true copies of this Convention to all Signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).

Commentary

The functions of depositary of Unidroit Conventions are traditionally exercised by the Government of the State on the territory of which the diplomatic Conference for the adoption of the Convention in question is held. Unlike earlier Unidroit Conventions, the Geneva Agency Convention followed the Vienna Sale Convention in containing no specific article setting out the functions of the depositary. The Secretariat however believes that such an article would be useful and has taken as a model for Article K the corresponding provisions of Article 17 of the 1984 Protocol.

Authentic text and witness clause

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at, this.....day of....., one thousand nine hundred and, in a single original, of which the English and French texts are equally authentic.

Commentary

The general language of this provision follows many precedents, in particular the Geneva Agency Convention. The reference to English and French as the authentic texts of the future Convention reflects the fact that the working languages of Unidroit are English and French and that the authentic texts of Unidroit Conventions have⁽³⁾ accordingly hitherto traditionally been drawn up in these two languages.

(3) The one exception being the 1973 Washington Convention providing a Uniform Law on the Form of an International Will (cf. Article XVI (1)), authentic texts of which were also drawn up in Russian and Spanish.