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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

PROPOSALS

of the delegation of Korea to the second
session of the committee of governmental
experts

Rome, April 1986

Article 9

Under this provision the duties of the supplier under the supply agreement shall also be owed to the lessee as if it were itself a party to that agreement and as if the equipment were to be supplied directly to the lessee for its professional or business purposes.

We appreciate that, as the statutory right of action inuring to the benefit of the lessee derives from the supply agreement (an agreement to which the lessee is not a party), the supplier's duties under this agreement should be owed to the lessee as if it were itself a party to that agreement (cf. Explanatory report, §§ 147-148).

And we also see how the supplier's duties to the lessee are independent of its duties to the lessor under the supply agreement, and how a posteriori the lessee is entitled to claim compensation directly from the supplier, compensation which may be broader in scope than that contemplated by the supply agreement (cf. Explanatory report, § 138).

Accordingly, in the event of default or breach of the supply agreement, the right to sue for the compensation contemplated by the supply agreement and the right to sue for the compensation provided for under Article 9 ~~vest~~ at the same time.

There can be no gainsaying the fact that these two rights are competing rights except to the extent that the supply agreement prohibits the lessor from suing the supplier.

In this case it is necessary to regulate the matter of the competing duties of the supplier so as to avoid the risk of payment of the compensation arising out of the same basic act being made twice over.

Another problem which ought to be regulated concerns the rights of set-off which the supplier may enjoy vis-à-vis the lessor and whether or not the supplier should be able to raise these against the lessee where the latter is pursuing its remedies against the supplier under Article 9. This problem also requires a uniform solution.

One possible solution would be to introduce an additional paragraph in Article 9 providing that:

"In the case addressed in paragraph 1 of this article, the lessor's rights of action against the supplier under the supply agreement shall no longer lie where and to the extent that the lessee has exercised its

rights of action against the supplier."

Article 10 (4)

Under this provision the lessee is stated not to be entitled to withhold payment of its rentals for non-delivery, delay in delivery or delivery of non-conforming equipment except to the extent to which this results from the act or omission of the lessor.

By virtue of this clause, the lessee is under the obligation of continuing to pay its rentals in the face of non-delivery of the equipment where this is not the result of an act or omission of the lessor. This means that, in the case of non-delivery or a delay in delivery, the lessee must first establish the facts for which responsibility may be laid at the door of the lessor before becoming entitled to withhold payment of its rentals.

The Explanatory report explains that this arises from the fact that the leasing agreement has to go on operating so long as there is still an opportunity for a tender of conforming equipment.

However, even if it is the lessee who selects both equipment and supplier, as is stated in Article 1, the acquisition of the equipment is, under the leasing agreement, incumbent on the lessor. We take the view that the delivery of the equipment and therefore the consequences of the supplier's failure to deliver the equipment in accordance with the terms of the supply agreement have more to do with the acquisition of the equipment than with the selection of the same; the supplier's duties under the supply agreement are only owed to the lessee under Article 9 where the supplier knows the purpose for which the lessee requires the equipment. It would be very unfair for the lessee to have to go on paying its rentals to the lessor.

We would accordingly propose that the words "be entitled to withhold the payment of the rentals, or" be deleted in Article 10 (4).

On the other hand, where there is non-delivery or a delay occurs in delivery, the rule under the proposed draft Convention as regards the matter of the lessee's payment of its rentals should be that the lessee should have the possibility of withholding the payment of its rentals even where the non-delivery or the delay in delivery is not the result of an act or omission of the lessor. In certain bipartite contractual relationships it is not unusual, while the contract goes on operating, for one party either to have its duties under that contract reduced or to be relieved of its duties thereunder as a result of the other party's non-performance.

Besides, the leasing agreement is bilateral; the use of the equipment corresponds to the payment of a rental. This is the principal purpose of the leasing agreement. Thus the rentals to be paid for the equipment must provide a measure of adjustment between the two parties to the leasing agreement, and it would be natural to relieve the lessee from the duty of paying those rentals corresponding to the time during which it still had not received delivery of the equipment or had not been able to use the same, given that responsibility for non-delivery cannot be laid at the door of the lessee.

Furthermore, the lessor has its own rights of action to seek redress for the loss or damage that it has sustained.

Article 12 (1)

This provision lays down that, in the event of the lessee's default, the lessor is entitled to terminate the leasing agreement, repossess the equipment following such termination and/or recover accrued rentals.

We would propose just one thing. This concerns the matter of guarantees. It happens relatively frequently or is at least foreseeable in the case of international financial leasing transactions that a lessor will require the granting of a surety in respect of the lessee's performance of its duties under the leasing agreement, given that the equipment leased will normally be very expensive.

Where such a surety is able fully to guarantee the lessee's performance of its duties, then the matter of the lessee's default needs to be dealt with otherwise than in the way in which it is dealt with in Article 12.

In these circumstances the lessor may be satisfied to receive the rentals which have accrued from the guarantor instead of terminating the leasing agreement.

It would accordingly be better to include some paragraphs in Article 12 dealing with the matter of guarantees. As to their contents and the manner in which they might be introduced, we would hope that these are matters which the committee might examine. In any event, there are two main aspects which might be studied: first, the lessor's giving notice to the guarantor in the event of the lessee's default and, secondly, the continuance of the agreement notwithstanding the lessee's default to the extent that the surety guarantees all the lessee's duties under the leasing agreement.