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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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

OBSERVATIONS

by the Government of the Federal Republic of Germany 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

Observations

of the Federal Government concerning the revised text of the preliminary draft uniform rules on international financial leasing

General observations

The Federal Government has obtained the views of the central commercial, industrial and credit associations on the UNIDROIT preliminary draft. The associations are receptive towards the UNIDROIT project. However, there is concurrence that leasing agreements where the lessor and the lessee have their places of business in different states are not often concluded at present. Two associations (commerce and industry) have drawn the conclusion that the uniform rules should rather be drawn up in the form of a guideline or a model law than in the form of a binding convention under international law. On the other hand, the credit sector advocates an international convention, from which it is to be hoped that there will be international recognition and further expansion of leasing. The associations consider it to be of particular importance that mandatory provisions have been dispensed with (Art. 14). They also consider important those provisions in the domain of avoidance of a contractual accord between lessee, lessor and supplier (Art. 5 and Art. 7).

Article 1

According to Art. 1 para. 1 (a) the Convention only governs those cases in which the lessor acquires the leased asset from a supplier. However, in practice it is often the case that a contract of sale is concluded

between the supplier and the lessee before any leasing agreement is entered into and the lessor subsequently assumes the rights and duties of the lessee as stipulated under the sales contract. This type of case should also be covered by the Convention.

According to Art. 1 para. 2 a financial leasing transaction "typically" displays a number of characteristics (a-c). This wording leaves open the question whether leasing transactions where one of the characteristics under a-c is missing is subject to the Convention or not.

With regard to Art. 1 para. 2 (c) the associations from the credit sector are united in objecting to the fact that so-called partial amortisation contracts are not covered because of the characteristic expressed in the wording "whole or substantial part of the cost". This defect could be remedied by deleting the word "substantial" or by inserting the words "and, where applicable, a contractually agreed residual value" after the words "rentals payable".

Article 3

In the opinion of the credit sector leasing agreements with a right of offer or an option to renew for the lessor should also be mentioned here.

Article 5

We understand Art. 5 para. 1 to mean that so far as there are no rules as to public notice in the state of the lessee's principal place of business the lessor's title can be enforced without more.

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Whereas in Art. 2 para. 2 the place of business which has the closest relationship to the agreement is declared to be definitive, it is intended in relation to observance under Art. 5 para. 1 of possible rules as to public notice that the law applicable shall be that of the state in which the lessee has his principal place of business. This variation may come as a surprise for the lessor. Hence we suggest that in Art. 5 para. 1 there should also be reference to the law of the state in which the lessee has his place of business.

The provision in Art. 5 para. 1 - according to which possible rules as to public notice in force in the state of the lessee's principal place of business have to be observed - does not offer an appropriate solution for registered ships and registered aircraft. In these cases double registration ought to be avoided at all events. In each case only one register ought to be applicable - in the case of seagoing ships, for example, the register of ships of the state whose flag the ship is flying, and in the case of inland waterway ships the register of ships of the port of registry.

According to Art. 5 para. 1 the lessor's title shall be enforceable against the lessee's trustee in bankruptcy. This wording allows an interpretation to the effect that the lessor may in the event of the lessee's bankruptcy demand surrender of the leased asset. In opposition to this, consideration is being given in the Federal Republic of Germany within the context of a comprehensive reform of the law relating to insolvency to a strengthening of the rights of the trustee in bankruptcy vis-à-vis the holders of certain

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securities. Inter alia, consideration is being given to requiring such creditors to bear a part of the costs of the proceedings in the interests of unsecured creditors as well as to leaving the realisation of the secured asset to the trustee in bankruptcy, etc. The lessor as owner of the leased asset can also be affected by this. Here consideration might be given, for example, to giving the trustee in bankruptcy a right to continuation of the leasing agreement or to acquisition by purchase of the leased asset. In order for the trustee in bankruptcy to be able in future to exercise these rights against foreign lessors as well an unlimited claim on the part of the lessor to surrender by the lessee's trustee in bankruptcy of the leased asset should not be laid down in Art. 5 para. 1. Allowance could be made for this concern by perhaps inserting the following words in Art. 5 para. 1: "The lessor's title to the equipment shall be enforceable against the lessee's trustee in bankruptcy in conformity with the applicable law of bankruptcy and creditors provided ..."

Article 7

The conception of the lessor's liability "in its capacity of owner of the equipment" - as provided for in para. 3 - has caused difficulty for all instances called upon to submit their observations. In particular, the significance of this provision in relation to the International Convention on Civil Liability for Oil Pollution Damage (Explanatory report no. 110) was not discerned.

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In the opinion of the Federal Government it is right to avoid inconsistency with the provisions on liability in the above-mentioned international convention on oil pollution damage. In the same vein inconsistency also ought to be avoided with Article 3 para. 2 of the EEC directive of 25 July 1985 concerning liability for defective products (85/374/EWG). According to this provision any person who imports into the Community a product for sale, hire, leasing or any form of distribution shall be deemed to be a producer of the product within the meaning of the directive and shall be responsible as a producer. Accordingly, it seems manifest that a lessor who acquires the asset to be leased from a foreign supplier must be considered to be an importer and bears liability in terms of Art. 3 para. 2 of the directive mentioned above.

A possible solution would be to delete Article 7 para. 3 without any replacement. Another possibility would be to stipulate - in a newly-worded paragraph 3 or in a concluding provision - that liability as an owner and an importer, as laid down under both of the conventions referred to, shall remain unaffected.

Article 9

As regards paragraph 2 doubts have arisen as to whether the words "to terminate" are to be understood in a comprehensive sense so that all forms of rescission - for example, also avoidance on account of error or deception - are included.

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Article 10

As regards paragraph 1 (b) the associations from the credit sector have suggested that the words in the second half of the sentence"(or, in the absence of any stipulation as to date, within a reasonable time ...") should be deleted without any replacement. The Federal Government does not, however, support this suggestion.

In the opinion of the associations in the credit sector the lessee's right of termination under paragraph 3 goes too far. These associations further take the view that the lessor ought only to be bound to repay rentals to the extent that the supplier has paid relevant sums to the lessor. The Federal Government does not support these suggestions; preference is given, on the contrary, to the UNIDROIT text.

In the Federal Government's opinion the relationship between paragraph 4 and the preceding provisions in paragraphs 1 - 3 should be explicitly clarified by an appropriate adjunct to the text (e.g. Notwithstanding the provisions of paragraphs 1 - 3 above; ... otherwise ...)

Article 12

In paragraph 1 it ought to be made clear whether the rights under a - d may also be enforced cumulatively. The Federal Government tends to take the view that the possibility of cumulative enforcement should be affirmed.