

UNIDROIT 1986
Study LIX - Doc. 28
(Original: English/French/German)

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 CONVENTION
ON INTERNATIONAL FINANCIAL LEASING

Revised text of the preliminary draft uniform
rules on international financial leasing
proposed by the drafting committee with a
view to taking account of the views expressed
during the committee of governmental experts'
first reading of the text adopted by the

Study Group:

Observations

submitted by the European Federation of Equipment Leasing Company
Associations (Leaseurope)

Rome, March 1986

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ERRATUM

At pages 5 and 5^{bis}:

What is set out as though it were the text of, and supporting comments relating to Article 9 (3) should be read as the text of, and supporting comments relating to Article 10 (3).

LEASEUROPE

OBSERVATIONS OF

LEASEUROPE

ON THE UNIDROIT DOCUMENT LEASING C.g.e. 1st Session / W.P.1
(Rome, 18th April 1985 - evening)

Revised text of the preliminary draft uniform rules proposed by the drafting committee with a view to taking account of the views expressed during the committee of governmental experts' first reading of the text adopted by the Study Group

Preliminary remark

The Federation states that the UNIDROIT document is only concerned with international transactions.

TEXT - 18th APRIL 1985 (evening)

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION.

RECOGNIZING the importance of removing the legal impediments to international financial leasing, while maintaining a fair balance of interests between the different parties to the transaction,

AWARE of the need to make international financial leasing more available to developing countries,

CONSCIOUS of the fact that the rules of law governing the traditional contract of hire are ill-suited to the distinctive triangular relationships created by the financial leasing transaction,

RECOGNIZING therefore the desirability of formulating certain uniform rules relating primarily to the civil law aspects of international financial leasing,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows :

TEXT PROPOSED BY LEASEUROPEPREAMBLE

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the importance of removing the **most important** legal impediments to international financial **equipment** leasing, while **maintaining** a fair balance of interests between the different parties to the transaction, (1)

Unchanged

CONSCIOUS of the fact that the rules of law governing the traditional contract of hire **merit being** adapted to the distinctive tripartite relationship created by the international financial leasing transaction, (2)

RECOGNIZING therefore the desirability of formulating certain uniform rules relating primarily to the **legal** aspects of international financial leasing, (3)

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

REASONS

- (1) The aim of the Convention, which is to remove all the legal impediments of international financial leasing (for equipment only), should be limited. Considering the formulation of Art. 15-2, the subjects not expressly dealt with by the text will be regulated by the **general** legal principles which inspire it or by the law of application by virtue of the international private law.
- (2) The rules of the leasing contract do not in themselves constitute the exclusive basis of the leasing regulations although in the opinion of the Federation, these rules constitute the essential fundamentals at the very least. Consequently there is a need to state that the adaptation of these rules to the foreseen body is perfectible, instead of being "ill-suited" as is mentioned in the text.
- (3) The reference to civil law is too limited seeing the contents of this idea in certain countries. It seems more opportune to speak of "legal aspects"

TEXT - 18th APRIL 1985 (evening)

ARTICLE 1

1. This Convention governs a financial leasing transaction in which one party (the lessor), on the specification of another party (the lessee),
 - a) enters into an agreement (the supply agreement) under which it acquires plant, capital goods or equipment (the equipment) from a third party (the supplier) and
 - b) enters into an agreement (the leasing agreement) granting to the lessee the use of the equipment for business or professional purposes in return for the payment of rentals.

2. The financial leasing transaction referred to in the previous paragraph is a transaction which typically possesses the following main characteristics:
 - a) the lessee relies on its own skill and judgment in specifying the equipment and in selecting the supplier;
 - b) 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; and
 - c) the rentals payable under the leasing agreement are fixed so as to take into account the amortisation of the whole or a substantial part of the cost of the equipment.

TEXT PROPOSED BY LEASEUROPEARTICLE 1.

1. This Convention governs a financial leasing transaction in which one (the lessor),
 - a) enters into an agreement (the supply agreement) on the specifications of another party (the lessee), under which it acquires ownership of plant, capital goods or equipment (the equipment) from a third party (the supplier) and (4)
 - b) grants to the lessee the use of the equipment thus acquired for business or professional purposes in return for the payment of rentals, under an agreement (leasing agreement)(4)
2. Unchanged
 - a) the lessee selects the equipment and the supplier; (5)
 - b) Unchanged
 - c) the rentals payable under the leasing agreement are fixed so as to take into account the amortisation of the whole or a part of investment made by the lessor. (6)

REASONS

- (4) It is the supply agreement (and this only) which is entered into on the specification of the lessee. The lessor acquires ownership of the equipment, the use of which is granted to the lessee under an agreement which is in itself the leasing agreement.
- (5) The selection of the equipment is the responsibility of the lessee : he also selects the supplier.
- (6) The amortisation of the good evokes a financial idea which is the return on the investment made by the lessor; in this respect this idea is more accurate than the "cost" mentioned in the text.

TEXT - 18th APRIL 1985 (evening)

ARTICLE 2

2. For the purposes of this Convention, if a party to the supply agreement or the leasing agreement has more than one place of business, the place of business is that which has the closest relationship to that agreement and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of particular agreement.

TEXT PROPOSED BY LEASEUROPE

ARTICLE 2

2. For the purposes of this Convention, if a party to the supply agreement or the leasing agreement has more than one place of business, the place of business is that which has the closest relationship to that agreement and its performance, having regard to the circumstances known or contemplated by the parties at the conclusion of the agreement. (7)

REASONS

- (7) At the conclusion of the agreement, the circumstances which preceded this conclusion are inevitably considered.

TEXT - 18th APRIL 1985 (evening)

ARTICLE 5

1. The lessor's title to the equipment shall be enforceable against the lessee's trustee in bankruptcy and creditors 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.

2. This article shall not apply in relation to a creditor having a lien or a security interest in the equipment.

TEXT PROPOSED BY LEASEUROPEARTICLE 5

1. The lessor's title to the equipment shall be enforceable against 1) **third parties**
or 2) **the lessees' trustee in bankruptcy and creditors as well as the successors in title of the lessee** 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. (8)
2. This article shall not apply in relation to a creditor having a lien in the equipment, **enforceable to the owner by virtue of the law of the country where the lien is enforced.** (9)

REASONS

- (8) The statement of the parties against whom the lessor is able to enforce his title, should be completed by those having a security interest or the third parties in general.
- (9) We should note that the prerogative of the lessor would remain subsidiary compared to a security interest (e.g. tax, social security ...) or a lien which would evoke international public order of the State concerned. However, in the absence of such a regulation, there is need to reserve more favourable conditions, than those already foreseen by the Convention, for the leasing company. The desire expressed in these observations results from the conception that the economic ownership and the legal ownership are, in fact, only two facets of the same reality for Leaseurope.

TEXT - 18th APRIL 1985 (evening)

ARTICLE 9

1. Where the supplier knows the purpose for which the lessee requires the equipment, the duties of the supplier under the supply agreement shall also be owed to the lessee as if it were party to that agreement and as if the equipment were to be supplied directly to the lessee for its professional or business purposes.
2. Nothing in this article shall entitle the lessee to terminate the supply agreement.
3. Where the supplier fails to deliver the equipment in accordance with paragraph 1 or paragraph 2 of this article, the lessee shall be entitled to terminate the leasing agreement to recover any rentals and other sums paid in advance.

TEXT PROPOSED BY LEASEUROPEARTICLE 9

1. Where the supplier knows the purpose for which the lessor requires the equipment, the liabilities of the supplier for default in the performance of the supply agreement shall also be owed to the lessee as if it were party to that agreement and as if the equipment were to be supplied directly to the lessee for its professional or business purposes. (10)
2. Unchanged
3. Where the supplier fails to deliver the equipment in accordance with paragraph 1 or paragraph 2 of this article the lessee shall be entitled to terminate the leasing agreement to recover any rentals and other sums paid for services not yet rendered. (11)

REASONS

- (10) There is reason to ask if the projected use of the equipment, mentioned in the supply agreement is not that which foresees the lessor, (and not the lessee), as being the only counterparty of the supplier in this agreement.

In the negative, the present formulation of the text would not conform to the theory of the effect of the agreements (privity of contracts).

- (11) Assuming that the lessee puts an end to the leasing agreement, he can only recuperate the sums corresponding to services not yet rendered from which he has not effectively benefitted (rentals). However, it is different for those sums which must be paid in all circumstances (insurance premiums on big-ticket operations, customs tax ...).

Article 10-4 assumes the continuation of the contract.

TEXT 18TH APRIL 1985 (evening)

ARTICLE 11

(Incorporated in the new Article 10)

TEXT PROPOSED BY LEASEUROPE

ARTICLE 11

The lessee is responsible vis-à-vis the lessor in the case of insolvency of the supplier, especially as he has a free choice of the selection of the equipment as well as of the supplier. (12)

REASONS

(12) The introduction of this new article is justified by the principle of "a fair balance of interests between the different parties" required by the Convention in the preamble.

This case envisages the responsibility of the lessee vis-à-vis the lessor in the case of insolvency of the supplier and corresponds (in terms of reciprocity) to the provisions of Art. 10 where the lessee is the beneficiary.

TEXT - 18th APRIL 1985 (evening)

ARTICLE 12

4. The lessor shall only be entitled to terminate the leasing agreement or accelerate payment of the rentals if it has by notice given the lessee a reasonable opportunity of remedying the default so far as the same may be remedied.

TEXT PROPOSED BY LEASEUROPE

ARTICLE 12

4. The lessor shall only be entitled to terminate the leasing agreement or accelerate payment of the rentals if it has by notice **given** the lessee a reasonable **time within which** he must remedy the default so far as the same may be remedied (13)

REASONS

- (13) The term "opportunity" is too vague; in fact it designates the terms and reasonable amounts of time that the lessee is allowed in order to repay sums to the lessor but without reducing the amounts.